



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU

APPEAL NO 165 OF 2016

**CEO (EASTERN AND SOUTHERN AFRICAN TRADE AND
DEVELOPMENT BANK) PTA BANK.....1ST APPELLANT/APPLICANT**
**HEAD OF LEGAL (EASTERN AND SOUTHERN AFRICAN TRADE AND
DEVELOPMENT BANK) PTA BANK.....2ND APPELLANT/APPLICANT**

VERSUS

REPUBLIC.....RESPONDENT

**(Being An appeal From the Order and/or Decision of Hon. Senior Principal
Magistrate S. Atambo Delivered on 25th November 2016 Delivered In the Case
Miscellaneous Application 403 of 2015)**

-BETWEEN-

REPUBLIC.....APPLICANT

-AND-

**CEO (EASTERN AND SOUTHERN AFRICAN TRADE AND
DEVELOPMENT BANK) PTA BANK.....1ST RESPONDENT**
**HEAD OF LEGAL (EASTERN AND SOUTHERN AFRICAN TRADE
AND DEVELOPMENT BANK) PTA BANK.....2ND RESPONDENT**

JUDGMENT

1. On 20/11/2015, Chief Inspector John Lelei approached the Chief Magistrate’s Court in Kiambu with a curious Miscellaneous Criminal Application of even date. The Application was presented ex parte but it named the Chief Executive Officer (CEO) of the Eastern and Southern African Trade & Development Bank (hereinafter referred to by its popular name “PTA Bank”) as the 1st Respondent and the Head of Legal Services at the same bank as the 2nd Respondent.

2. The Application sought two substantive prayers:

a. “That the Honourable Court be pleased to issue a warrant to investigate documents related [to] joint extra-territorial investigations for offences of: abuse of authority contrary to section 99 of the Penal Code, Cap 87 of the Laws of Zambia; Fraudulent Accounting contrary to section 326 of the Penal Code of Zambia and Theft by public servant contrary to section 277 [of the Penal Code of Zambia].”

b. “That the order of this Honourable Court be served upon the CEO – Eastern and Southern African Trade & Development Bank – Kenya (PTA Bank) and Head of Legal Services – PTA Bank Kenya.”

3. The Supporting Affidavit of CI John Lelei listed eleven specific documents he wanted given to him and, for good measure, included a twelve omnibus category of “any other documents relevant to the case.”

4. CI John Lelei was successful in his quest before the Learned Magistrate for he got the orders he sought and a warrant to search and seize evidence was issued and signed on the same day.

5. It would seem, however, that CI John Lelei’s success was ephemeral. The Respondents refused to comply with the Warrant. This prompted CI John Lelei to return to Court and apply for Summons to Show Cause why the Respondents should not be cited for Contempt of Court. It was the service of this Notice to Show Cause that ultimately drove the Respondents to Court. Through their lawyer, they filed a Conditional Appearance and a Notice of Preliminary. That Preliminary Objection which was vehemently opposed by the Prosecution, was argued before the Learned Magistrate on 27/09/2016. A ruling was eventually given on 25/11/2016. In her ruling, in material parts, the Learned Magistrate decided that:

a. The matter was not an appropriate one for a Preliminary Objection since it was not “based purely on points of law and thus the Applicant[s] through their counsel on record has gone through pains to elaborate on the same through factual illustrations.”

b. The immunity accorded to the Respondents is not absolute and that immunity is “not in any way affected by the prayers sought.”

6. The Learned Trial Magistrate, consequently, dismissed the Preliminary Objection, affirmed her earlier orders and required the Respondents to comply with the orders issued.

7. The Respondents were aggrieved and approached this Court praying for reversal of the Learned Magistrate’s Orders.

8. For all the rich literature the case has produced on both sides and the fecund grounds of appeal enumerated by the Appellants, this appeal presents only two questions for determination so far as I could tell:

a. The extent of the legal immunity accorded to the PTA Bank and its foreign employees based in Kenya, and in particular whether that immunity inoculates the PTA Bank and its foreign officials in Kenya from compulsion to produce the documents ordered by the Court in its order of 20/11/2015 and affirmed by the Learned Magistrate on 25/11/2016.

b. Whether the conduct of the Respondents somewhat disentitles them and the PTA Bank from the legal immunity otherwise afforded to them by the law.

c. Whether the immunity question should have been raised as a Preliminary Objection or whether it was a factual question to be canvassed in a different procedural posture.

