REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(*Coram: Mwilu, DCJ & Vice-President; Ibrahim; Ojwang; Wanjala; and Lenaola SCJJ*)

PETITION NO. 2 OF 2015

—BETWEEN—

KAREN NJERI KANDIE.....APPELLANT

—AND—

1. ALASSANE BA.....
2. SHELTER AFRIQUE..... RESPONDENTS

(Being an appeal from the Judgment of the Court of Appeal of Kenya at Nairobi (Ouko, Kiage and M'Inoti JJA) delivered on 13th February 2015 in Nairobi Civil Appeal No. 20 of 2013)

JUDGMENT OF THE COURT

I. INTRODUCTION

[1] This appeal challenges the judgment of the Court of Appeal at Nairobi (*Ouko, Kiage and M'Inoti JJA*) delivered on 13th February 2015, in Civil Appeal No. 20 of 2013 and is anchored on Article 163(4)(a) of the Constitution of Kenya, 2010 (the Constitution).

[2] Karen Njeri Kandie (the appellant), is a citizen of Kenya who was employed by Shelter Afrique (the 2nd respondent) as its Finance Director under a renewable fixed term contract for the period 1st December 2009 to 6th July 2012. Alassane Ba (the 1st respondent) was the Managing Director of the 2nd respondent having been seconded as such from the African Development Bank, while the 2nd respondent is an African housing development and finance institution with a membership of 44 states, including Kenya.

[3] The appellant alleges that on 28th June 2012, the 1st respondent physically assaulted her at the work place and that she sustained injuries as a result thereof. She also alleges that she reported the matter to the police but no action was taken and instead on 6th July 2012, the 1st respondent wrote a letter to her in which she was sent on special leave from 9th July 2012 to 31st August 2012. The letter also indicated that the special leave was only a temporary measure that would neither affect her salary and benefits nor pre-empt any disciplinary action against her. On 9th July 2012, her official mobile phone was taken away, but the 1st respondent denies the said allegation. In a letter dated 20th July 2012, the appellant was then notified of a special meeting of the Board of Directors of the 2nd Respondent (the Board) to be held on 25th July 2012 in which she would be given the opportunity to present her report, and on 23rd July 2012, she wrote a letter to the Board explaining the alleged assault by the 1st respondent. The appellant however did not attend the meeting held on 25th July, 2012 because she had been admitted in hospital for treatment. The decision of the Board taken on 6th July 2012 and the events narrated above, triggered proceedings at the Industrial Court (as it then was).

Proceedings at the Industrial Court (as it then was)

[4] The appellant filed a petition at the Industrial Court (Cause No. 1296 of 2012) dated 31st July 2012 wherein she sought the following orders:

(a) a declaration that the 1st respondent's decision dated 6th July, 2012 and ratified by the 2nd respondent to send the appellant on special leave is null and void;

(b) the appellant be reinstated to her employment;

(c) a permanent injunction to restrain the 1st respondent from terminating the appellant's employment contract pursuant to her complaint of assault by the 1st respondent;

(d) the Board of the 2nd respondent be compelled to suspend the 1st respondent from holding office;

(e) the Board of the 2nd respondent be compelled to investigate the appellant's complaint of assault against the 1st respondent;

(f) damages for breach of contract and unlawful suspension from work;

(g) damages for assault by the 1st respondent; and (h) costs of the suit.

[5] On 24th August 2012, the respondents filed a notice of preliminary objection arguing that:

(i) the respondents are holders of diplomatic immunity under the Privileges and Diplomatic Immunities Act, Chapter 179 of the Laws of Kenya (Privileges and Diplomatic Immunities Act);

(ii) the 2nd respondent had entered into a Host Country Agreement with Kenya on 19th October 1983 which grants the 2nd respondent diplomatic privilege and immunity;

(iii) the 2nd respondent and the African Development Bank had entered into agreements with the government of Kenya that confer diplomatic immunity and privilege on its employees; and

(v) the Court does not have the jurisdiction to grant the appellant the orders that she had sought.

[6] As to whether the respondents have diplomatic immunity against prosecution, the Industrial Court analysed the Privileges and Immunities Act, the Vienna Convention on Diplomatic Relations of 1961, the Host Country Agreement of 19th October, 1983, the Shelter Afrique Act, Chapter 493 of the Laws of Kenya (the Shelter Afrique Act) and the Convention of the Constituent Charter of Shelter Afrique of 1982 (the Charter), and concluded that the respondents enjoy privileges and immunities including immunity from legal processes of any kind, seizure of personal property and immunity from arrest and detention. The Court further held that the premises of the 2nd respondent are inviolable, and legal service of process may not be effected without the

consent of the 1st respondent. The Court therefore upheld the Preliminary Objection, and struck out the cause, without costs to the respondents.

Proceedings at the Court of Appeal

[7] Aggrieved by the decision of the Industrial Court (*now the Employment and Labour Relations Court*), the appellant filed **Civil Appeal No. 20 of 2013** at the Court of Appeal at Nairobi, and raised 10 grounds of appeal which were summarised in the Court of Appeal Judgment as being that: *"the learned judge erred by: (i) entertaining the respondent's preliminary objection on contested facts; (ii) failing to find that the Shelter Afrique Act only domesticated some provisions of the Host Country Agreement and the Convention of the Constituent Charter of Shelter Afrique which was the only basis for any immunity for the respondents and did not include immunity from all legal process; (iii) failing to give effect to the customary international law doctrine of restrictive immunity for the respondents which does not include immunity from all legal process; (iv) failing to give effect to the customary international law doctrine of restrictive immunity for the respondents thereby abrogating the appellant's access to justice and equal protection of law rights; (v) failing to hold provisions of the Host Country Agreement and Convention on the Constituent Charter unconstitutional; and (vi) failing to afford the appellant an appropriate effective alternative legal recourse against the respondents."*

[8] The Court of Appeal in its judgment, while observing that the central issue in the appeal was the question whether the learned judge of the Industrial Court was entitled to find that the respondents had immunity from any legal processes, nonetheless went on to determine other issues arising in the appeal. It held in that regard, that the preliminary objection aforesaid was properly before the Industrial Court and the respondents were not required to first file a response to

the appellant's claim before filing the notice of preliminary objection. In any event, since the preliminary objection on the issue of immunity raised a procedural bar to the court's jurisdiction, it ought to have been determined first, as it was.

