A A Global Logistics v Director General, South Sudan Customs Service & another; Kenya Ports Authority (Interested Party) (Judicial Review Application 028 of 2021) [2021] KEHC 134 (KLR) (21 October 2021) (Ruling)

Neutral citation: [2021] KEHC 134 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION 028 OF 2021

JM MATIVO, J

OCTOBER 21, 2021

BETWEEN

A A GLOBAL LOGISTICS ..... APPLICANT

AND

DIRECTOR GENERAL, SOUTH SUDAN CUSTOMS SERVICE .... 1ST RESPONDENT

SOUTH SUDAN EMBASSY IN KENYA ..... 2ND RESPONDENT

AND

KENYA PORTS AUTHORITY ..... INTERESTED PARTY

RULING

1. In order to put the applicant's application dated 29th June 2021, the subject of this ruling, into a proper perspective, it is necessary to highlight the history of this file, albeit briefly, as mirrored in the court file.

2. By a Chamber Summons dated 17th June 2021 expressed under the provisions of Order 53 Rules (1) & (2) the *Civil Procedure Rules, 2010*, the applicant moved this court seeking leave to institute Judicial Review proceedings to seek orders of Certiorari and prohibition to quash the 1st and 2nd Respondents' decision contained in their letter dated 29th April 2021 and 7th May 2021 respectively terminating its operations at the port of Mombasa and to prohibit its implementation. Further, the applicant prays that the leave sought, if granted operates as stay of the impugned decision. Lastly, its prayed for costs of the application.

3. On 17th June 2021, at the ex parte stage, Onyiego J granted the applicant leave to commence judicial review proceedings. He directed the applicant to file the substantive application within 7 days from the said date. Further, the judge ordered that upon being served, the Respondent would be required to

file their reply within 14 days, and if need be, the applicant to file a further affidavit within 7 days. The judge also directed that the parties were at liberty to file skeleton submissions not exceeding 6 pages in font 14 and scheduled the application for inter partes hearing on 15th July 2021.

4. The applicant did not file the substantive application within 7 days as ordered by the court. Also, despite the clear order fixing inter partes hearing on 15th July 2020, there is nothing on record to show that the matter was placed before a judge on the said date nor is there any explanation why the matter was not listed. There is nothing in the file to show that service was effected as ordered by the court.

5. On 26th June 2020, two days after the lapse of the 7 days within which the applicant was required to file the substantive motion, the applicant filed a Certificate of Urgency seeking an order that the leave granted operates as stay. A pertinent question which I will address later arises, which is whether on the face of the applicant's failure to file the substantive motion within 7 days, the leave granted was still subsisting and whether it lapsed after the 7 days.

6. The certificate was placed before Mwangi J on 2nd August 2021. The applicant did not bring to the court's attention its failure to file and serve the substantive application within 7 days as ordered by the court. The court directed the applicant to file and serve written submissions on the "substantive application" within 21 days. The court also ordered the Respondents and the Interested Party to file their response within 21 days and scheduled the matter for highlighting on 22nd September 2021. (Note: there was no substantive application since none had been filed).

7. On 25th August 2021, the 2nd Respondent moved the court vide an application dated 24th August 2021 seeking inter alia that the said order be discharged. The court (Ogola J) certified the application as urgent and directed that it be served for hearing on 2nd September 2021 when it was stood over to 22nd September 2021 but on the said date, the application was withdrawn with no orders as to costs. Additionally, the court issued directions on filing affidavits and submissions on the applicant's application the subject of this ruling.

The instant application

8. The applicant's application dated 29th June 2021 is expressed under section 95 of the *Civil Procedure Act*,[1] section 59 of the *Interpretation and General Provisions Act*,[2] Order 50 Rules 3 and 5 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant prays for extension of time within which to file the substantive motion. It also prays for orders of certiorari and prohibition to quash the impugned decision and to prohibit its implementation. Lastly, it prays for costs of the application.

9. The application is founded on the grounds that the 1st Respondent vide its letter dated 25th January 2019 nominated the applicant to clear goods destined for South Sudan at the Port of Mombasa and based on the nomination, the applicant entered into an agreement with two Container Freight Stations (CFS's), that is, Makupa Transit Shade Limited and Boss Freight Terminal Limited in February 2019. The applicant states that even though it undertook the cargo clearance as envisaged in the agreement without any complaints, the 1st Respondent unilaterally terminated its operations on the pretext of reducing the number of South Sudanese companies operating at the Port of Mombasa without following due process or providing reasons. It states that the decision is high handed, capricious, abuse of power, breach of the rules of natural justice, contrary to public policy, arbitrary, unilateral, and

1 Cap 21, Laws of Kenya.

2 Cap 2, Laws of Kenya.

unreasonable within the Wednesbury's test and that it is in the interests of justice that the application be allowed.

