



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 176 OF 2014**

**THE CREATIVE PRINT HOUSE LIMITED..... PLAINTIFF**

**-VERSUS-**

**EAST AFRICAN DEVELOPMENT BANK..... DEFENDANT**

**R U L I N G**

**INTRODUCTION**

1. Through the **Notice of Motion** application dated **19th May 2014** and filed in court on 20th May 2014, the Defendant came to court seeking as the main order that the Plaintiff's suit be struck out and that the costs of the suit and that of this application be given to the Defendant. This drastic prayer was premised on the grounds that:-
  1. ***This court lacks jurisdiction to deal with these proceedings.***
  2. ***The Plaintiff's claim is an abuse of the court process in that:-***
    - a. ***The Defendant enjoys immunity from every form of legal process pursuant to Article 44 (1) of the Charter of the East African Development Bank annexed to the Treaty for East African Co-operation of 1967 as amended on 23rd July 1980 and as set out in the Schedule to the East African Development Bank Act, Cap 493 and amended by the Finance Amendment Act of 2013, Act No. 38 of 2013.***
    - b. ***The Defendant has not expressly waived its immunity in writing.***
    - c. ***Other grounds and reasons to be offered at the hearing.***
2. The Plaintiff opposed the application through Grounds of Opposition dated 5th June 2014 in which the Plaintiff states that the transaction giving rise to the Plaintiff's cause of action is an ordinary commercial transaction between a Banker and its customer and was not a commercial transaction but one carried out in a private capacity and hence the alleged immunity does not apply.
3. The background to the application is that simultaneously with the suit filed in court on 5th May 2014 the Plaintiff filed a Notice of Motion application of even date against the Defendant seeking urgent injunctive orders against the Defendant on the grounds that the Defendant has proceeded to instruct the auctioneers known as KEYSIAN AUCTIONEERS to repossess an equipment namely a Digital Printer Xerox Doculolor 5252; Booklet Maker Horizon Colourworks 2000 and a Documents Cutter Document 545 HC that was hired on a lease agreement to the Plaintiff by the Defendant under a lease agreement dated 29th September 2005 entered into between the parties. This is done despite the allegation that the Plaintiff has already paid a sum of USD 512,953.59 out

of the total amount payable to the Defendant amounting to USD631,743.10. The Plaintiff therefore came to court to stop the Defendant from repossessing the said equipment. The Plaintiff granted interim injunctive orders securing the suit property. It is now the Defendant's application that the Defendant enjoys immunity and cannot be sued as has been done by the Plaintiff since the Defendant enjoys immunity from every form of legal process and consequently, the court has no jurisdiction to entertain the suit against the Defendant. This is the gist of the current application by the Defendant.

4. Parties filed submissions to the application. The Defendant/Applicant submitted that the defendant, the East African Development Bank (hereinafter 'the EADB') was originally established by the governments of Kenya, Uganda and Tanzania pursuant to Articles 21 and 22 of the Treaty for East African Co-operation dated 6th June, 1967. Following the collapse of the original East African Community, the same three governments entered into a further treaty Amending and Re-enacting the Charter of the EADB which was signed and entered into on 23rd June 1980 ("Charter"). The Charter is annexed to the Treaty for East African Co-operation of 1967 as amended on 23rd July 1980 (hereinafter 'the Treaty'). A copy of the Charter establishing the EADB is attached to the defendant's supplementary list and bundle of authorities filed on 9th June 2014.
5. In order for Kenya to fulfill its obligations under the Charter, the Kenya Parliament enacted the East African Development Bank Act, Cap 493A (hereinafter 'the Act') to give legal effect to certain articles of the Charter and the Treaty. The Act came into force on 18th May 1984. A copy of the Act is at pages 1 to 6 of the defendant's list and bundle of authorities filed on 30th May 2014. Section 3 of the Act incorporates the provisions of the Charter in the following terms: "the provisions of the Charter annexed to the Treaty for East African Co-operation, 1980 and set out in the Schedule to the Act shall have the force of law in Kenya". The Schedule is at page 3 of the defendant's list and bundle of authorities filed on 30th May 2014. The Schedule sets out the provisions of the Charter annexed to the Treaty which have the force of law in Kenya
6. It is submitted for the Defendant that EADB's case on statutory immunity is based on the premise that it is an international organization established by sovereign states by way of the Charter— the immunity provisions of which have been domesticated by the Kenyan Parliament in terms of the Act. These sovereign states have jointly determined the legal status, capacities, privileges and immunities of EADB. The court is prevented from altering the sovereign will of states as expressed in the Charter – particularly when that sovereign will has been given full effect and reinforced by way of a Kenyan statute. Quite separately, Articles 2(5) and (6) of the Constitution of Kenya 2010 also provide that the general rules of international law and any treaty or convention ratified by Kenya form part of the Laws of Kenya.
7. Article 42 of the Charter provides as follows;