[9] In addressing the central issue for determination by it, the Court of Appeal held that Article 2(6) of the constitution implies that a treaty that was ratified before the promulgation of the Constitution on 27th August 2010, forms part of Kenyan law, because the Constitution does not have a futuristic imperative nor does it suggest that treaties ratified before the 2010 Constitution do not form part of Kenyan law.

[10] On the issue of whether the appellant's employment was a matter of professional or commercial activity outside the respondents' official functions, and thus exempted from immunity under Article 31 of the Vienna Convention, the Court of Appeal held that the 1st respondent had immunity because he was not conducting a commercial activity at the material time and that the 2nd respondent is clothed with immunity because it has the same status as an embassy and the said immunity shuts out any form of enquiry by litigation against it. In conclusion, the Court found that the immunity conferred on the 1st and 2nd respondents is in accord with international treaties that Kenya has ratified and, by dint of Article 2(6) of the Constitution, such immunity is a legitimate limitation to the right of access to justice under Article 48 of the Constitution, and is not disproportionate to the legitimate aims of conferment of state immunity.

Proceedings before the Supreme Court

[11] Aggrieved by the decision of the Court of Appeal, the appellant filed a Notice of Appeal on 26th February 2015 and a Petition of Appeal at this Court, dated 24th March 2015. She seeks the following orders, that—

(i) The judgment and orders of the Court of Appeal (*Ouko, Kiage and M'Inoti JJA*) delivered on 13th February 2015 be set aside and substituted by an order allowing Nairobi **Civil Appeal No. 20 of 2013**.

(ii) The appellant's costs of this appeal including those in Nairobi **Civil Appeal No. 20 of 2013** be borne by the 1st and 2nd respondents.

(iii) Such consequential and appropriate relief or other orders as this Honourable Court may deem just.

[12] The appellant relies on 13 grounds of appeal, summarized into the following issues:

(a) Whether the Court of Appeal erred in its finding that Article 2(6) of the Constitution applied in the same way to treaties and conventions ratified by Kenya before and after the effective date of the Constitution;

(b) Whether the Court of Appeal erred in its finding that the Convention on the Constituent Charter of Shelter Afrique is part of the law of Kenya under Article 2(6) of the Constitution;

(c) Whether in light of Articles 2(6), 24 and 48 of the Constitution, the Court of Appeal erred in its finding that the respondents enjoyed absolute immunity from legal processes under the laws of Kenya;

(d) Whether the Court of Appeal erred in its finding that the incident of alleged assault leading to the appellant's suit at the Industrial Court was within the 1st respondent's official duties as the Managing Director of the 2nd Respondent; and

(e) Whether the Court of Appeal erred in its finding that conferring absolute immunity to the respondents was a legitimate limitation to the appellant's right to access justice under the Constitution and was not disproportionate to the aims of conferring immunity.

(f) Whether the appeal should be allowed or not.

II. SUBMISSIONS OF THE PARTIES

a. The appellant's submissions

[13] Learned Counsel, Mr. Nyaoga and Senior Counsel, Mr. Oraro, represented the appellant. Mr. Nyaoga submitted that as a result of the assault on the appellant, her contract was unlawfully terminated and she was not paid her dues. This, he argued, was an infringement of the appellant's rights to human dignity and to access justice.

[14] Counsel submitted further that the retrospective application of Article 2(6) of the Constitution by the Appellate Court, did not meet the criteria set out in the Supreme Court case of ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank & Others Sup. Ct. Application No. 2 of 2011; [2012] eKLR*** and stated that in that case, courts were cautioned not to interpret the Constitution retrospectively, where the language of the Constitution is forward – looking, or does not indicate any retrospective application thereof. In that regard, counsel urged that an interpretation of retrospectivity would affect legislation that was passed before the Constitution in 2010, and divest any rights that had accrued legitimately to individuals.

[15] Mr. Oraro on his part disagreed with the Court of Appeal's finding that the Shelter Afrique Act was not a faithful reproduction of the international principle of *pacta sunct servanda,* and according to him, Article 26 of the Vienna Convention on the Law of Treaties of 1969, which states that *"every treaty in force is binding upon the parties to it and must be performed by them in good faith,"* reflects that the principle of *pacta sunct servanda* applies only after a treaty has entered into force. Further, he submitted that the principle of *pacta sunct servanda* cannot in any event override constitutional provisions.

[16] Counsel submitted, in addition, that before domestication of the Charter, vide the Shelter Afrique Act, the Convention was inapplicable in Kenya. This is because, he argued, Kenya was a dualist state, and hence the process of ratification of any treaty would only be complete upon domestication. That, therefore, the state correctly exercised its executive powers when it deleted the immunity provisions from the Act.

[17] It was, furthermore, the appellant's case that the learned Court of Appeal judges erred in law in finding that Section 3 of the Shelter Afrique Act was an

impermissible derogation from the obligation Kenya entered into with regard to the immunity of the respondents, and her counsel submitted that parliamentary approval in the ratification of a treaty is protected by the principle of 'sovereignty of the people.' He cited in that regard Section 8(4) of the Treaty Making and Ratification Act, which empowers Parliament to approve the ratification of a treaty with or without reservations to specific provisions of the treaty.

[18] Mr. Oraro also contended that none of the parties had raised the issue of whether the Shelter Afrique Act was applicable or not, before the Appellate Court, and therefore, the Appellate Court could not properly develop *suo motu,* an issue and proceed to rule on it without the parties having submitted on such an issue.

[19] On the question of diplomatic immunity, it was submitted on behalf of the appellant, that the respondents did not have diplomatic immunity, and in the event the court were to find that they were clothed with immunity, then such immunity was not absolute.