The Respondents' Notice of Preliminary Objection

10. The 1st Respondent filed grounds of opposition dated 21st September 2021 stating that the impugned decision was made in South Sudan by the South Sudan Customs Service and therefore this court lacks territorial jurisdiction to entertain these proceedings and to make the orders. The 1st Respondent also states that the South Sudan is a sovereign state with all the privileges and immunities while the 2nd Respondent being an embassy of a sovereign state enjoys Diplomatic Privileges and Immunities from criminal, civil, labour and administrative jurisdiction of the receiving state.

The Respondents' Replying affidavit

11. In addition to the above grounds, the Respondents filed the Replying affidavit of Marko Yach Rounrach Amuk dated 21st September 2021, its Deputy Chief Customs, Mombasa monitoring South Sudan Customs Service. The substance of his affidavit is that sometimes in January 2019, the applicant, a company registered in South Sudan was appointed by South Sudan Customs Service based in South Sudan as a legal clearing company to promote speedy clearance of goods destined to South Sudan.

12. He averred that the license issued expired and the applicant did not renew it as required by the Laws of South Sudan. Further, he deposed those complaints were made against the applicant citing delay of cargo causing unnecessary storage costs to the importers in Southern Sudan, and, as a consequence, the South Sudan Customs Service sitting in South Sudan decided to terminate the applicant's operations. He averred that as a result, the National Revenue Authority Customs Division of the Republic of South Sudan terminated the applicants' operations and the 2nd Respondent issued a notice dated 7th May 2021 communicating the termination.

13. He deposed that the termination was made in Juba, South Sudan, a sovereign enjoying Diplomatic Immunities, and outside this court's jurisdiction, while the 2nd Respondent, the Embassy of a sovereign state enjoys privileges and immunities. He averred that the Government of South Sudan has not waived immunity nor has it consented to the jurisdiction of Kenyan courts regarding the matters raised in these proceedings. Further, he averred that the applicant has not made a full disclosure to the court and that the orders sought are tantamount to authorizing the applicant to conduct business without a licence and authority from the Government of South Sudan and its Agencies.

The Interested Party's Replying affidavit

14. Mr. Michael Bokole, the Interested Party's Principal Operations Officer (Shore) swore the Replying affidavit dated 20th August 2021. He deposed that the mandate of the Interested Party is to inter alia act as stevedore, warehouse men and store goods whether or not such goods have been or are to be handled as cargo by the authority. He averred that the South Sudan National Revenue Authority Customs Division have the sole mandate of determining where cargo destined for South Sudan is to be cleared from. Further, he deposed that the South Sudan National Revenue Authority Customs Division communicates with the Interested Party and issues letters on where cargo destined for South Sudan is cleared from.

15. Mr. Bokole deposed that the South Sudan National Authority Customs Division wrote to the Interested Party on several occasions communicating the stoppage of nomination of South Sudan destined cargo to various entities. Further, he deposed that the allocation is done by the South Sudan Government through the South Sudan National Revenue Authority who communicate the allocation to the Ministry of Foreign Affairs in Kenya, and that the Ministry of Foreign Affairs in Kenya

communicates the position to the Interested Party through its parent ministry for implementation, hence, the Interested Party has been wrongfully sued.

The applicant's further affidavit

16. The applicant's counsel requested that the applicant's Replying affidavit sworn by Zabadayo Kuol Ayuen Deng dated 30th August 2021 in response to the 1st Respondent's application which was withdrawn be treated as its reply to the Respondent's replying affidavits. In the said affidavit, Mr. Deng deposed that the deponent to the 1st Respondent's affidavit has not provided evidence that he has been authorized to swear the affidavit nor has he demonstrated any nexus between the Respondents to warrant swearing matters on behalf of the 2nd Respondent. He averred that the applicant operates both in Kenya and South Sudan.

17. He averred that the applicant is duly licensed to operate in South Sudan but he cannot access the license because the Director General of the 1st Respondent is one of the applicant's directors holding 30% shares and the current frustrations facing the applicant are attributed to differences with him and that the termination of the license has nothing to do with the complaints cited. Lastly, he deposed that the reasons provided are an afterthought aimed at sanitizing an illegal process.

