



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 8 OF 2011

THOUSAND PALMS BEACH HOTEL LTD.....PLAINTIFF

VERSUS

EAST AFRICAN DEVELOPMENT BANK.....DEFENDANT

RULING

1. Pursuant to the provisions of East African Development Act, Privilege and immunities Act and Order 2 Rule 15(a) and of the Civil Procedure Act, the defendant filed the Notice of Motion dated 15th November and sought in the main that the suit be struck on the grounds that the defendant enjoys complete and absolute immunity from legal process which immunity it had not waived and therefore the court lacked jurisdiction to entertain the matter.
2. The application was supported by the affidavit of on LOISE MUGIA, the principal investments officer of the defendant whose matter was that the defendant was founded by three East African countries pursuant to the provisions of Articles 21 & 22 of the treaty for East African Cooperation dated 6.6.1967, as later reenacted in 1980 and pursuant to which enactment the Kenyan Parliament enacted EAST AFRICA DEVELOPMENT BANK LTD. In 1984 which encodes the complete and absolute immunity to the bank against law suits of whatever nature.
3. The plaintiff opposed the application and filed a replying affidavit sworn by one NAWDIR JESSA whose gist was that the court has jurisdiction to entertain the matter on the basis that the Act and treaty do not give immunity to the bank in matter akin to those pleaded in this suit and that both the Act and the treaty permit the bank to be sued by citizens as only member states are excluded from suing as there is anticipated a special procedure for the settlement of disputes between the bank and its members. In conclusion the deponent concluded that since there exists no immunity under the Charter there is no proper application of the privileges and immunities Act and the statute Misc.Amendment Act,2007. Pursuant to leave granted on the 11.11.2014 the AG was allowed to participate in the proceedings as an *amicus curiae* and further directions were issued that the *amicus* files a brief within 2 weeks for that date.
4. Those directions were coupled with the 26.11.2014 when the *amicus* brief was filed Ms.R.C.Lutta.
5. The brief underscores the fact that the Government of the Republic of Kenya holds 27.17.% of class A shares of the bank and that anything that affects the bank shall affect the economy and the investment of Kenya as a Republic in the Bank.
6. On the applicable law, the brief invokes the provisions of the EADB Act Cap 493A as well as the decisions in **BLUE ENTERPRISES LTD -VS- EADB LTD**. (Court of Appeal Civil Appeal No. 21 or

2012 and **EADB LTD. -VS- BLUELINE ENTERPRISES CACA NO. 110 OR 2009** to stress the point that the bank is immune from all legal process of whatever nature unless and that immunity it cannot be sued in the manner the plaintiff has purported to do.

7. It was then added that by Article 50 of the treaty the state members are obligated to make legislation to effectuate the status immunity and privileges of the bank as provided in the Treaty. The *amicus* then concludes that the treaty has been demonstrated under the Act without reservations hence it would purport grave implication to disregard or fail to recognise the statutory and treaty obligations within the Kenyan jurisdiction.

8. In support of the application, the Defendant applicant filed written submissions after filing supplementary affidavits sworn on the 28.2.2014. That Supplementary Affidavit, it seems was meant to highlight the amendment so far effected on the treaty and the Act and their import and to counter the assertion in the Republic affidavit regarding the true interpretation and meaning of articles 44 & 45 as countered by the plaintiff. The submissions largely reiterate the application and the defendant's interpretation and application of the two instruments as interpreted in Judicial pronouncements. The defendant then buttressed the submissions by four (4) sets of list of authorities which Mr. Inamdar said was necessary to bring to the court attention the latest determination by the courts on the status immunity and privileges of the defendant. Having filed the submissions, the defendant did not stop at that upon being served by the plaintiff's submissions it filed which it called "Defendant & Applicant replying submission to the plaintiff's submissions". The same were filed on the 25.9.2014. As the title suggests, it was intended to respond to the plaintiff's submissions and the authorities cited of interest is the appreciation both parties have given to the interpretation by the Supreme Court of Uganda in interpretation of **EAST AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK ACT, (UGANDA)**.

9. I must say the industry exhibited by the parties in this matter must be acknowledged. The court's duty is to look at the material provided and make a determination.