***"to enable the bank to effectively fulfil its objectives and carry out the functions with which it is entrusted, the status, immunities exemptions and privileges set forth in the chapter are to be accorded to the Bank in territories of each of the Member states."***

8. Article 44(1) of the Charter provides as follows;

***"the bank shall enjoy immunity from every form of legal process except in any case where it has expressly waived its immunity in writing, when it may be sued in a court of competent jurisdiction in a Member state in which the Bank has an office and has appointed an agent for purpose of accepting service or notice of process. It is however understood that no waiver of immunity shall be implied or extend to any measure of execution."***

There is an amendment to the Schedule to the Act introduced by section 30 of the Finance Act, Act No. 38 of 2013. The amendment came into force on 1st January 2014 pursuant to section 1(d) of the Finance Act, No. 38 of 2013. The wording of the provisions of the Charter which have been reproduced in the Schedule to the Act is similar to that in the main Charter. It was submitted that the plain meaning of Article 44(1) of the Charter is that the EADB enjoys absolute immunity from every form of legal process except where it has expressly waived its immunity in writing. There is no evidence that the EADB has waived its immunity in writing to enable the plaintiff to

sue the EADB in these proceedings. Consequently, it was submitted, the Plaintiff's suit lacks legal basis and is an abuse of the court process. The Defendant quoted the New Shorter Oxford English Dictionary where the word immunity is defined to mean 'exemption' or 'privilege', and submitted that this includes an exemption from jurisdiction, and that the EADB is exempted from the jurisdiction of this court and is therefore immune from any proceedings brought against it. In essence, the court has no jurisdiction to entertain a matter where the party brought before the court is immune or exempted from the jurisdiction of the court.

9. The Defendant/Applicant in support of this position relied on two East African cases. The Tanzanian Court of Appeal's landmark decision in **CIVIL APPEAL NO. 110 OF 2009 - EAST AFRICAN DEVELOPMENT BANK V BLUELINE ENTERPRISES LIMITED (2012) 2 EA 55** and the Ugandan High Court's decision in **NELSON DHIBIKIRWA -VS- AGRO-MANAGEMENT (U) LTD (MISC APPLICATION NO. 651 of 2010)**. Both cases are wholly supportive of the principles of absolute immunity from suit and legal process as are entitled to be enjoyed by EADB. In the case of **EAST AFRICAN DEVELOPMENT BANK V BLUELINE ENTERPRISES LIMITED** the Tanzanian Court of Appeal had an opportunity to deal with an exactly similar situation where the same defendant herein, EADB, enjoyed absolute immunity from every form of legal process when exercising its lending powers and qualified immunity when exercising its borrowing powers in Tanzania. The Charter provisions granting the EADB the said immunity were given the force of law in Tanzania by an Act of Parliament just as it has been done here in Kenya. The Court of Appeal of Tanzania upheld the EADB's plea of immunity and declared execution proceedings brought against the EADB a nullity. In the **BLUELINE CASE**, the Tanzanian Court of Appeal examined the issue of immunity in meticulous detail by reference to a plethora of local and international authorities. Their conclusion was framed in the following terms:-