9. The last question is, in my view, functionally moot. The procedural posture of the case necessitated that the Appellants raise the question as a preliminary question on jurisdiction since the matter had proceeded *ex parte* and orders issued by the time they came to Court. They might have approached the Court with an application to set aside – but the procedural raiment of the application is, to my mind, a red herring. The Court was called upon to determine whether the Appellants were entitled to immunity from the process or not. It ended up concluding, after considering the circumstances and context and the undisputed facts in the case, that it had jurisdiction. It is that last substantive determination that is on appeal here.

10. I will now turn to the first question and then return to the second question after.

11. Sharply put the question is whether the Appellants are protected by the law from being compelled to produce the documents ordered by the Court in its order of 20/11/2015. It would follow that if the Appellants were inoculated from that legal compulsion, then the orders by the Honourable Learned Magistrate should be reversed. There is the wrinkle of whether the orders should be left to stand merely because the Appellants did not timeously or promptly raise the issue of immunity when first served with the Learned Magistrate's orders dated 20/11/2015 disobedience of which led to the Notice to Show Cause why the Appellants should not be cited for contempt of Court. This latter question, I will discuss below when discussing whether the conduct of the Appellants disentitles them from reliance on the legal immunity accorded to them.

12. The Appellants pivot their arguments on immunity on three sources:

a. The provisions of the Privileges and Immunities Act and Legal Notice number 17 of 2012 issued thereunder

b. The Charter of the PTA Bank as read in line with Article 2(6) of the Constitution of Kenya; and

c. Customary International Law as permitted under Article 2(5) of the Constitution of Kenya.

13. After scrutinizing the language of the treaties, the statute and the Legal Notice and the background to their adoption and the cases cited by the Appellants, I wish to make two preliminary points that shape my overall view of the case.

a. First, although the Appellants have devoted a lot of energy and space in their court documents to argue about the place of treaty law as the law of Kenya, I believe the issue is largely uncontested. There is no question that the Constitution of Kenya accords special status to international treaties as part of the law of Kenya in Article 2(5). There may be questions of whether a treaty can trump a statute when the two are in conflict – the question presented in *Beatrice Wanjiku and Another v Attorney General and Others* Petition 190 of 2011 [2012] eKLR and *Diamond Trust Ltd v Daniel Mwema Mulwa* [2010] eKLR (holding that Treaty law is part of the laws of Kenya under the Constitution and it does not automatically trump conflicting local law but must be subjected to rules of interpretation to determine which one should prevail) and *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR (holding that international law including treaty law trumps conflicting local law). But that question is not presented here. The only

issue presented in this case is the straightforward interpretation and application of the treaty.

b. Second, the-Vienna Convention on Diplomatic Relations which the Appellants have cited copiously is only applicable by analogy: That Convention does not deal with the privileges and immunities of representatives of states to international organisations, and neither does it deal with privileges and immunities of employees or officials of international organisations. The employees and officials of international organisations – such as the PTA Bank – are not diplomats in the strict sense of the word since they are not accredited to a receiving country, in this case, Kenya. However, as the analysis below will show, it is unnecessary to resort to the Vienna Convention on Diplomatic Relations to resolve this case since the Charter establishing the PTA Bank (which is applicable as a treaty in Kenya) as well as statutory law in Kenya provide sufficient material to provide answers to the questions posed.

14. In my view, the question of whether the Appellants were protected by legal immunity from handing over the documents in CI Lelei's list is a straightforward one. The State, through Mr. Kinyanjui, does not deny that PTA Bank and its foreign employees (including the Appellants) enjoy legal immunity in Kenya. Their argument, rather, is that the legal immunity they enjoy is qualified immunity and not absolute immunity and that the documents ordered to be produced are not covered by the legal immunity accorded by the law to the PTA Bank and its foreign employees.

