



IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 255 of 1998

TONONOKA STEELS LIMITED.APPELLANT

AND

THE EASTERN AND SOUTHERN AFRICA

TRADE AND DEVELOPMENT BANK.....RESPONDENT

{An appeal from the Ruling of the High Court of Kenya at Nairobi (Ole Keiwua, J) dated 8th May, 1998.

in

H.C.C.C. NO. 267 OF 1998)

JUDGMENT OF TUNOI JA.

The appellant, Tononoka Steels-Limited, the plaintiff in the suit, is a limited liability company incorporated in the Republic of Kenya. It is engaged in the manufacturing and selling of steel products, especially steel pipes. The respondent, the defendant in the suit, is a body corporate established by Charter pursuant to Chapter 9 of the Treaty for the establishment of the Preferential Trade Area for Eastern and Southern African States and its **operational offices are at Nairobi, Kenya. I shall hereinafter refer to the respondent as "The-PTA Bank"**.

The appellant was desirous of setting up in Kenya a plant for manufacturing steel products. By a Loan Agreement dated 1st. December, 1994 The PTA Bank agreed to finance the implementation of the project as well as the freight costs of the plant from India to the Port of Mombassa. Pursuant to the agreement, the appellant received from. The PTA Bank a term loan in various currencies equivalent-to US\$675,000 .00. against certain specified securities. Another Loan Agreement (the Facility Agreement) was entered into by the parties on 4th December, 1996. The purpose of this further loan was to enable the appellant to finance working capital requirements, expand and undertake trade activity for the project. By this facility the appellant was provided with an Import Credit Facility in an aggregate amount not exceeding US\$1,000,000.

As for settlement of disputes the parties agreed that the Agreement shall be governed by and construed, not in accordance with the Laws of any Member State, but, with the Laws of England. I may observe here that this is a standard provision in many international trade agreements where a borrower is either a developing country or one of its citizens or corporations. Probably, such a clause is inserted in loan agreements in order to safeguard the interest of the lending institutions against supposed or perceived vagaries of the judicial systems of developing nations,

By a plaint dated 26th February, 1998, the appellant averred that having fulfilled all the relevant conditions and terms of the Loan Agreement and on the strength of the Facility Agreement it procured goods from suppliers in the Republic of South Africa through the Nedband line of credit which bank, as the nominated or negotiating bank, required the Authority to Negotiate (ATN) from The PTA Bank in order to be able to contact the suppliers and to induce them to commence the process of shipping the goods to the appellant. On 27th November, 1997 the appellant forwarded to The PTA Bank an application for the issue of an ATN, but, the latter, it is further contended, refused to honour its part of the Agreement and instead introduced new terms and conditions to the existing facility which terms were alleged to be extortionate, mala fides and unreasonable. Thus, it was pleaded The PTA Bank was in fundamental breach of the agreement and was dishonest in its dealings, in word and deed, and had openly demonstrated commercially unacceptable conduct towards the appellant in consequence of which it had suffered severe injury to its credit- and reputation. It is also alleged that it suffered loss of profits.

The appellant sought, inter alia, (a) injunctions against The PTA Bank restraining it from recalling or taking possession of the project (b) special damages; and, (c) general damages. On the same day of lodging the plaint, the appellant took out a chamber summons under Order 39 rules 1,2,3,7 and 9 of the Civil Procedure Rules seeking a temporary injunction against The PTA Bank from invoking the provisions of Section 8.01 of the Loan Agreement which section mandates The PTA Bank, inter alia, to realise the securities issued under the Loan Agreement.

The PTA Bank entered appearance under protest and on 10th March, 1998, it filed its written statement of defence. It averred that:

4. *No action can lie against the Defendant in the Municipal courts of the Republic of Kenya by virtue of the Provisions of The Privileges and Immunities Act (Cap 179) read together with " Legal Notice No. 265 of 26th May, 1991 and the Charter.*

5. *Without prejudice to the foregoing -the Defendant contends that under the terms of the - Loan Agreement pleaded in paragraph 3 of the Plaint the Plaintiff- is obliged to refer 'any dispute arising there under to arbitration in accordance with clause 16.12 thereof or Article XIV of the Facility Agreement pleaded in paragraph 6 of the Plaint.*

7. *This Honourable court has no the jurisdiction: to hear this suit for the reasons stated above as also for the reason that the agreed law of contract was the Law of England and not the Laws of Kenya. Paragraph 49 of the Plant is specifically denied.*

When the application was called to hearing in the superior court Mr. Muthoga, counsel for The PTA Bank, raised the issue of jurisdiction. He argued that The PTA Bank cannot be impleaded in the municipal courts as it enjoyed statutory- immunity from all suits and legal processes. The learned Judge, Ole Keiwua, J. acceded to the preliminary objection. He held that the superior court has no jurisdiction to entertain the suit since Parliament had knowingly and deliberately conferred upon The PTA Bank absolute immunity and therefore the court had no right whatsoever to override such a provision. It mattered not that The PTA Bank was engaged in commercial transactions. The learned judge then struck out both the application and the suit and dismissed them with costs.

The gravamen of this appeal is that the learned Judge " was wrong so to hold. It is urged that he gravely erred in invoking absolute immunity from, court process to a transaction of a private commercial nature; and, that he ought to have considered current

International Law trend on immunity from suits for both international organizations and sovereigns.