[20] Counsel further urged the point that the Court of Appeal erred in finding that the privileges and immunities in the Privileges and Immunities Act was applicable to the respondents, and it was his submission in that regard that it is not in dispute that the respondents were entitled to the immunities conferred by the provisions of part IV of the said Act, but there was no evidence to show that the Minister charged with the lawful responsibility to do so, had issued an order in the gazette to confer such immunity as contemplated by Section 9 of the Act. It was furthermore contended that the Court of Appeal did not address its mind to the applicability of the said Section 9 of the Privileges and Immunities Act at all, and thus fell into error.

[21] In the alternative to the above, counsel submitted that even if the 2nd respondent were entitled to diplomatic immunity, the said immunity was only functional in nature and that, functional immunity applies where a person is entitled to enjoy immunity only in respect of his official functions, and any act that deviates from an official function is excluded from immunity. He supported this argument by citing Article 31 of the Vienna Convention on Consular Relations of 1963 and contended that, the fact that an official of an organization enjoying diplomatic immunity had assaulted the appellant, during official working hours and at the organization's premises, cannot make the said act an official act or function.

[22] It was also counsel's submission that the Court of Appeal erred in law in finding that the respondents' immunity is a legitimate limitation to the appellant's rights to access justice, and the right to a fair hearing. As to the appellant's right to access justice, it was argued that although the appellant had sought redress at the Industrial Court, the respondents' assertion of immunity had in fact, thereby, impeded her right to access justice.

[23] Counsel further urged that although the right to access justice can be limited, there is a three – pronged test to be used in establishing whether the limitation is justifiable. It was his submission in that context that the European Court of Human Rights' case of ***Sunday Times v. United Kingdom (No. 2) (1992) 14 EHRR 229***, the United Nations Human Rights Committee decision in ***Marques de Morais v Angola 2005 AHRLR 3 (HRC),*** and the African Court of Human and Peoples' Rights case of ***Interights and Others v. Mauritania (2004) AHRLR 87 (ActHPR)***, had all established the said three-fold test for validity of limitations of rights, to be the tests of legality, legitimacy and necessity. In the Kenyan context, counsel cited the case of

Geoffrey Andare v. The Hon. Attorney General Petition No. 149 of 2015; [2016] eKLR, to support that submission.

[24] Counsel in urging the above issue, also contended that the legality limb of the limitations test failed, because the respondents' contention that their defence of immunity is founded on the law was in fact not sound in law, and even if their defence is based on the law, counsel argued that the respondents' arguments would fail on the legality and necessity limbs, because the appellant would thereby be barred from accessing justice, and would not have any other mechanism to pursue her claim. It was further submitted that the internal process contained in the 2nd respondent's staff rules was not viable in granting access to justice, as the 1st respondent was the one tasked to oversee the internal process of the 2nd respondent, yet he was the guilty party. That therefore, proportionality favours that the appellant's right to access justice is not limited at all.

[25] On the issue of whether the appellant's rights to fair trial (Article 25) and fair hearing (Article 50(1)) were infringed, counsel contended that the right to fair trial under Article 25 is non-derogable and thus, the blanket application of immunity offends this right, as it also prevents the appellant from accessing the courts. And, that if immunity is granted, then there was no alternative remedy which the appellant can rely on for justice, and for the above reasons, she prays that the appeal be allowed with costs.

b. The 1st and 2nd Respondents' submissions

[26] Mr. Munyu represented the 1st and 2nd respondents. On the issue of whether treaties and conventions ratified before and after the promulgation of the Constitution should be treated in the same manner, in the context of

retrospectivity, counsel submitted that unlike ordinary statutes, the Constitution is not subject to the rule against retrospectivity. This, he argued means that all conventions and treaties that Kenya has entered into, automatically form part of Kenyan law, without the need for domestication, irrespective of the date when the treaty or convention was ratified.

[27] Counsel submitted further that if there was an intention by the framers of the Constitution to limit the application of Article 2(6) to treaties entered after the promulgation of the said Constitution, as alleged by the appellant, such an intention would have been provided for in the Constitution itself, and in that context, all the provisions of the Charter and the Host Country Agreement, having been ratified by Kenya without reservation, assumed the force of law in Kenya, notwithstanding the provisions of the domesticating statute.

[28] Regarding the Shelter Afrique Act, and the argument that as the domesticating legislation it had derogated from the Host Country Agreement and the Charter, counsel admitted that whereas the preamble to the Shelter Afrique Act recognizes Kenya's obligations as set out in the Host Country Agreement, it seems that the Legislature only directly and expressly provided for exemption from taxation, as a privilege, but omitted from the Act all other privileges and obligations including those on immunities. He however argued that the State's ratification of the Charter as well as the Host Country Agreement had created a legitimate expectation that Parliament and decision – makers would act in conformity with the said instruments in their entirety. In addition, he contended that in instances where privileges were not specifically contained in the Act, the Court must take judicial notice of Kenya's general international obligations and, in that regard, he cited Article 27 of the Vienna Convention of Treaties, which provides that a state party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform its obligations under such a treaty.

[29] On the issue of whether Kenya had made reservations when enacting the Shelter Afrique Act, counsel disagreed with the appellant's submission that while domesticating the Charter and the Host Country Agreement, Kenya had issued reservations on the provisions on immunities. According to him, a reservation to a treaty is only made at the point of ratification, signing and acceptance of the treaty, as per Article 2(c) of the Vienna Convention on Treaties, and that in this instance, Kenya did not record any reservations when it ratified the Charter on 11th May 1982, nor when it concluded the Host Country Agreement on 19th October 1983. That therefore, any departure from the Charter or Host Country Agreement amounts to Kenya's derogation from its international obligations, and such an action would not, in any event, amount to a reservation.

[30] Counsel further argued that there is no conflict as to the privileges and immunities of the 2nd respondent in the Shelter Afrique Act, the Charter, and the Host Country Agreement, because there is no provision in the Act restraining the application of the obligations and privileges set out in the Host Country Agreement. He thus submitted that any real or perceived conflict between the Charter, Host County Agreement, and the Act would only arise if Parliament, when enacting the Act, expressly stated that it had repudiated a provision in the former, and if as a result of that express intention, the conflict between the Act and the treaty was irreconciliable.