15. The State has marshalled four arguments in this regard:

a. First, the State relies on Article 42(1) of the Charter establishing PTA Bank which says that "Subject to paragraphs 3 and 4 of below, the Bank shall enjoy immunity from every form of legal process except in cases arising out of its borrowing powers when it may be sued only in a court with competent jurisdiction in the territory of member states in which the bank has principal office... The State argues that the Appellants are not being sued in the matter before the Learned Magistrate but are only required to produce documents; the suit itself shall ultimately be in Zambia – the requesting State.

b. Second, the State cites Article 43(13) of the Charter which provides thus:

The Bank shall cooperate at all times with the appropriate authorities of the member states to facilitate the proper administration of justice, secure the observance of national laws and prevent the occurrence of any abuse in connection with the privilege, immunities and facilities mentioned in the articles.

The State argues that the position taken by the Appellants flies in the face of this obligation by the bank since their refusal to hand over the documents or participate in the proceedings amounts to lack of cooperation.

c. Third, the State argues that the immunity accorded to the Appellants is qualified immunity and it did not extend to the requested documents. To this extent, the State cited principally the decision of the Court of Appeal in *Tononoka Steels Limited v The Eastern and Southern Africa Trade and Development Bank* where while citing with approval *Trendtex Corporation Ltd v Central Bank of Nigeria (1977) 1 ALL ER 881*, Justice Kwach expressed himself thus:

In my judgment, even if PTA Bank is an international organisation entitled

to immunities and privileges including immunity from suits and legal process, it is not immune from suits in respect of subject matter of this case. In coming to this conclusion, I have taken into account the intrinsic nature of the transaction as the material consideration in determining whether entering into that transaction is a commercial activity or an exercise in sovereign authority.

Mr. Kinyanjui also relied on the persuasive authority from the Ugandan Supreme Court, *Concorp International Ltd v East and Southern Development Bank (Civ. App. No. 11 of 2009)* where the Court distinguished between sovereign immunity and the immunity accorded to International organisations. The Court concluded that International Organisations only enjoy “functional immunity” which “encompasses all acts needed for execution of the functions and activities with which the relevant International Organisation is entrusted concrete determination of the scope of the immunity is based on the respective treaties or charters establishing each International Organisation.” Further, the Court held that International Organisations only have immunity which are necessary for the fulfilment of the purposes of the organisation.”

d. Lastly, the State argued that, from the argument in (c) above, it is clear that the question of immunity accorded to International Organisations is a “factual” question as it depends on the function of the International Organisation and the nature of the process it is being subjected to. To this extent, the State argues that the question whether the documents in CI Lelei’s list are inviolable or not is a factual one which should have been canvassed in the trial and not as a preliminary objection. The Appellants would have had to demonstrate to Court factually that the documents requested were inviolable – a fact that made the case inapposite for disposition through a preliminary objection.

16. On the other hand, the Appellants place their reliance on the text of the law and customary international law.

17. There is no question that Kenya is a member of the PTA Bank. As such, it is a signatory to its Charter. That Charter is a Treaty and therefore enjoys the status of the law of Kenya under Article 2(6) of the Constitution. This does not require belabouring. The question is the extent of the rights created under the Charter.

18. Article 43 of the Charter covers the “status, capacity, immunities and privileges” and lists all the status, capacity, privileges, immunities and exemptions which shall be accorded with respect to the Bank in the territory of each Member State to “enable the Bank to achieve its objectives and perform the functions with which it is entrusted.” I have recited these words because they approximate the test used by the Ugandan Case cited by the State (*Concorp International Ltd Case*). In other words, Article 43 of the Charter establishing the PTA Bank makes is sufficiently clear that all the immunities listed thereunder are “necessary for the fulfilment of the purposes of the organisation.”

19. What this means to me is that when it comes to the PTA Bank, the Court is not necessarily required – at least for the immunities which are explicitly provided for – whether they are necessary to realise the objectives of the International Organisation. The Member States have already specifically contracted the enumerated immunities as necessary. In addition, the Member States are required, as a Treaty Obligation, to take immediate steps to accede to, ratify and implement the Agreement on Privileges and Immunities adopted by the PTA Bank Member States in December 1984.

20. It is pursuant to this that Kenya promulgated Legal Notice No. 17 of 2012 entitled “The Privileges and Immunities (Eastern and Southern African Trade

Development Bank) (PTA Bank) Order, 2012 (hereinafter “Legal Order”).

21. The Legal Order, for our purposes here, did, in the main, three things. First, the Legal Order declared the PTA Bank to be an organisation to which section 9 of the Privileges and Immunities Act shall apply.