*"We conclude, therefore, our extensive discussion on this crucial point affirming the stance taken by counsel for the appellant that basing on the generally accepted rule, the immunity of international organisations is based on the principle of functionality. Furthermore, we accept as a correct proposition of law, as evidenced by state and judicial practice as well as academic writings on the issue, that the proper determination of this immunity should be based on the organisation's constitutional instrument (eg. Treaty, Charter etc). The member States have full sovereignty to grant such privileges and immunities to the organisation as they deem it proper for the purpose of achieving its objectives. The courts should always be loath to interfere with the States' transparent exercise of their sovereign powers or impose constrained interpretations on such treaties on the basis of fanciful reasons."*

*"For the foregoing reasons we have no lurking presentiment in holding that via Article 44 of the schedule to the Act, the EADB, has been granted absolute immunity from all forms of legal process in all cases arising out of the exercise of its lending powers. Equally, all its properties and assets and business premises enjoy absolute immunity under Article 45 except when exercising its borrowing powers. A contrary construction, in our respectful view, would necessarily lead to a blatant breach of the terms of the Charter and the Treaty establishing the East African Community. Such an eventuality will not augur well for the country in its relationship with the Partner States and the international community."*

10. The High Court of Uganda in the Agro-Management case adopted in full the principles set out in the BlueLine case on the issue of immunity and further extended these principles to cover the immunity from any legal process of Applicant's directors, officers and other employees acting in an official capacity.
11. The Applicant also relied on the case of **NDEGWA V THE MINISTRY OF DEFENCE OF THE GOVERNMENT OF THE UNITED KINGDOM (1983) KLR** for the proposition that it is a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived and further that a court will not entertain a suit against such person where it had neither waived its immunity nor consented to

submit to the jurisdiction of Court of Kenya.

12. On their part the Plaintiff/ Respondent submitted that the Defendant's claim to immunity is not grounded in law. Even if (which is denied) immunity was applicable, such immunity would only attach in respect of actions or omissions directly related to the Defendants core business i.e. Development banking. It was submitted that the transaction at the core of the Plaintiff's claim is a commercial lease and the Defendant's threat to illegally breach the same, notwithstanding the fact that the said goods that were delivered to the Plaintiff by its supplier did not constitute any security for the Defendant herein and in the process committing acts of trespass and waste. It was submitted that lease transaction pleaded in the Plaintiff is a commercial transaction. It is not a government or public transaction hence immunity cannot extend thereto. The Plaintiff submitted that it would be iniquitous to allow the Defendant applicant to carry out illegal actions amounting to trespass against the Plaintiffs moveable property without granting the Plaintiff redress in the form of injunctive relief. The Plaintiff relied on the decision in **TONONOKA STEELS LIMITED vs EASTERN & SOUTHERN DEVELOPMENT BANK (2000) 2 E.A. 536 & CONCORP INTERNATIONAL LTD vs EAST AND SOUTHERN DEVELOPMENT BANK (CA NO. 11 OF 2009)**.

The Plaintiff submitted that Defendant seeks to plead immunity but this court must note that the acts complained of by the Plaintiff are grave issues and should the Defendant not be enjoined as prayed by the Plaintiff, then there shall be a state of anarchy, as the Defendant will at any given time be able to commit acts of trespass and waste as against anyone it wants to, and once sued rely on the said plea of immunity, which, it was submitted, does not extend to commercial transactions carried out by the Defendant.

13. I have carefully considered these submissions of the parties. The only issue which arises for determination is whether the Defendant enjoys immunity from the current legal process. Fortunately for one, that is an issue of law, and there are now ample legal authority in this matter. In my view, the applicable statutory law is beautifully and correctly stated by the Defendant/Applicant in its submissions as stated in the foregoing paragraphs of this Ruling. I restate position.