[31] With regard to the issue of whether the Constitution could be applied retrospectively in the present circumstances, counsel submitted that the action which the appellant has complained of arose in 2012, and therefore the 2010 Constitution is applicable, and when the Court of Appeal interpreted and applied Article 2(6) of the Constitution to her case, it did not divest the appellant of any rights.

[32] Counsel was furthermore of the view that the appellant's interpretation of Section 9 of the Privileges and Immunities Act, which requires the Minister, by an order in the gazette, to declare the international organizations entitled to privileges, cannot be read in isolation. He urged the Court, in that regard, to consider the effect of the Host Country Agreement signed between the parties to it which confers the privileges set out in the preceding paragraphs, which include the fact that the 2nd respondent's headquarters are akin to an embassy with state immunity and therefore inviolable.

[33] It is also the respondents' case that the action complained of arose during a professional activity in the course of the employment of the appellant, and related to an employer/employee relationship, hence the filing of the matter at the Industrial Court. Counsel urged further that in order to exempt such actions from immunity, the appellant had to prove that the 1st respondent had committed the alleged assault on his own account, for profit, or the pursuit of trade or business. Over and above that, it was submitted that the 1st respondent carried a diplomatic passport from Mauritania, and therefore, his immunity applies even after he leaves office.

[34] Mr. Munyu further submitted that the right of access to justice under Article 48 of the Constitution is not an absolute right, and can be limited under Article 24 of the Constitution. In this instance, it was argued that since Kenya had entered into international agreements to provide for the immunity of the respondents against legal proceedings, the limitation of the appellant's right to access justice is provided by the law. The respondent, in addition, cited several cases, for example the European Court of Human Rights' decision in ***Jones v. United Kingdom [2014] 59 EHRR 1*** and the United Kingdom Court of Appeal case in ***Reyes and Another v. Al- Malki and Another [2015] EWCA Civ 32,*** to support the proposition that the State's recognition of rules of

public international law which support the conferment of state immunity, cannot be regarded as a disproportionate limitation of the right to access a court.

[35] The respondents, lastly, submitted that under Article 159(2)(c) of the Constitution, the appellant could access alternative forms of dispute resolution, and therefore had an alternative mechanism to seek redress of any of her complaints, but did not do so; and for the above reasons, her appeal must fail.

III. ISSUES FOR DETERMINATION

[36] We have read the pleadings and the written submissions of the parties, and the following issues arise for determination:

(i) What is the proper interpretation to be accorded to Article 2(6) of the Constitution and its effects thereof in the circumstances of the present case?

(ii) Whether the 1st and 2nd respondents enjoyed absolute immunity.

(iii) Whether the privileges and immunities conferred upon the respondents, if any, are justifiable limitations under Article 24 of the Constitution of the appellant's rights to fair trial, fair hearing and access to justice under Articles 25, 50 and 48 of the Constitution, respectively.

IV. ANALYSIS

i. What is the proper interpretation to be accorded to Article 2(6) of the Constitution, and what are the effects thereof, in the circumstances of the present case?

[37] Whereas submissions were made on the question whether Kenya is a monist or dualist state, we do not think it necessary in the circumstances before us to delve into that issue, because what needs to be resolved at the first instance is the question whether Article 2(6) of the Constitution should be applied retrospectively, and the effect thereof on the instruments ratified by Kenya and Shelter Afrique, and which form part of the subject of the dispute between the parties.

[38] Once that issue has been resolved, it is our view that the monist – dualist debate would not require our attention in this appeal, though the court may in the future be called upon, in appropriate circumstances, to make a firm finding on the issue.

a) Should Article 2(6) be applied retrospectively?

[39] On the question whether *Article 2(6) of the Constitution should be interpreted retrospectively, to apply to treaties and conventions ratified prior to the 2010 Constitution*, the Court of Appeal in this matter held that it could, and thus pronounced itself as follows:

> ***"Starting from the constitutional text itself, it will be noted that there is no cut-off point; it only states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. The text does not of itself contain a futuristic***

imperative. Nor does it directly or by implication suggest that such instruments as have been previously ratified are not part of the law of Kenya…. [T]he corpus of international treaties in Kenya cannot be demarcated for jural efficacy into pre-and post-2010 categories. We take the view that as long as Kenya's ratification of any treaty remains in force, unrevoked, unrecalled and unsuspended, the obligations that flow from it and its jussive force as part of the laws of Kenya remains the same irrespective of when the ratification occurred. A differentiation born of judicial interpretation is neither tenable nor practical. Its utility is equally doubtful."

[40] This Court has itself previously addressed the question of the retrospective effect of the Constitution in the case of ***Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others Sup. Ct. Application No. 2 of 2011; [2012] eKLR***, (***Samuel Kamau Macharia***) where it held [para 62]:

"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a

particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."

[41] We reiterate the above holding, and from a plain reading of Article 2(6) of the Constitution, it appears that the Constitution is silent on whether treaties ratified prior to the 2010 Constitution also form part of the laws of Kenya. In our view, however, the language of Article 2(6) itself should be the beginning of the resolution of the question of retrospectivity, and we note in that regard that, it does not distinguish the types of treaties and conventions that form part of Kenyan law; because the language plainly commands that *any treaty or convention that Kenya has ratified* becomes part of the laws of Kenya. The provision does not also distinguish treaties and conventions ratified before or after the Constitution of 2010, and therefore, in this particular instance, the agreements and Conventions that Kenya entered with Shelter Afrique, although ratified before 2010, are in force, have remained unrevoked, and therefore, form part of the laws of Kenya, only subject to the Constitution.