The Charter of the PTA Bank sets out the following objectives:

"The objectives of the bank shall be among other things to:

- (a) Provide financial and technical assistance to promote the economic and social development of Member States, taking into account the prevailing varying economic and other relevant conditions within, the Common Market;
- (b) Promote the development of trade among the member states conducted in accordance with the provisions of, the Treaty by financing, where appropriate, activities related to such trade;
- (c) Further the aims of the Common Market by financing, wherever possible, projects designed to make the economies of the Member States increasingly complimentary to each other;
- (d) Supplement the activities of National Development Agencies of the Member States by joint financing operations and by use of such agencies as channels for financing specific projects;
- (e) Co-operate, within the terms of this Charter, with other institutions and organizations, public or private, national or international, which are interested in the economic and social developments of the Member States; and
- (f) Undertake such other activities and provide such other services as may advance the objectives of the Bank.

"Legal Notice No. 265 of 1991, issued under The Privileges And Immunities Act Cap.179 Laws of Kenya (the Act) cited as "The Privileges of Immunities (Eastern and Southern African Trade Development Bank) Order 1991 gave to the PTA Bank the privileges and immunities specified in Part 1 of the Fourth Schedule of the Act limiting such privileges and immunities to the extent of exemption made under Article 23 of the First Schedule to the Act.

Mr. Nyaencha, counsel for the appellant, submitted that since The PTA Bank had entered into a private (as opposed to public) commercial loan agreement with the appellant it could not claim immunity from suits and legal process since it had drastically moved away from its stated objects and had acted as a private bank. He placed reliance on the following decisions:

1. Plan mount Limited vs. Republic of Zaire[1981] I ALL. E.R. 1110.
2. Trendtex Trading Corporation .Limited.vs.Central Bank of Nigeria [1977] I ALL.

-E.R. 881.

These cases referred to and reviewed several other cases relating to immunity from suits and legal processes. They discussed the doctrines of absolute and restrictive immunity and the modern trend in international law. They decided in the main that if a sovereign government-owned trading entity enters into private contracts, that entity is not immune from proceedings, that is, there is immunity for acts of a governmental nature but no immunity for acts of a commercial nature.

Kenya is a party to numerous international arrangements providing for the legal status, privileges and immunities of international organizations and persons connected with them. The Charter of the United Nations stipulates that they should enjoy in the territory of each of the Member States such privileges and immunities as are necessary for the fulfillment of their purposes, and that representatives of Member States and officials of these bodies are similarly to enjoy such immunities as are necessary for the independent exercise of their functions. Local examples are for instance, The World Bank, UNEP, IMF, WHO, etc.

Where an organization is declared by the Act to be one of which Kenya and one or more foreign sovereign powers are members, then to the extent specified by the Act certain immunities and privileges may be conferred on such an organization. The immunities and privileges which may be conferred include, amongst others, immunity from suit and legal process. The order for conferment shall be effected by means of notice in the Gazette and by Section 17 of the Act any order made there under must be laid in draft before Parliament and approved by resolution.

Immunity from suit and legal process conferred on The PTA Bank and other similar organizations was necessary for the fulfilment of their purposes, for the preservation of their independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of their multinational functions only and not private functions. See Mukuro vs. European Bank for Reconstruction and Development [1994] I CR 897, 903. .

Clause (f) aforesaid of the Objects of The PTA Bank is ejusdem generis with clauses(a) to (e) thereof, so that it can be said to widen the scope of The PTA Bank's objects within the limits set out by clauses (a) to (e) This loophole enables The PTA Bank to also act and operate as a private bank. In my view, if The PTABank operates outside its mandate and objectives and acts as a private bank then it must, a fortiori, be subject to the Laws of this country.

I do not think that Parliament in its wisdom could have granted absolute immunity from suit and legal process to such a body or organisation if it was going to engage in purely private

commercial activities and which had nothing whatsoever to do with Member States. This would be prejudicial to the interests of Kenya and would be contrary to public policy.

Looking at the matter as a whole, from another angle, the Minister by Legal Notice No. 265 of 26th May, 1991, has deprived the High Court of Kenya of jurisdiction to hear and determine a suit whose cause of action properly arose in Kenya and the subject matter of the dispute being an immovable property situated in Kenya. By so doing, the Minister is effectively amending Section 60 of the Constitution which gives the High Court unlimited original jurisdiction in civil matters. I would think that this is a dispute which properly belongs to the courts of this country and it should be adjudicated here.

In Feihmarn, The [1957] 2 Lloyd's Rep 551, Lord Denning said:-

"I do not regard this provision as equal to an

arbitration clause, but I do say that the English

Courts are in charge of their own proceedings: and

one of the rules they apply is that a stipulation

...that all disputes should: be judged by the tribunals of a particular- country is not absolutely binding..

It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, 'but it is subject to the . Overriding principle that no one by his private stipulation can oust these courts of their-jurisdiction in a matter that properly belongs

I would adopt those words in full substituting only the Courts of Kenya for the English courts'.

I agree with Lakha JA that the right of access to the courts of this country may only be taken away by clear and unambiguous words of the Parliament of Kenya.

For these reasons, I agree that this appeal succeeds, and I concur in the orders proposed by Lakha J.A.

Dated and delivered at Nairobi this 13th day of August, 1999.

P.K. TUNOI

JUDGE OF APPEAL