The Defendant, the East African Development Bank (hereinafter 'the EADB') was originally established by the governments of Kenya, Uganda and Tanzania pursuant to Articles 21 and 22 of the Treaty for East African Co-operation dated 6th June, 1967. Following the collapse of the original East African Community, the same three governments entered into a further treaty Amending and Re-enacting the Charter of the EADB which was signed and entered into on 23rd June 1980 ("Charter"). The Charter is annexed to the Treaty for East African Co-operation of 1967 as amended on 23rd July 1980 (hereinafter 'the Treaty'). In order for Kenya to fulfil its obligations under the Charter, the Kenya Parliament enacted the East African Development Bank Act, Cap 493A (hereinafter 'the Act') to give legal effect to certain articles of the Charter and the Treaty. The Act came into force on 18th May 1984. Section 3 of the Act incorporates the provisions of the Charter in the following terms: "the provisions of the Charter annexed to the Treaty for East African Co-operation, 1980 and set out in the Schedule to the Act shall have the force of law in Kenya". The Schedule sets out the provisions of the Charter annexed to the Treaty which have the force of law in Kenya. EADB's case on statutory immunity is based on the premise that it is an international organization established by sovereign states by way of the Charter - the immunity provisions of which have been domesticated by the Kenyan Parliament in terms of the Act. These sovereign states have jointly determined the legal status, capacities, privileges and immunities of EADB. The court is prevented from altering the sovereign will of states as expressed in the Charter – particularly when that sovereign will has been given full effect and reinforced by a Kenyan statute. Quite separately, Articles 2(5) and (6) of the Constitution of Kenya 2010 also provide that the general rules of international law and any treaty or convention ratified by Kenya form part of the Laws of Kenya. Article 42 of the Charter provides as follows;

***"to enable the bank to effectively fulfil its objectives and carry out the functions with which it is entrusted, the status, immunities exemptions and privileges set forth in the chapter are to be***

*accorded to the Bank in territories of each of the Member states."*

Article 44(1) of the Charter provides as follows;

*"the bank shall enjoy immunity from every form of legal process except in any case where it has expressly waived its immunity in writing, when it may be sued in a court of competent jurisdiction in a Member state in which the Bank has an office and has appointed an agent for purpose of accepting service or notice of process. It is however understood that no waiver of immunity shall be implied or extend to any measure of execution."*

There is an amendment to the Schedule to the Act introduced by section 30 of the Finance Act, Act No. 38 of 2013. The amendment came into force on 1st January 2014 pursuant to section 1(d) of the Finance Act, No. 38 of 2013.

The wording of the provisions of the Charter which have been reproduced in the Schedule to the Act is similar to that in the main Charter. The plain meaning of Article 44(1) of the Charter is that the EADB enjoys absolute immunity from every form of legal process except where it has expressly waived its immunity in writing. There is no evidence that the EADB has waived its immunity in writing to enable the plaintiff to sue the EADB in these proceedings. This means that the EADB is exempted from the jurisdiction of this court and is therefore immune from any proceedings brought against it. In essence, the court has no jurisdiction to entertain a matter where the party brought before the court is immune or exempted from the jurisdiction of the court. It is clear to me that EADB enjoys immunity arising from the Charter establishing it and further that in considering whether or not the EADB enjoys immunity the issue of immunity must be judged only on the basis of its Charter and Treaty provisions as these are the documents that established the Bank.

14. The Plaintiff has relied on the decision of **TONONOKA STEELS LIMITED V EASTERN & SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (2000) 2 E.A 536**

I have carefully considered that decision, which is clearly distinguishable on the following basis:-

- a. The **TONONOKA STEELS LIMITED** case involved the Eastern and Southern Africa Trade and Development Bank (hereinafter 'the PTA Bank') where the property and assets belonging to the PTA Bank enjoyed immunity from every form of legal process and which immunity was conferred on the PTA Bank through a ministerial order purportedly made under the Privileges and Immunities Act. The Minister had done this through subsidiary legislation. The immunity was not through an Act of Parliament. This is totally different from this case. The immunity granted to the EADB is through its Charter which has the force of law in Kenya through an Act of Parliament.
- b. In the case of the **PTA BANK**, the Minister of Foreign Affairs had to make a Ministerial order as there was no Act of Parliament regulating the immunity status of the PTA Bank. It is the legality of that order that was questioned in that case. In the present case, the EADB's immunity from legal process is sufficiently covered by the Act and the question of the legality or constitutionality of the Act is not in issue and cannot be put to question.
- c. In the **TONONOKA STEELS LIMITED** case the court relied on the case of **TRENDEX TRADING CORPORATION V CENTRAL BANK OF NIGERIA (1977) 1 ALL ER 881** (where the plea of immunity was hinged on the principle of sovereign immunity and which the English court found inapplicable where a sovereign nation enters into a commercial transaction) to hold that the PTA Bank did not enjoy immunity in its commercial activities as a bank. In the present case, the plea of immunity is not based on the doctrine of sovereign immunity but on the constitutive statutory instruments creating the Bank which is the Charter and the Treaty.
- d. In the case of **EAST AFRICAN DEVELOPMENT BANK V BLUELINE ENTERPRISES LIMITED, THE TANZANIAN COURT OF APPEAL** held that the Trendex Trading Corporation's case which was the basis of the court's decision in the Tononoka Steels Limited case, had no relevance on the issue of immunity granted by an international organization's Charter

or Treaty such as is the case here.

It is clear from the Charter establishing the EADB that the EADB enjoys absolute immunity from all forms of legal processes unless the immunity is waived in writing.

15. It is important to note that the position arrived at herein has been adopted in both Tanzania and Uganda in the case of **East African Development Bank – Vs – Blue line Enterprises Limited (Tanzania)** and **East African Development Bank – Vs George Willy Mugisha Misc, Applic No. 77 of 2013 (unreported)** Uganda), these countries have upheld the rule of absolute immunity for the same bank, in recognition of its international immunity in respect of all kinds of legal action. The latest judicial decision in this matter in Kenya is the Court of Appeal Decision in **Karen Njeri Kandie – Vs – Alssane BA, and Shelter – Afrique, Nairobi, Civil Appeal No. 20 of 2013 (unreported)**. In that case, the appellant had sued the Respondents for various reliefs and remedies arising from alleged physical assault and other claims. The Court of Appeal, in confirming the High court's decision, found that the immunity that attaches to the 2nd Respondent and its officers such as the 1st Respondent finds recognition and legitimacy from international treaties entered into by Kenya and had express validation by the Articles 2 (6) of the Constitution of Kenya. It is important to note that in this suit, immunity is expressly conferred by an international legal instrument which is subsequently adopted in Kenya through a local legislation. As we have seen, the bank enjoys immunity from every form of legal process except in any case where it has expressly waived its immunity in writing. This court has not been shown any such waiver, leave alone a written one. In this regard, the Defendant's claim to immunity cannot be challenged. In fact, in this case, Clause 29 of the said Agreement expressly provides that:-

***“nothing in the agreement shall operate or be regarded as a waiver, renunciation or other modification of any right, privilege or immunity of the bank under the Treaty and Charter establishing the bank, under international conventions or under any other applicable laws.”***

16. The submission by the Plaintiff that the transactions giving rise to the Plaintiff's cause of action is an ordinary commercial transaction between a banker and its customer has no legal logic in light of the foregoing findings. The caution this court may give to any party who engages with personalities who enjoys these kind of immunities is to ensure that they secure express waiver of immunity in writing before engaging further.

17. I am persuaded that the Defendant's application is merited. I make the following orders:

- a. ***The Defendant/Applicant enjoys immunity from the current legal process initiated by the Plaintiff/Respondent in the main suit.***
- b. ***This court has no jurisdiction to entertain this suit.***
- c. ***The suit herein is struck out for lack of jurisdiction.***
- d. ***Cost of both the suit and this application shall be for the Defendant/Applicant.***

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 26TH DAY OF MARCH 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Njenga for the Plaintiff

Mr. Odundo holding brief for Murugara for the Defendant

Teresia – Court Clerk