



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1034 OF 2002 (O.S)

INDIGO EPZ LIMITED.....PLAINTIFF

VERSUS

EASTERN AND SOUTHERN AFRICAN

TRADE & DEVELOPMENT BANKDEFENDANT

RULING

The defendant, Eastern and Southern African Trade and Development Bank has brought this application pursuant to the provision of Sections 3 A and 95 of the Civil Procedure Act, Order XLIX Rule 1 and Order L Rule 1 of the Civil Procedure Rules for the following orders:

- “2. That this Honourable Court has no jurisdiction to try this suit.
3. That the plaintiff/respondent’s suit herein be dismissed with costs to the Defendant/applicant.
4. That in the event that this application is disallowed and the Originating Summons has to proceed to hearing and if the prescribed period will have expired, this Honourable Court be pleased to enlarge time within which the Defendant/applicant should prepare and file a Memorandum of Appearance in respect of the said Originating Summons and a Replying Affidavit or Affidavits in response thereto.”

The circumstances leading to this application are that the parties hereto entered into a loan agreement under which the plaintiff Indigo EPZ Limited, was advanced a medium term loan of UAPTA 2,362,000 by the defendant.

Clause 16.12 of the agreement stipulates that any dispute or difference between the parties thereto or as to the rights or obligations of either party thereunder or otherwise in connection with the Agreement shall be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the aforesaid Rules.

As security for the loan, the plaintiff executed:

- (a) a debenture over all its assets; and
- (b) a first legal mortgage over its property know as LR No 29/6/2 Nairobi in favour of the defendant.

By a letter dated 9.8.2002 the defendant demanded immediate payment of the principal loan with interest thereon up to the time of demand. Included in the amount demanded were other sums allegedly due and owing in respect of other charges under the agreement. The plaintiff considered the demand for the repayment of the loan unjustified and moved this court by way of Originating Summons under section 7

of the Arbitration Act 1995 and Rule 2 of the Arbitration Rules 1997 for several injunctive orders aimed at preventing the defendant from:

- (a) demanding immediate repayment of the amount outstanding under the loan agreement.
- (b) enforcing the securities issued to it by the plaintiff under the loan agreement;
- (c) appointing a receiver and manager of the applicant;

That is the matter which the defendant through this Notice of Motion now wishes to be dismissed. The defendant asserts that this courts lacks jurisdiction to try the suit.

Briefly stated, the defendant's basic contention is that the parties having mutually agreed to refer any disputes arising between them to international arbitration, none of them has any recourse to any municipal court. The defendant also contends that the parties having mutually agreed that the agreement shall be construed and governed in accordance with the Laws of England, no other laws, including the Laws of Kenya, have any application to this matter. At the hearing of this application, the defendant's learned counsel, Mr Regeru went beyond those two contentions and argued that the courts of this country cannot be moved under local law for any relief pursuant to the agreement between the parties hereto.

Mr Ougo for the plaintiff disputed Mr Regeru's interpretation of the loan agreement and the law applicable to the matter and said that the Clause in question namely No 16.10 of the loan agreement did not oust the jurisdiction of the court. He submitted that the Arbitration Act 1995 and in particular section 7 (1) thereof as well as the Arbitration Rules 1997 permitted the plaintiff to bring an application for interim protection pending reference of the dispute to arbitration in terms of the agreement.

The clause in question reads:

“This Agreement shall be construed and governed in the accordance with the Laws of England.”

In my opinion the clause concerns itself with matters of construction or rather interpretation of the agreement and does not relate to in issues of jurisdiction or applicability of Kenyan laws to the agreement. If Mr Regeru's interpretation of the clause is followed to its logical conclusion, it would mean that in the events of a dispute between the parties none of them would be entitled to access to a Kenyan court and they would in that event be obliged to seek redress in an English Court. In my view, it would be absurd to suggest or even contemplate such a scenario. In any case, “(there) is a well settled general rule recognized (even) in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the court. (see Judgment of Lakha JA in the case of *Tononoka Steels Limited v The Eastern and Southern African Trade and Development Bank* (Court of Appeal Civil Appeal No 255 of 1998). Bearing in mind the law as stated above, I would say that there is nothing in the wording of clause 16.10 that suggests even in the remotest way possible that the relevant laws of this land and particularly the Arbitration Act 1995 and the Arbitration Rules 1997 have no application to the loan agreement. Accordingly, the defendant's contentions and regarding the applicability of local laws to the loan agreement are untenable.

With respect to the Arbitration Clause itself, I can do no better than quote from the judgment of Kwach JA in the *Tononoka* case (above) where he observed:

“Turning now to the arbitration clause, it was the submission of Mr Muthoga, for PTA Bank, that by providing in the Agreements that they would be governed and construed in accordance with the Laws of England, and that any dispute or difference between the parties shall be finally settled by the rules of conciliation and arbitration of the International Chamber of Commerce sitting in London, and that the arbitration award shall be final and binding on both parties, amounted to a complete ouster or exclusion of the jurisdiction of Kenya courts. With respect, I do not think this submission is correct. While the jurisdiction to deal with substantive disputes and differences is given to the International Chamber of Commerce in London, the Kenya courts retain residual jurisdiction to deal with peripheral matters and see to it that any disputes or differences are dealt with in the manner agreed between the parties under the Agreements.

It would be absurd to suggest that a borrower, whose Security is being sold in Nairobi illegally by PTA Bank, cannot approach the High Court for a temporary injunction, because I cannot see how in those circumstances the International Chamber of Commerce in London can be of any assistance to him. The Kenya courts must retain the power to look at the securities and instruments and be in a position to tell PTA Bank, in an appropriate case, that while the dispute is being referred to London for arbitration, and final determination, it cannot realize its security in the meantime. That, in my judgment, must be what the officious bystander would have said he understood the parties to these Agreements had in mind when they opted for arbitration in London.”

In view of the legal position as stated above, I am satisfied that the plaintiff was entitled under section 7 (1) of the Arbitration Act 1995 and Rule 2 of the Arbitration Rules 1997 to bring the suit in the manner he did. Accordingly, the defendant’s application lacks merit and is dismissed with costs. With regard to the prayer for the enlargement of time sought in prayer (d) of the application, the defendant is granted 7 days from the date of this ruling to take whatever steps it deems appropriate in the circumstances of the matter. There will be orders in those terms.

Dated and delivered at Nairobi this 25th day of October, 2002

T. MBALUTO

JUDGE