[42] We, further, and as a consequence of the above finding, restate our position in ***Samuel Kamau Macharia,*** that the Constitution cannot be subjected to the principles of statutory interpretation that prohibit retrospective application of laws generally; and where need be, only the language of the Constitution should be a guide as to whether a provision applies retrospectively or not. We also agree with the Court of Appeal, in the present case, that an interpretation of Article 2(6) of the Constitution in a manner that distinguishes treaties which

Kenya ratified prior to, and after the 2010 Constitution, is not tenable, and we believe that this interpretation is also in line with Section 7(1) of the Sixth Schedule which reads:

> ***"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."***

It is our finding, in a nutshell, that our reading of Article 2(6) of the Constitution can only lead to the conclusion that there is no bar to its provisions being applied retrospectively.

b) Status of the instruments that were ratified and domesticated by Kenya prior to the 2010 Constitution as applicable to this appeal

[43] It is the appellant's case, in the above regard, that prior to the promulgation of the Constitution, Kenya was a dualist state, and that all statutes that were enacted to domesticate a treaty or convention, had pre-eminence over the treaty or convention itself. The appellant therefore contended that the respondents did not have immunity, because the Shelter Afrique Act, which domesticated the agreements and conventions in issue, did not provide them with immunity against legal processes. To the contrary, the respondents submitted that the agreements and conventions aforesaid had granted them immunity, and although the Shelter Afrique Act did not expressly reflect their immunity against legal processes, Kenya was still bound to adhere to its international obligations, contained in those conventions and agreements, and to confer immunity on the respondents.

[44] On our part, we have analysed the Shelter-Afrique Act as well as the agreements and conventions that Kenya ratified prior to the enactment of the said Act, in order to host the 2nd respondent. For clarity, we will outline a chronology of the ratified instruments, and some key provisions of the said agreement and convention.

[45] Firstly, on 4th September 1981, the African Development Bank and its member states, including Kenya, entered into a **Memorandum of Understanding on the Establishment of an African Housing Development and Finance Institution** (MoU) [Exhibit R 04 of the Petition of Appeal]. Clause 2 of the MoU states that Shelter Afrique will be incorporated as a limited liability company in an African country, and Clause 7 provides for privileges and immunities for Shelter Afrique and its personnel, similar to those granted to the headquarters, and to personnel of other international and regional organizations.

[46] Secondly, on 11th May, 1982, Kenya ratified the **Convention on the Constituent Charter of Shelter Afrique** (Charter) [Exhibit R 03 of the Petition of Appeal]. Annex B to the Charter, which was signed on 28th June 1982, provides in Article 2.1(c) that Shelter-Afrique shall have the legal capacity to sue and be sued in its own name, whereas Article 4 grants officials and personnel of Shelter Afrique, who are not citizens of Kenya, exemptions, concessions and privileges in respect of taxation and import duties, *inter alia,* no less favourable than those accorded to other persons in international financial institutions located in Kenya.

[47] Thirdly, on 19th October 1983, Kenya ratified the **Agreement between the Republic of Kenya and the Company for Housing and Habitat in Africa regarding the Establishment of the Headquarters of the**

Company for Housing and Habitat Africa (Host Country Agreement) [Exhibit R 06 of the Petition of Appeal]. Article II of the Host Country Agreement outlined that the headquarters of the 2nd respondent would be in Kenya, and Article III, Section 8 (a) of the Host Country Agreement reads:

> ***"The headquarter's seat shall be <u>inviolable</u>. No officer or official of the Republic of Kenya, or other person exercising any public authority within the Republic of Kenya, shall enter the headquarter's 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."***

In addition, Article XI, Section 23 reads in the pertinent part:

> ***"Senior Officials of Shelter Afrique shall enjoy within and with respect to the Republic of Kenya, the following privileges and Immunities:***
>
> ***(a) <u>Immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them in their official capacity,</u> such immunity to continue notwithstanding that the person concerned may have ceased to be officials of Shelter-Afrique;***
>
> ***(b) <u>Immunity from personal arrest or detention</u> and from seizure of their personal and official baggage. "*** (emphasis added)

Further, Section 24 provides that—

> ***"In addition to the privileges and immunities specified in section 23:***
>
> ***(a) 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."*** (emphasis added)

[48] On 23rd October 1983, following all the necessary processes, the **Shelter-Afrique Act**, **Chapter 493C,** then came into force. The preamble to the Act provides as follows:

> *"**An Act of Parliament to provide for the carrying out of the obligation of Kenya arising under the Convention on the Constituent Charter of Shelter-Afrique and to provide for matters incidental thereto.**"* (emphasis added)

[49] Section 3 of the Act further stipulates that—

> ***"The provisions of the charter set out in the Schedule and the statutes of Shelter-Afrique as promulgated from time to time shall have the force of law in Kenya."*** (emphasis added)

[50] The Schedule to the Act, in addition, outlines the provisions of the Constituent Charter of Shelter Afrique that are to have the force of law in Kenya.

These provisions are similar to those that are contained in Annex B of the Charter, and only provide for immunity on taxation and import duties. *A contentious issue, therefore, arises: because the Shelter Afrique Act does not expressly grant the respondents immunity against legal processes, though the said immunities are explicitly provided for under the MoU, the Charter and the Host Country Agreement*.

[51] In the above context, the appellant is of the view that since Parliament has the power to legislate and exercise the sovereignty of the people, in doing so, it can make reservations to a treaty when domesticating it, and she also refers to this domestication process as 'ratification', and urges that Parliament acted correctly when it passed the Shelter Afrique Act without conferring the respondents with specific immunity against legal processes. The respondents are of the contrary view, and argue that the state can only effect such an alteration or reservation at the time of the ratification of the treaty, and not at the time of domestication.

[52] In that regard, *PLO Lumumba and Luis Franchesci* in ***'The Constitution of Kenya, 2010: an Introductory Commentary'*** have discussed some of the challenges that arise with regard to the ratification of treaties. We note their reasoning at page 73 that—

> ***"[e]ven when parliamentary approval may be called ratification, it should not be confused with the actual treaty ratification. ...Monism or dualism does not depend on the ratification processes but rather on the manner in which incorporation or domestication of a treaty takes place."***

[53] We agree with the learned scholars and although, as already stated in an earlier part of this judgment, we have declined to discuss the question whether Kenya, previously a dualist state, is post 2010 still dualist, or monist; we are not persuaded by the appellant's submission that Parliament entered a reservation at the point of domestication of the treaty in question. This is because Article 2(1)(d) of the Vienna Convention on the Laws of Treaties, which Kenya signed in 1969, defines a 'reservation' to mean:

> ***"a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."***

[54] We adopt the above definition, and we therefore find that the domestication of a treaty with modifications does not amount to an act of 'reservation' of a treaty under international law. A State can only enter a reservation with respect to a treaty at the point of signing, ratifying, accepting or acceding to it, and we use the term 'ratification' as referred to in international law under Article 2(1)(b) of the Vienna Convention on the Laws of Treaties, and it means:

> ***"the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."***

[55] On the issue of Parliament's legislative role with regard to treaties under Article 94(1) of the Constitution, and the application of international treaties and conventions which Kenya has ratified when there are national statutes addressing the same issue, the High Court case of ***Beatrice Wanjiku &***

Another v. the Attorney General & Others, Petition No. 190 of 2011, (***Beatrice Wanjiku***) comes to the fore. *Majanja J* in that case, analysed the application of treaties and conventions in instances where there is a domesticating statute dealing with the same issue. He registered his concern that ratification of treaties in effect, being in the realm of the Executive, usurps Parliament's legislative role contained in Article 94(1), as read with Article 1 of the Constitution, and held that this was contrary to what the framers of the Constitution had intended. He further held [para 23]:

> ***"23. The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by Parliament under Article 94 and when dealing with matters of fundamental rights and freedoms, the duty to the court, when applying a provision of the Bill of Rights, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom as provided in Article 20(3)(b). The issue then, is not necessarily one of hierarchy but of application of treaties and conventions"*** (emphasis added).

[56] We agree with the learned Judge, and we also note that the 2010 Constitution does not provide for the manner in which treaties and conventions are ratified, and the role the Legislature plays in the international law scene. In the above High Court case of ***Beatrice Wanjiku,*** the judgment was delivered on 23rd July 2012, when there was still no legislation that provided for the

Treaty-Making and Ratification process and, therefore, the learned judge's observations and concerns about the participation of the Legislature in law making was justified.

[57] However, the lacunae expressed above has been cured by the **Treaty Making and Ratification Act** (Act No. 45 of 2012), which commenced on 14th December 2012, and which was enacted to give effect to the provisions of Article 2(6) of the Constitution and *to provide the procedure for the making and ratification of treaties* and connected purposes. Section 2 of the Act provides that the legislation applies to treaties concluded after the commencement date i.e. 27th August 2010 when the Constitution was promulgated, whereas Section 4(1) provides that the National Executive has the responsibility to initiate the treaty making process as well as negotiate and ratify treaties. Further, Section 7 provides for the prior approval of a treaty by the relevant Cabinet Secretary in consultation with the Attorney-General before ratification, and Section 8 states that Parliament could consider some treaties for approval depending on the subject matter.

[58] We also note that the said Act commenced on 14th December 2012, a number of years after the Legislature had enacted the Shelter Afrique Act, which as we have stated, excluded any direct provisions that would have conferred on the respondents immunity against legal process. The question that then arises is this: in this Constitutional era, *should the Shelter Afrique Act be considered superior to the agreements that Kenya concluded which gave rise to certain international obligations including grant of immunity to the respondents in the terms expressed elsewhere above?* We think not. We state so because the provision on immunity against legal processes in the agreements Kenya entered into are in tandem with the objectives set out in the Shelter Afrique Act, which in fact recognized the agreements that Kenya ratified in order to host Shelter

Afrique in Kenya. In addition, by virtue of Article 2(6) of the Constitution, the Shelter Afrique Act cannot be read to be derogating from the obligations Kenya entered into at the time of ratifying the relevant agreements. This is irrespective of the fact that, the said agreements and conventions were concluded before the promulgation of the Constitution.

[59] In a nutshell, it is our finding that Article 2(6) of the Constitution applies retrospectively in the circumstances of the appeal before us and the provisions of the Charter, Host Agreement and the Shelter Afrique Act must be read together and if so, they confer immunity on the respondents against legal processes including personal arrest and detention. The next question is whether that immunity is absolute or not.

ii. Whether the 1st and 2nd respondents enjoyed absolute immunity.

[60] The appellant urges that the respondents are not categorized as beneficiaries of the processes under Part IV of the Privileges and Immunities Act, which provides under Section 9 that—

> ***"9. (1) This section shall apply to an organization which the Minister may, by order, declare to be an organization of which Kenya, or the Government, and one or more foreign sovereign powers, or the government or governments thereof, are members.***
>
> ***(2) The Minister may, by order—***
>
> ***(a) provide that an organization to which this section applies (hereinafter referred to as the organization) shall, to such extent as may be***

specified in the order, have the immunities and privileges set out in Part I of the Fourth Schedule to this Act, and shall also have the legal capacities of a body corporate

(b) confer upon—

(i) any persons who are representatives (whether of governments or not) on any organ of the organization or are members of any committee of the organization or of an organ thereof;

(ii) such number of officers of the organization as may be specified in the order, being the holders of such high offices in the organization as may be so specified; and

(iii) such persons employed on missions on behalf of the organization as may be so specified, to such extent as may be specified in the order, the immunities and privileges set out in Part II of the said Fourth Schedule."

[61] The appellant in relying on the above provisions contended that there was no evidence to show that the Minister had issued an order in favour of the respondents, as contemplated under the above section. On the contrary, the respondents submitted that the appellant's interpretation of Section 9 aforesaid, cannot be read in isolation, and that the court ought to also consider the net effect of the Host Country Agreement, signed between Kenya and Shelter

Afrique, and which are lawfully binding on both parties irrespective of any other provisions of the law.

[62] We take the position that, the provisions of section 9 above are discretionary in nature, in that the Minister may by order, confer immunities and privileges on certain kind of persons in particular organizations. Most importantly, and in the present case, the immunities and privileges of the respondents are clearly set out in the Host Country Agreement, the Memorandum of Understanding, and the Charter which as already stated, are treaties and conventions that Kenya has ratified, and now form part of the laws of Kenya. The Privileges and Immunities Act must, therefore, be read together with these instruments for their full effect and tenor, and none should override the other. They are both lawful instruments of privilege, and a reliance on one as against the other does not negate the immunities and privileges conferred by one of them, in this case, the above instruments.