Determination

18. For starters, I will address prayer 1 of the application in which the applicant seeks extension of time to file the substantive application. Despite the fact that this is a crucial prayer upon which the life of the applicant's case rests, no grounds were cited in the application in support of this prayer nor did the applicant's counsel address it in his submissions. In fact, a reading of both party's submissions leave no doubt that the parties proceeded on the erroneous assumption that the substantive application had been filed.

19. Perhaps, I should also comment on the manner in which the application is drawn. The applicant sought extension of time and in the same application, it included substantive seeking judicial review writs of certiorari and prohibition as if leave had been granted or assuming that leave is a matter of right simply available for the asking. Good pleadings dictate that leave be sought and obtained first, and once granted, the substantive application can be filed, or a specific prayer that once leave is granted, the application be deemed as duly filed and served.

20. More significant is the fact that the applicant was directed to file the substantive application within 7 days but it failed to do so. The import of this is that the leave granted by Onyiego J lapsed upon the expiry of the 7 days and therefore the legal validity of the subsequent proceedings is in doubt. In particular, by the time the applicant filed the Certificate of Urgency dated 26th July 2021 upon which the court ordered that the leave granted operates as stay, there was no leave subsisting because the leave earlier granted had lapsed. It follows that the stay granted was irregular because it was a product of irregular proceedings. I am not sitting on an appeal, but it would be a serious dereliction of duty if I do not point out such irregularities. No doubt, parties and their legal advisers should not be encouraged to become slack in their observance of the rules, which are an important element in the machinery for the administration of justice.

21. Of great concern is the applicant's advocate's decision to file a certificate of urgency after the expiry of the 7 days and the failure to notify the court that the period had lapsed. The court even gave directions on the substantive application, perhaps acting on the premise that the substantiative application had been filed. Had this information been brought to the court's attention, certainly, it would not have granted the stay.

22. It is settled law that a person who approaches the court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was appreciated as early as in 1917 in *R. v. Kensington Income Tax Commissioner*.[3]

23. A litigant is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.[4] In my view, much as the applicant's counsel needed the stay order, he was under a solemn duty to bring to the attention of the court the existence of an order directing the applicant to file the substantive motion within 7 days and the omission or failure to do and seek an extension even as he sought the stay order.

24. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the applicant, but also to any additional facts which it would have known if it had made inquiries.

25. Failure to disclose relevant material to the court is an obstacle to the efficient administration of justice. A court of justice need not and should not wait to be moved by a party where there is substantial reason to believe that the processes of the court have been abused or there is concealment of material facts. Tampering with the administration of justice in any manner injures far more than a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.

26. The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, first, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.[5]The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when a party can move to court, and obtain a stay order on a non-existent application and fail to disclose such a material proposition to the court and after securing the stay order, move the court for "extension of time" to file the application? By now it's evident that the failure to disclose such a crucial omission fits the description of an abuse of court process. On this ground alone, the application is fit for dismissal.

27. Next is a pertinent question, namely, whether the prayer for extension time is warranted. Despite the fact that this is a highly dispositive issue, and despite clearly praying for extension of time, the applicant never pleaded any grounds in the application in support of this prayer nor did the applicant's counsel submit on this issue. Indeed. None of the parties submitted on this question, yet, the entire application

[3] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[4] *Brinks-Mat Ltd v Elcombe* {1988} 3 ALL ER 188

[5] *Clark vs R* {2016} VSCA 96 at [14].

stands or falls on this prayer. Simply put, no material was placed before the court upon which the court can weigh whether or not the said prayer is merited and, on this ground, alone, the said prayer collapses.

28. Even if the applicant had propounded grounds in support of the said prayer, it should be remembered that the provisions of order 53 of the Civil Procedure Rules, 2010 have been the subject of numerous judicial determinations in this county which numerous decisions holding that time lines under the said order cannot be extended. In *Ako v Special District Commissioner, Kisumu & Another*[6] the Court of Appeal underscored the need to adhere to the time frames provided under sub-section 3 of the *Law Reform Act*[7] and proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time. Similarly, the Court of Appeal in *Wilson Osolo -Vs- John Ojiambo Ochola & Another*[8] the Court of Appeal expressed itself thus: -

> " It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed for the extension of time limited by statute, in this case, the Law Reform Ac.t"There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act* (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here."

29. It is also important to point out that the provisions of order 50 Rule 6 of the Civil Procedure Rules, 2010 which grant the court power to enlarge time cannot override the express provisions the Statute, namely, section 9 (3) of the *Law Reform Act*.[9] In this regard, I find useful guidance in *Re an application by Gideon Waweru Githunguri* [10] whereby the colonial Supreme Court held that the said section imposes an absolute period of limitation and *Raila Odinga & Others vs Nairobi City Council*[11] in which it was held that:- (i) the Rules under the Act cannot override the clear provisions of Section 9 (2) of the Act; (ii) an act of Parliament cannot be amended by subsidiary legislation; (iii) Parliament in its wisdom has imposed this absolute period...and it is the Parliament alone which can amend it.

30. However, in *Republic v Public Procurement Administrative Review Board ex parte Syner-Chemie*[12] the court correctly observed that there are two schools of thought on the issue whether the court can extent time in Judicial Review proceedings. First, there are decisions holding that no such enlargement of time for filing of a substantive motion is envisaged in Order 53 of the Civil Procedure Rules. The same proponents argue that owing to the special procedure adopted in Judicial Review proceedings, a party, other than invoking Order 53 of the Civil Procedure Rules cannot invoke the provisions of the *Civil*

6 Civil Appeal No. 27 of 1989, Nyarangi JA., Gachuhi JA., Kwach Ag. JA.

7 Cap 26, Laws of Kenya.

8 {1995} eKLR.

9 Ibid.

10 {1962} 1 EA 520.

11 {1990- 1994} 1 E.A 482.

12 *Republic vs Public Procurement Administrative Review Board ex parte Syner-Chemie* {2016} eKLR.

Procedure Act[13] and the Rules made there under.[14] A second school of thought holds that although the court has no jurisdiction to enlarge the period provided by the *Law Reform Act*,[15] under the current constitutional dispensation, the court should not let the former intricacies and obscurities hamper the provision of effective redress to facilitate access to justice for all and therefore it should adopt a flexible approach. The court in the above cited case allowed the application but not before citing *Gateway Insurance Company Ltd v Avies Auto Sprays*[16] where the Court of Appeal cited with approval several cases including the Indian case of *Periagami Asari v Illupur Penchayert Board*[17] which dealing with the rule identical to Order 50 Rule 6 of the Civil Procedure Rules held that:-

> "The principle that when the effect of the order granting time in the event of non compliance has to operate automatically the court has no power to extend time as it becomes functus officio, will apply when the suit is finally disposed of. If the order is not final and the court retains control over it and seized of the matter, it will have power to extend time." (Emphasis added)

31. Even if I were to be persuaded by the later school of thought, the applicant has to surmount not one but three hurdles. First, the failure to cite reasons for the delay or grounds in support of the said prayer. Second, extension of time is not a right of a party a position underscored by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*[18] which laid down the principles to guide courts while considering extension of time. It stated: --

    i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

    ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

    iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;

    iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

    v. Whether there will be any prejudice suffered by the respondents if the extension is granted;

    vi. Whether the application has been brought without undue delay; and

    vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

13 Ibid.

14 Citing See *Republic Vs Kahindi Nyafula & 3 Others Exparte kilifi South East Farmers Co- Operative Society* [2014] e KLR by Angote J, applying *Welamudi vs The Chairman Electoral Commission of Kenya* [2002] KLR 285 **and** *Republic V Kenya Bureau of Standards & Others [2006] EA 345.*

15 Cap 26, Laws of Kenya.

16 {2011}eKLR

17 AIR 1973 Mad 250

18 {2014} e KLR.

32. Third, extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e., statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law.

33. In *Smith v Middleton*[19] it was held that the discretion is to be exercised in a selective and discriminatory manner, not arbitrarily or idiosyncratically otherwise as Lord Diplock said in *Cookson v Knowles* [20] the parties would become dependent on judicial whim. Discretion must be exercised in accordance with sound and reasonable judicial principles. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable.' The exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit.

34. As stated above, the applicant did not cite any grounds in support of the said prayer. No explanation was offered for the omission. The applicant fully aware that the time had lapsed moved the court and obtained a stay order. What is required is an explanation not only of the delay in the timeous filing of the application, but also the delay in seeking extension of time. The applicant must show that he did not willfully disregard the timeframes dictated by the court. He is obliged to satisfy the court that there is sufficient or good cause for excusing him from compliance. Leave may be refused where there has been a flagrant breach of the rules or a court orders especially where no explanation is proffered. The applicant should convince the court to exercise its discretion in his favour. In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Ordinarily, these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting leave. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts.

35. Viewed from the considerations discussed above, I find and hold that the applicant's explanation for extension of time is manifestly wanting. On this ground alone, the applicant's application collapses.

36. Even if the applicant's application had surmounted the above hurdle, it has yet another formidable hurdle to pass. This is the obstacle erected by the two-fold grounds of objection cited the Respondents. These are the jurisdictional objections founded on the ground that the impugned decision was made in Uganda and the equally dispositive objection founded on Diplomatic Immunity.

37. Reacting to these two grounds of objection, the applicant's counsel cited *Mukisa Biscuit Manufacturing Co. Lt v West End Distributors Ltd*[21] which defined a Preliminary Objection and argued that the applicant was appointed a clearing agent in Kenya and that the agreement provided that the governing laws are the laws of Kenya, and that the termination which triggered this case had a direct impact on the said agreement. Further, he argued that the impugned decision was to be implemented in Kenya. Additionally, the applicant's counsel submitted that the applicant's operation in Kenya is

19 {1972} SC 30.

20 {1979} AC 556.

21 {1969} EA 696.

guided by the Northern Corridor Transit Transport Agreement which treats member states as single custom territory, hence, any member state can lodge action in any of the member state.

38. On the question of Diplomatic Immunity, the applicant's counsel submitted that the Government of South Sudan is not on trial because the applicant seeks to stop individual actions disguised as government actions. He justified the joinder of the South Sudan Embassy arguing that it was enjoined because it is the entity which communicates the 1st Respondents decision to the Kenya's Foreign Affairs Department. To buttress his argument, counsel argued that the 1st Respondent is one of the directors of the applicant and that his actions are actuated on malice. Further he cited the shifting of the reasons for the impugned decision which changed from the need to reduce the number of Sudanese companies at the Port to failure to renew the licence. He urged the court to dismiss the Preliminary objection for want of merit.

39. The Respondent's counsel cited section 8 of the *Law Reform Act*[22] and Article 165 (3) of the Constitution and submitted that the Jurisdiction conferred upon this court is unlimited regarding causes of action that arise within Kenya. He argued that this court cannot assume jurisdiction to a cause of action that arises in another country.

40. On the question of Diplomatic Immunity, the Respondents' counsel submitted that the 2nd Respondent is the embassy of South Sudan and therefore a Representative of the South Sudanese government in Kenya. He cited Article 31 (1) of *Vienna Convention* which grants immunity to any diplomatic agent and diplomatic mission from criminal, civil and administrative jurisdiction of the receiving state. To fortify his argument, he relied on *Ishak Mohamed v Libyan Embassy*[23] which underscored the import of Diplomatic Immunity. On this ground, he urged the court to dismiss the suit with costs.

41. Additionally, counsel cited Section 145 of the *East African Customs Management Act* and submitted that the applicant is neither Licensed by Kenyan or South Sudan Authorities to operate as a Customs Agent and has been operating illegally for over a period of more than one year and eight months. He argued that the applicant seeks orders to enable it to perpetuate its illegality.

42. With tremendous respect, the applicant's counsel misconstrued the nature of the Respondents' objections. There is no contest that the 2nd Respondent is the Embassy of South Sudan. The 1st Respondent is the Director General, South Sudan Customs Service. Vide a Note Verbale dated 7th May 2021, the Embassy of the Republic of South Sudan notified the Protocol Office, Ministry of Foreign Affairs of the Republic of Kenya, inter alia to notify the relevant authorities at the Port of Mombasa about the termination of the applicant's operations at the Port of Mombasa. Two consequences flow from the foregoing communication.

43. One, the applicant, a company incorporated in South Sudan was appointed and licensed to operate at the Port of Mombasa by the South Sudanese Authorities who also cancelled its licence. Clearly, the Kenyan court has no jurisdiction to entertain the applicant's claim. The argument that it was licensed to operate in Kenya and that its agreement provided for the laws of Kenya to apply is equally legally frail. Before this court is a totally different dispute challenging a decision rendered by the South Sudanese government revoking a license issued in Sudan by the said government. This court cannot assume jurisdiction under such circumstances.

22 Cap 32, Laws of Kenya

23 {2016} e KLR.

44. Regarding the second limp of the objection, that is Diplomatic Immunity, the applicant again misunderstood the law on this subject and sued the Embassy of the South Sudan in Kenya which is tantamount to suing the government of South Sudan in Kenyan courts in total disregard of Diplomatic immunity, a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official and, to a large extent, their personal activities.