22. Section 9 of the Act provides as follows:

(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;

(c) confer upon such other classes of officers and servants of the organization as may be specified in the order, to such extent as may be so specified, the immunities and privileges set out in Part III of the Fourth Schedule, and Part IV of the said Fourth Schedule shall have effect for the purpose of extending to the staffs of such representatives and members as are mentioned in subparagraph (i) of paragraph (b) of this subsection, and to the families of officers of the organization, any immunities and privileges conferred on the representatives, members or officers under that paragraph, except in so far as the operation of Part IV is excluded by the order conferring the immunities and privileges.

(3) An order under subsection (2) of this section shall be so framed as to secure that there are not conferred upon any person immunities or privileges greater in extent than those which, at the time of the making of the order, are required to be conferred on that person in order to give effect to any international agreement in that behalf and that no immunity or privilege is conferred upon any person as the representative of the Government of Kenya or as a member of the staff of such representative.

23. The second consequential effect of the Legal Notice was that it accorded PTA Bank all the privileges and immunities specified in paragraphs 2, 3, 4, 5, and 6 of Part I of the Fourth Schedule of the Act.

24. Paragraph 2 is the only with direct relevance to these proceedings. Paragraph 2 of Part I of the Fourth Schedule to the Act provides as follows:

The like inviolability of premises occupied as offices and of official archives as is accorded by Articles 22 and 24 of the First Schedule to this Act.

25. Article 22 and 24 of the First Schedule to the Act, on the other hand, provide that:

ARTICLE 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

ARTICLE 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

26. Finally, the consequential effect of the Legal Notice is that it accords to "any person who is an employee of the Bank....while residing in Kenya and performing duties in the service of the Bank....[the] privileges and immunities specified in paragraphs 1 to 7 of Part III of the Fourth Schedule to the Act.

27. Of the seven paragraphs referred to, paragraph 1 is most relevant to these proceedings. It provides as follows:

1. Immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties.

28. I have reproduced these texts from the legal instruments unadorned because, in my view, their plain meaning resolves the controversy in this case. The following seems plainly obvious from the texts:

a. The premises of PTA Bank in Nairobi are inviolable meaning that they are not subject at all to any warrant for search or seizure. This by virtue of Article 22 of the First Schedule to the Act which is made applicable by virtue of Paragraph 2 of Part I of the Fourth Schedule to the Act. This Paragraph 2 of Part I of the Fourth Schedule to the Act is, in turn, made applicable by Paragraph 3 of the Legal Notice.

b. The archives and documents of the PTA Bank based in Nairobi are equally inviolable and are not subject to any search or seizure. This is by virtue of Article 24 of the First Schedule to the Act which is made applicable by virtue of Paragraph 2 of Part I of the Fourth Schedule to the Act. This Paragraph 2 of Part I of the Fourth Schedule to the Act is, in turn, made applicable by Paragraph 3 of the Legal Notice.

c. The Two Appellants being the CEO of PTA Bank and the Head of Legal Services of the same Bank in Nairobi are immunized from any legal process in respect of any duties or functions they perform in the course of the performance of their official duties. This is by virtue of Paragraph 1 of Part III of the Fourth Schedule to the Act which is, in turn, made applicable by virtue of paragraph 4 of the Legal Notice.

29. Having reached these broad conclusions from a straightforward reading of the law, the question arises, then, how the Warrant issued by the Learned Magistrate could be justified under the law.

30. One response is to say that the three types of immunities granted are not absolute but are functional. This was Mr. Kinyanjui's argument before me and it was the argument that persuaded the Learned Magistrate that she was correct.

31. There are two problems with that argument. The first problem is that when it comes to the inviolability of the premises and the archives and documents of the PTA Bank, it flies in the face of the clear text of the law: The law does not qualify the immunity accorded to both the premises and the archives and documents of PTA Bank. To the extent that execution of the Search and Seizure Warrant would entail the State's agents to breach the inviolability of the premises and the archives of PTA Bank, it will clearly be illegal and in breach of Kenyan law and Kenya's treaty obligations. It is that plain and simple.

32. Can the State go round this by requiring the CEO and Head of Legal Services to produce the documents? It is a clever argument but it is equally thwarted by clear legal provisions: the two are immunized from "suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties."

33. There is no doubt that what the Appellants are not targeted for any activities which were not done in the course of their official duties. Indeed, they are not the targets of the investigations: they are required to produce documents in the course of the performance of their duties.

34. This legal result cannot be avoided by arguing that the proceedings before the magistrate were neither civil nor civil proceedings but *sui generis* proceedings. The text of the law anticipated that: it speaks of legal process; all legal process!

35. So what about the distinction engendered in the ***Tononoka Steel Limited Case***? That suit involved the PTA Bank pitted in a legal tussle with a borrower who had consumed its commercial services as a client. When a dispute arose, the Court of Appeal correctly said that the Bank could not use its legal immunity as a shield to inoculate itself from the suit. The Court of Appeal simply held that the legal immunity did not extend thus far.

36. In my view, that interpretation is correct: in ***Tononoka Steel Limited Case***, the PTA Bank was acting in as a commercial player and hence, it would not be immune to a civil suit in that capacity. Elsewhere in international law, and analogously, this is referred to as the commercial activity exception to sovereign immunity – see, for example, United States Foreign Sovereign Immunity Act (§1605(a)(2)). This "commercial activity" exception applies when a sovereign (or in this case an International Organisation) has acted as in the manner of a private player within it. See, for example, *Argentina v. Weltover*, 504 U.S. 607, 614 (1992). It is important to note that this exception applies where the Sovereign or International Organisation is facing a suit of a civil nature; over an activity that it engaged in its capacity as a private player (for example, by entering into a contract). The exception does not extend to

requiring State agents to enter and seize documents from the protected premises or archives of the Sovereign or International Organisation.

37. In any event, I find it plainly fallacious to argue that the proceedings before the Learned Magistrate were not of a criminal nature. If they were not so originally, they certainly evolved to be so: the Appellants are required to show cause why they should not be cited for contempt of court – a criminal offence – with respect to functions they undertook in their official capacities as officers of the PTA Bank.

38. Finally, do the obligations of the PTA Bank under Article 43 of the Charter obligate the Appellants to turn over the requested documents as the State claims? The obligations under Article 43(13) are to “cooperate at all times with the appropriate authorities of the member states to facilitate the proper administration of justice, secure the observance of national laws and prevent the occurrence of any abuse in connection with the privilege, immunities and facilities mentioned in the articles.” I do not think that it amounts to an abuse of the privileges and immunities accorded to the PTA Bank and its employees for the Bank and its employees to insist on the privileges and immunities they are entitled to. Differently put, Article 43(13) does not impose an obligation on the PTA Bank to waive its privileges and immunities when a Member State so requests. I find no evidence that the obligations imposed on the PTA Bank under Article 43(13) of the Charter would require it to acquiesce to the request or order by the Learned Magistrate to turn over the documents in the Warrant for Search and Seizure.

39. In the final part of this decision, I have to deal with one final matter: Did the conduct of the Appellants in this case disentitle them to their claim of immunity? This was the argument by the State: that immediately after they were served with the Search and Seizure Warrant, the proper conduct for the Respondents would have been to approach the Court with an explanation why they were unable to comply. Instead, the State complains, the Respondents completely ignored the Court order and only deemed it fit to enter conditional appearance when they were served with a Notice to Show Cause why they should not be cited for Contempt of Court. Even then, bristles the State, their conduct has been high-handed choosing to use immunity as a broad ex ante shield as a preliminary objection rather than explain why the production of the particular documents would affect their functional immunity.

41. I have looked at the record in this case and considered the circumstances. I am unable, as a matter of fact, to conclude, as the State does, that the Appellants have acted in a high handed manner. All they have done is to assert their legal immunity. They have a right to do so. We may quibble on the exact form the assertion of their rights should have taken – but how they acted is no way high handed. Not that their conduct would, in these circumstances, strip them of their legal immunity anyway. This immunity is given by the law and their conduct cannot have the legal effect of taking it away. To put it clearer: The conduct of the Appellants did not, and could not have the legal effect of waiving their immunity.

41. Consequently, the result that is obvious after this analysis is that the appeal herein succeeds in entirety. The decision by the Honourable S. Atambo in Kiambu Chief Magistrate Court’s Miscellaneous Criminal Application No. 403 of 2015 is hereby set aside. In its place, the Preliminary Objection by the Appellants is upheld.

42. Orders accordingly.

Dated and delivered at Kiambu this 23rd day of March, 2017.

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JOEL NGUGI

JUDGE