[63] The appellant has also argued that the respondents were not clothed with absolute immunity, because while they may have been conferred with immunity, the alleged assault on the appellant did not amount to an official function covered by immunity. The appellant therefore challenges the Court of Appeal's reasoning that the assault occurred as part of an official function, because the assault was allegedly committed by an official clothed with immunity, on official premises, and during official work hours.

[64] In addressing the above issue, we note that section 23 of the Host Country Agreement which forms the subject of interpretation herein, provides that senior officials of Shelter Afrique shall enjoy:

> ***"(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 person concerned may have ceased to be officials of Shelter-Afrique.

(b) Immunity from personal arrest or detention and from seizure of their personal and official baggage ” (emphasis added).

[65] The above provision, in our view, safeguards against *inter alia*, the arrest, detention and prosecution of a senior Shelter Afrique officer who commits an unlawful act which would in ordinary circumstances attract legal sanction. For such a benefit to arise, the said ‘act’ must be executed by the relevant officer in his official capacity on the one hand; and on the other hands, the benefit arises to prevent their personal arrest or detention.

[66] In stating so, we must distinguish between absolute immunity, and qualified and restricted immunity; and in that context, under Section 23 of the Host Country Agreement, the immunity conferred on the 1st respondent is not absolute, because it only applies to official functions, and where his arrest and detention are sought. Furthermore, the preamble to the Vienna Convention on Diplomatic Relations, 1961 ratified by Kenya on 1st July, 1965 also recognized that *"the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"*. The immunity is, therefore, only functional in nature – aimed ensuring that an organization such as Shelter Afrique effectively performs its functions, and not to aid individuals to escape legal sanctions outside the parameters set out above.

[67] With respect to the 2nd respondent, the immunity, is also not absolute, because the Managing Director can waive the immunity hence Section 8 of the Host Agreement which provides for this as follows:

> ***"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"*** (emphasis added).

[68] While we appreciate the fact that the 2nd respondent was the Managing Director of Shelter Afrique, and could not be expected to grant himself immunity, there is no bar, as a matter of necessity, for the consent to waive immunity to be granted by any other authority within Shelter Afrique, including the Board of Directors, which exercises supervision over the Managing Director. After, therefore, carefully considering the above provisions of the agreements and treaty, we find that the immunity conferred upon the respondents is not absolute because in the instance of the 1st respondent, it is only limited to actions related to official functions, and his arrest and detention at the instance of the 2nd respondent, the Managing Director or the Board, may waive the immunity. If it were absolute, none of these exceptions would have applied.

In a nutshell, the immunity granted to the respondents is limited both by international law, and by the instruments of law that grant them such immunity as we have explained above.

iii. Whether the respondents' immunity is a justifiable limitation under Article 24 of the Constitution, to the appellant's rights to fair trial, fair hearing and access to justice under Articles 25, 50 and 48 of the Constitution respectively

[69] It is the appellant's case that the respondents' defence of immunity unjustifiably limits her rights to fair trial, fair hearing, and access to justice. In her opinion, the said immunity does not meet the requirements of the limitation test laid down in Article 24 of the Constitution. On the other hand, the respondents contended that the immunity granted to them is provided for in the international agreements that Kenya entered into with the 2nd respondent, which provide for immunity of the 2nd respondent and its officials in the manner explained above.

[70] Further, the 1st respondent submitted that he also carried a diplomatic passport from Mauritania, and was thus protected from any legal processes by dint of diplomatic immunity. The respondents also argued that the limitation of the rights was for a legitimate aim of Kenya complying with its international obligations, to allow the 2nd respondent to carry out its official functions. They also asserted that Article 159(2)(c) of the Constitution provides for alternative forms of dispute resolution, and in this instance, the appellant has not only limited herself to one mechanism for addressing her complaints through court processes, but that arbitration, reconciliation, mediation amongst other forms of alternative dispute resolution, were available to her, yet she did not use them.

[71] In addressing the above issues, it is important to first set out the limitation clause in Article 24 of the Constitution which reads, in part, as follows—

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) ...

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied."

[72] Article 24 should also be read together with Article 25, which provides for the rights that cannot be limited (non-derogable rights) as follows:

> ***"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***
>
> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
> ***(b) freedom from slavery or servitude;***
> ***(c) the right to a fair trial; and***
> ***(d) the right to an order of habeas corpus".***

[73] Kenyan courts have previously analysed the limitation test enshrined in Article 24 of the Constitution; for example, in the case of ***Attorney-General & another v. Randu Nzai Ruwa & 2 others Civil Appeal No. 275 of 2012; [2016] eKLR*****,** the Court of Appeal observed that the rights and freedoms in the Bill of Rights can only be limited under Article 24 of the Constitution, and neither the State nor any State functionary can arbitrarily do so. The Court further endorsed the holding of the trial court with respect to Article 24, and stated thus:

> ***"Our reading of Article 24 (1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster but also the manner in which the law is effected or proposed. So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of Article 24."***

[74] Further, in the High Court case of ***Union of Civil Servants & 2 others v. Independent Electoral and Boundaries Commission (IEBC) & another H.C. Petition No. 281 of 2014 & 70 of 2015; [2015] eKLR***, the Court examined Article 24 and stated that the test to be applied is a strict and elaborate scrutiny based on the 'reasonability and justifiability' test. The learned Judge thus stated:

> ***"46. … once a limitation of a fundamental right and freedom has been pleaded as has happened in the present Petition, …, then the party which would benefit from such a limitation must demonstrate a justification for the limitation. In demonstrating that the limitation is justifiable, such a party must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question; See S v. Zuma & Others (1995)2 SA 642(CC)."***

[75] Courts in Kenya have also been persuaded by foreign case law from Canada and South Africa, that have expounded on the limitation clauses in their respective Constitutions. The Supreme Court of Canada, in that regard, analysed the limitation clause in the Canadian Charter of Rights and Freedoms in the case of ***R v. Oakes [1986] 1 S.C.R 103*** and observed thus [page 136]:

> ***"The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."***

[76] In South Africa, the Constitutional Court, in ***S v. Makwanyane and Another [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995),*** also analysed the limitation test as follows [paragraph 104]—

> ***"In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."***

Additionally, the said Constitutional Court in ***S v. Manamela and Another (Director-General of Justice Intervening) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000)*** observed that the Court should not follow a mechanical checklist when determining whether a right is justifiably limited, but instead the Court must engage in a balancing exercise while considering proportionality. It also observed that—

> ***"It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. ...As a general rule, the more serious the***

impact of the measure on the right, the more persuasive or compelling the justification must be. … Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting."