45. The principle of diplomatic immunity is one of the oldest elements of foreign relations. Ancient Greek and Roman governments, for example, accorded special status to envoys, and the basic concept has evolved and endured until the present. As a matter of international law, diplomatic immunity was primarily based on custom and international practice. In the period since World War II, a number of international conventions (most noteworthy, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations) were concluded. These conventions formalized the customary rules and made their application more uniform.

46. The special privileges and immunities accorded foreign diplomatic and consular representatives assigned to other countries reflect rules developed among the nations of the world regarding the manner in which civilized international relations must be conducted. The underlying concept is that foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country. Lord Denning had this to say in *Ministry of Defence of the Government of the United Kingdom v. Ndegwa*[24] and *Thai-Europe v. Government of Pakistan*: -[25]

> "...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 entertain the claim, and in consequence gave judgment against the foreign sovereign, they could be called on 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."(Emphasis added)

47. Long before the promulgation of the 2010 Constitution which expressly now provides that the general rules of international law shall form part of the law of Kenya,[26] Kenya's jurisprudence courtesy of the application of the Vienna Convention on Diplomatic Relations and other Privileges and Immunities embraced absolute foreign immunity such that no suit can be entertained against a foreign sovereign without waiver by the foreign sovereign. This position was affirmed by the *Privileges and Immunities Act*.[27] In *Trandex Trading Corporation Ltd v Central Bank of Nigeria*[28] Shaw L.J at page 908 observed as follows: -

> "... so long as sovereign institutions confine themselves to what may in general terms be described as the basic functions of government a total personal or individual immunity from suit was unobjectionable..." (Emphasis mine)

24 Civil Appeal No. 31 of 1982 at page 965

25 *{1975} 3 ALL ER 961*

26 See Article 2 (5) of the Constitution.

27 Chapter 179 of the Laws of Kenya

48. In *Bird Shifting Corporation v The embassy of the United Republic of Tanzania*, United States district Court, District of Columbia 1980, the court held that, "in determining the immunity the foreign state must have waived its immunity...." The following passage attributed to Lord Denning in my view sheds more light on the subject at hand:-

> "Sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly, but rather on the nature of the dispute ... 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, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic Courts of another Country; but if the dispute concerns, for instance, the commercial transaction of a foreign government, and it arises properly within the territorial jurisdiction of a sovereign government, and it arises properly within the territorial jurisdiction of our Court, there is no ground for granting immunity".[29]

49. Also relevant is *Ministry of Defence of the Government of the United Kingdom v Ndegwa*[30] which laid down three guiding principles:-

50. No such waiver as contemplated in paragraph two above has been obtained. It follows that no suit can be entertained against a foreign sovereign without waiver. It is not for this court to issue or decree the waiver. Further, Article 2 (6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. Clearly, the applicant is inviting this court to act contrary to these clear constitutional dictates and international conventions to which Kenya is a party.

51. It is important to mention that section 4 (1) of the *Privileges and Immunities Act*[31] provides for the application of the Vienna Convention set out in the first schedule of the act (that is Articles of the Vienna Convention on Diplomatic Relations signed in 1961) and the section specifically provides that the said convention shall have the force of law in Kenya. Article 32 of the first schedule of the Articles of Vienna Convention on Diplomatic Relations having the force of law in Kenya provides that the immunity from jurisdiction of Diplomatic agents and of persons enjoying immunity under Article 37 thereof may be waived by the sending state and that such waiver must always be express.

52. By now its trite that the leave being sought is to institute a proceeding which are dead on arrival. Even if the application had survived the other two grounds, the ground on Diplomatic Immunity

28 {1977} 1 All ER 881

29 *Rahintoolia v HE. The Nizam of Hyderabad and Others, {1957} ALL E.R. 441*

30 {1983} KLR 68

> 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.
>
> 2. Such persons and institutions include foreign sovereign or heads of state and government, foreign diplomats and staff and their staff, consular officers and representatives of international organizations such as the United Nations Organizations (UNO) and the Organization of African Unity (OAU) (sic).
>
> 3. 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 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 about it.

31 Ibid

would have hammered the final nail to its coffin. Having so concluded, it will be a waste of ink, paper and judicial time to address the merits or otherwise of the grounds in support of judicial review. Differently put, the parties jumped the gun and addressed the substantive application which was yet to be filed. Consequently, I dismiss the applicant's application dated 29th June 2021 with costs to the Respondents.

Orders accordingly

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21STDAY OF OCTOBER 2021

JOHN M. MATIVO

JUDGE