10. In seeking to achieve that mandate, I have isolated only two issues for determination.

- **Does the defendant enjoy absolute or indeed any immunity in relation to the plaintiff's suit.**
- **Does the existence of immunity by itself deny the court jurisdiction to pronounce itself in the matter.**

11. In seeking to determine the two issues, the court shall not seek to interrogate the merits of the plaintiff's case and therefore even the detailed facts leading to the suit may not be necessary to outline. To the court this determination solely rests on the interpretation of what the Law says on jurisdiction and the immunity involved.

Immunity of the defendant

12. The East African Development Bank Act for all intents and purposes must be seen to be what its preamble says:

"An Act of Parliament to provide for the carrying out of the obligations of Kenya arising under the Treaty amending and Reenacting the Charter of the East African Development Bank and to provide for matters related thereto

And at the recital section, the Act says;

... it is expected that Kenya should make provisions for giving legal effect to certain Articles of the Charter and fulfill the obligations thereunder"

13. Articles 44 & 45 have been relied upon by the defendant to underscore the fact that the defendant enjoys complete and absolute immunity from every form of legal proceedings. To understand what those

provisions say, it is important to reproduce them here.

Article 44 JUDICIAL PROCEEDINGS

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

15. No action shall be brought against the bank by members of persons acting for or deriving claim from members. However members shall have recourse to such special procedure for the settlement of disputes between the bank and its members as may be prescribed in this charter. In the regulations of the bank or in contract entered into with the bank.

Article 45, IMMUNITY OF ASSETS

“Property and other Assets of the bank, wheresoever located and by whosoever held shall be immune from interference, search, requisition, attachment, confiscation, expropriation, Nationalisation or execution or any other form or measure of taking or foreclosure by execution or any other form or measure of taking or fireclosure by executive or legislative or judicial or administrative action or by any other action and premises used by the business of the bank shall be immune from search.”

16. Pursuant to Article 57 of the Charter, Kenya enacted the East African Development Bank Act Cap 493 A whose preamble I have cited above. It is to be noted that by the Act, not the entire charter is intended to be given effect but only certain Articles. Indeed section 3 of the Act sets out the provisions of the charter to be given force of law in Kenya to be those set out in the schedule to the Act. Of relevance to the court for those determination are Articles 42, 44 & 45.

17. I have read the provisions relied upon and from the word go I am hesitant to find that the law accords to the defendant complete absolute or indeed any immunity as a gist claims like those before the court.

Absolute Immunity.

18. By its plain meaning, it requires no novel interpretation as to what Article 44 says. It says that the bank can be sued where it has waived its immunity, in cases arising out of its borrowing powers. That to me means that where the dispute is grounded on the banks borrowing powers or where the bank has incurred its immunity, there is unqualified right to sue. To that extent it is plainly wrong to say that the law accords to the bank complete and absolute immunity from legal process.

19. Infact, Article 45(1) of the Charter gives the impression that the bank can be sued and proceedings taken and appeals filed save that from legal proceedings brought within the terms of the charter the immunity on the assets and property of the bank shall apply.

20. Before delivery of a final judgment against the bank by the highest court of competent jurisdiction.

21. How about the challenge of immunity appointed against the plaintiff's claim before this court? Article 45(2) of the Charter to me only limits the suits against the bank by its members and or persons acting for or deriving claim from members. To me the provisions on immunity are designed to protect the bank against the coercive state actions by member states. That to me is explicable from the part of view that by the treaty and the charter, the members or the promoters and contributions to the bank and its capital.

22. If I was to be wrong on my interpretation and the understanding of the provisions then I seek the guidance from the decision by the Supreme Court of Uganda in **CONCOPP INTERNATIONAL LTD. - VS- EAST & SOUTHERN AFRICAN DEVELOPMENT BANK LTD, CIVIL APPEAL NO. 11 OF**

2009. Having highlighted the sections providing immunity to the Respondents the objects of the Respondent and the legislation giving the charter of the Respondent the force of law in Uganda; GM.OKELO, JSC. Said

“The terms every form of legal process in article 43(3) must be restricted to the transaction between the Respondent and the Government of Uganda because the objects of Cap 53, was to regulate the relationship between them. To counter on the Respondent absolute immunity would be contrary to public policy.”

23. I am persuaded and guided to follow this decision having taken note that the precible to own statute, giving effect to the chamber of the bank disclose the purpose of the legislation as making provisions for Kenya to meet its obligations under the Treaty amending and reenacting the charter. To me the working and effects of the statue and provisions on immunity are very similar and of same effect.

24. Looked at the other way, I am of the learning that and entertain no doubt whatsoever that the Charter even without the Act, is squarely a part of the law of pursuant to Article of 2(6) of the constitution of Kenya 2016. Being part of the Kenyan law, and in terms of the provisions of Article 2(2) & (4) of the same constitution must conform to the values and principles of that constitution. For purposes of this determination, the values that I find to be relevant and merit my consideration are those under the bill of rights; non discrimination, right to property right to a fair hearing.

25. It has brother me if it can be lawfully and genuinely said that in enacting Cap 493A, the Kenya Parliament sought to create a law that denies citizens the right to access court under Article 48 and that of fair hearing under Article 50(1). I am of the learning that somerights can be limited within the parameters set out at Articles 24 and 25. However are right that the constitution declares to be incapable of limitation is the right to a fair hearing. I am minded to say and find that if I was to say that by the provisions in the Charter and the Act, the plaintiff herein is forever exclude from seeking his dispute to be determined by this court as established under Article 165, I would be limiting the plaintiffs right in total violation of Article 51 as read with Article 25 (c). To that extent this court will not be doing anything but to affront the provisions of Article 2(1) and Article 3. I hold that the court must be watchful again walking that route.

26. Equally I take it that a cause of action or chose in action is a property as defined under Article 240 of the constitution 2010. Such is a guaranteed and parliament is forbidden from enacting any law that sanctions the arbitrary deprivation of property of any description. Once again I find that to interpret at the Charters and the Act as shutting out the plaintiff from seeking to protect, the right in close of action, however deeply misconceived before it is determined on the merits, would be to say that parliament has enacted a legislation that purports to deprive the plaintiff of his chose in action. Giving all the foregoing the consideration they deserve, the only purposeful interpretation I give to the Articles 44 & 45 of the Charter and the statute giving them the force of law is that they only apply to the Kenyan Government as a member of the bank and any person who may stake a claim or derive a cause of action from such a member and not otherwise.

27. In coming to this conclusion, and with due respect being read the decision by the court of appeal in KAREN NJERI KANDIE -VS- ALSSANE BA, CACA No.20 of 2013, I am unable to wholly to allow that decision for the following reasons.

28. The facts in that decision concerned a contract of employment and the court specifically found at page 17 paragraph 2 that entertaining the matter would involve the interrogation of the internal workings of the international organization whose headquarters are given the status of a foreign mission. Those facts are clearly distinguishable from those in the instant matter where the dispute is purely commercial in nature and by which the parties in the contract of charge exhibited in the Application clearly adopted arbitration as a means of dispute resolution. Had the dispute arisen on the terms of that charge, it would be proper for the plaintiff if the Defendant would be hesitant to submit to arbitration, to come to court and sue.

29. Reliance was equally placed on the other decision by the court of appeal being African Development

Bank -vs- Beatrice Achola and Rosemary Achola. Once again the decision also commenced a dispute grounded on contract of employment and would invariably involve the court in interrogation of the internal working of the bank. However must importantly, the decision at page 10 of 11 paragraph 1 states:

30. I have said that article 25(c) safeguards the right under Article 50(1) from any limitation. In so far as that decision was upheld the limitation on the basis that the immunity was justified under Article 24 for Limiting right to a fair hearing, I respectfully take the view that Article 25 (c) was not brought to the attention of the court.

On Jurisdiction

31. What I have said about surties to disputed of the matter as I have said there exist a statutory immunity to stop the plaintiff from having his matter detained by the court. The question of jurisdiction would have been available for determination had I found that there exists immunity in favour of the Defendant/Applicant. However it may be important to state these and now that the jurisdiction of this court is created by the constitution and can only be limited by that constitution but not otherwise. If one was to say that the immunity in the defendants charter and the Act ipso facto, denied the court the jurisdiction to and no move entrain the matter, I would disagree. Disagree because, that charter as I have said stands at per with over general law but cannot to be at per with the constitution not to override its clear provision under Article 165.

32. The upshot is that I am convinced that the application dated 15.11.20134 lacks merits for having been prescribed and founded on the misapprehension of the law. It is therefore dismissed with costs to the plaintiff.

33. Costs to the plaintiff.

Dated, signed and delivered at Mombasa this 6th day of June 2016.

P.J.O.OTIENO

JUDGE