[77] After carefully considering Article 24 of the Constitution and the above cases, we find that the test to be applied in order to determine whether a right can be limited under Article 24 of the Constitution, is the 'reasonable and justifiable test', that must not be conducted mechanically. Instead the Court must, on a case- by- case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word 'including' in Article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration.

[78] Before applying the 'reasonable and justifiable' test, therefore, a court must first determine whether a right has been limited under a particular law and in this case, we have held that the appellant cannot proceed with the case against the respondents, because the respondents are clothed with immunity from legal processes, which applies to the arrest and detention of the 1st respondent. Thus, the appellant's right of access to justice through the courts, is necessarily limited, as the respondents' immunity which is provided for in the law, and arises from

treaties and conventions which form part of the laws of Kenya under Article 2(6) of the Constitution. Sections 23 of the Host Country Agreement further provides that senior officials of Shelter Afrique shall enjoy immunity from legal processes in respect of words or actions performed in their official capacity, immunity from personal arrest or detention, as well as from seizure of their personal and official baggage, and from inspection of their baggage; and Section 24 thereof extends the immunity to the Managing Directors and Officials of Shelter Afrique having the rank of Assistant Director, and that their immunities and privileges will be similar to those accorded to ambassadors.

[79] *Is this limitation reasonable and justifiable*? It is important to consider the factors set out in the Constitution, that will assist us to answer this question including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual does not prejudice the rights of others, as well the consideration the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve that purpose. We will herebelow carry out an analysis on the rights that the appellant alleges were unjustifiably limited.

Article 48

[80] Article 48 of the Constitution provides for the right to access justice as follows:

> ***"The State shall ensure access to justice for all persons, and if any fee is required, it shall be reasonable and shall not impede access to justice."***

[81] The Court of Appeal examined the scope of this right in the case of ***Joseph Nyamamba & 4 others v. Kenya Railways Corporation [2015] Civil Appeal No. 239 of 2009 eKLR*** where it held that—

> ***"The scope of access to justice as so enshrined is very wide – it includes ability of a party to file suit in court, ability to access the police with legitimate expectation of fair, expeditious and prompt investigations of one's complaint, prosecution of suspects, enforcement of decrees and orders issued by a court and prompt and fair compensation by government upon compulsory acquisition of one's property for public use – see, for exposition of these principles, Dry Associates v. Capital Markets Authority & Anor Petition No. 328 of 2011 (unreported)."***

[82] The High Court, in the case of ***Kenya Bus Services Limited and Anor v. Minister of Transport & 2 Others [2012] eKLR,*** also conducted an analysis of Article 48 and held as follows:

> ***"37. … Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law."***

[83] In the above context and in a nutshell, the appellant argued that the conferment of immunity upon the respondents has restricted her access to justice. To the contrary, the respondents argued that they were clothed with diplomatic immunity, whose purpose is to ensure efficient performance of the functions of a diplomatic mission, by its employees, and was therefore not disproportionate.

[84] In that regard, it must be noted that the right of access to justice provided under Article 48 is not an absolute right listed under Article 25 of the Constitution, and therefore it can, in proper circumstances, be limited by the law. In invoking Article 24(3), the respondents have presented submissions as to why this right is reasonably and justifiably limited. It was argued on their behalf that, immunity is only a procedural bar, and not a limitation of the right to access justice, and it was not a disproportionate limitation as it served the purpose of fulfilling international law obligations of allowing diplomatic missions and its employees to carry out their functions. We agree with that submission, and find that it is not unjustified to hold that the legitimate aim of diplomatic immunity is for the state to meet its obligations under international law, and to allow diplomats and those clothed with diplomatic immunity, like the respondents, to effectively conduct their official functions, without any hindrance.

[85] In concluding on this issue, we therefore find that after balancing the right of the appellant to access justice, and Kenya's obligation to ensure that it meets its international obligations of letting the respondents work without hindrance, the limitation on the right to access courts is not disproportionate. The conferment of immunity for the purposes of Kenya upholding its international law obligations, is to that extent, a reasonable and justifiable limitation of the right to access justice as provided under Article 48 of the Constitution, and we so hold.

Articles 25 and 50

[86] A perusal of the judgments of the Industrial Court and the Court of Appeal shows that the appellant did not raise the issue of the limitation of her rights to fair trial, or fair hearing, and therefore, none of the courts pronounced themselves on this issue. This Court is not a court of first and last instance, and therefore, we will not make a determination on an issue not addressed at the superior courts (See ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board [2012] eKLR*** at paragraph 13A)

V. CONCLUSION

[87] We have held that all treaties and conventions that Kenya has ratified form part of Kenyan law, subject to the Constitution. We have also held that the respondents were conferred with immunity against legal processes by the international agreements that Kenya entered into, though the immunity so granted was not absolute, as there were exceptions provided in the operative law. Finally, the privileges and immunities that the respondents enjoy were a reasonable and justifiable limitation of the right of access to justice. These findings would leave us with only one other issue to address: costs. In light of the facts at hand, we exercise our discretion and order that each party shall bear its own costs in this matter.

VI. FINAL ORDERS

[88] The following are the orders of the Court:

(1) The petition dated 24th March 2015 is hereby dismissed.

(2) The Judgment and orders of the Court of Appeal (Ouko, Kiage and M'Inoti JJA) delivered on 13th February 2015 are upheld.

(3) The parties shall each bear their respective costs.

DATED and **DELIVERED** at **NAIROBI** this 28th day of July, 2017.

…… ……

P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

…… ……

J. B. OJWANG
JUSTICE OF THE SUPREME COURT

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

……

I. L. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is

a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA