



**REPUBLIC OF KENYA
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**

**(Appeal from the Ruling of the High Court of Kenya at Nairobi [Justice Ole Keiwua] dated 8th
May, 1998.)**

In

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

JUDGMENT OF LAKHA, J.A.

This is an appeal by the unsuccessful plaintiff from the ruling of the superior court (Ole Keiwua, J.) given on 8 May 1998. By it the court ordered that the plaintiff's suit against the defendant, the Eastern and Southern Africa Trade and Development Bank. ("The Bank") and its interlocutory application for injunction should be struck out and dismissed with costs of the suit and of the application to the defendant.

The plaintiff is a limited liability company incorporated in the Republic of Kenya with its registered office also within the Republic. The defendant is a body corporate established by the Charter pursuant to Chapter 9 of the Treaty for the establishment of the Preferential Trade Area for Eastern and Southern Africa States whose principal and operational offices are in Nairobi, Kenya.

By a Loan Agreement ("the Loan Agreement") dated 1 December, 1994 the plaintiff was granted by the defendant a term loan in various foreign currencies equivalent to US\$ 675, 000/= to be utilized for the implementation of the plaintiff's project described therein against specified securities. By another agreement ("the Facility Agreement") dated 4 December 1996 the plaintiff was provided with an import credit facility by the defendant in an aggregate amount not exceeding US\$ one million. There was a term (clause 16.12) referring any dispute there under to arbitration of the International Chamber of Commerce sitting in London. There was a further term (clause 16.10), which provided the Loan Agreement shall be construed and governed in accordance with the laws of England. In or about December 1997 the defendant repudiated the Facility Agreement.

On 26 February 1998, the plaintiff filed a suit in the superior court against the defendant. It claimed

damages, injunction and costs. On the same day, the plaintiff also made an application to the superior court for an interlocutory injunction supported by an affidavit. The defendant entered an appearance under protest and in its defence the defendant pleaded that the defendant enjoyed immunity under the Privileges and Immunities Act. Cap. 179 of the Laws of Kenya read together with Legal Notice No. 265 of 26 May, 1991, that the Loan Agreement had an arbitration clause and therefore the court had no jurisdiction to hear the suit and also because the agreed law of contract was the law of England and not the law of Kenya. At the hearing of the application and by way of a preliminary issue, Ole Keiwua, J. found, in a reserved ruling, in favour of the defendant holding that the court had no jurisdiction to entertain the application and the suit. He, therefore, struck out both the application and the suit and dismissed them with costs. The plaintiff has now appealed to this court. On such appeal, the first and fundamental question for this court to consider is the effect of clause 16.10 of the Loan Agreement, which provides: -

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

But before I do so, I must deal at the outset with the objection by Mr. Muthoga who appears for the defendant that this point was not pleaded, raised or canvassed before the superior court. That is partly true but not entirely so because this matter was, in fact, raised by the defendant in its defence, in paragraph 7 as follows: -

“This Honourable court has no jurisdiction to hear this suit for the reasons stated above and 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 plaint is specifically denied.”

Apart from that, it was specifically mentioned by the learned judge in his ruling when he referred to the arbitration being subject to the Laws of England. Mr. Muthoga, for the defendant, did not in the first instance object to this point being argued. No application was therefore made for leave to argue the point, which had not been argued before the superior court. Nor did it decide the preliminary issue relying on this ground. But rule 101 of the Rules of this Court makes provision that such a point may be argued with leave of the court, absence of such pleading notwithstanding. The correct position in the instant case, however, is that it was in fact the court itself that raised the point as it was of such a fundamental importance. But whether and when a point of law may be taken for the first time on appeal, without having been argued before the superior court, has been the subject of much discussion and case law. The general principles on this subject are not in dispute and they may be summarized as follows: -

1. Generally, the attitude of the Court in such circumstances has been to allow a new question of law to be raised where it concerns the legal effect of pleaded facts and does not require the investigation of disputed facts which were not tested in the trial court: Overseas Finance Corporation Ltd. V Administrator-General [1942] 9 E.A.C.A. 1

2. Where no question of evidence arises, as, for example, where the new question concerns the construction of a document or the legal effect of admitted facts, it will usually be regarded as expedient in the interest of justice to entertain it. As was stated by Scrutton, L.J. in Lever Bros. V Bell [1931] 1 K.B. 557 at p. 582 and 583: -

“ In my opinion the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial.”

Again Lord Watson stated in Connecticut Fire Insurance Company v Kavanagh [1892] A.C 473 at p. 480: -

“When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.”

A fortiori when it is being raised is a point of law based upon admitted facts at a hearing before the court.

3. Where it is not certain whether all the evidence necessary to support the new submission is before the Court, the Court may allow it to be argued de bene esse and then decide whether leave should be given: Visram and Karsan v. Bhatta [1965] E.A. 789

4. The Court will itself in certain circumstances raise of its own motion and consider points of law that were not considered or relied upon in the superior court. This is almost invariably done where there is any question as to jurisdiction. Damodar Jihanbhai & Co. Ltd. V Eustace Sisal Estates Ltd. [1967] E.A. 153 at 158 or where the Court is asked to give a judgment which would be contrary to a statute: Jagat Singh Bains v Chogley [1949] 16 E.A.C.A. 27

Applying the above principles to the facts of the present appeal, I am inclined to the view that the fact upon which reliance is placed to raise the question of law is not in dispute as it forms part of the agreement between the parties and does not require any investigation of disputed facts, the point must be allowed. Indeed, it is also in the interest of justice to entertain it apart from it being a jurisdictional point.

What then is the effect of Clause 16.10 of the Loan Agreement applying the English Law to the dispute between the parties? Clause 16.10 of the Loan Agreement above referred to provides for the appropriate law of the contract by express selection for, as here, where the parties expressly stipulate that a contract shall be governed by a particular law, that law will be the proper law of the contract. If there had been no express choice of the proper law, the Court will consider whether it can ascertain that there was the inferred or applied choice of law by the parties. If the parties agree, for example, that arbitration shall take place in a particular country, it can be concluded that the parties have chosen the law of the country of arbitration as the proper law. In the instant case, that again would be the law of England.

If the contract between the parties herein is to be applied in accordance with the English Law, what is the English Law in relation to immunity enjoyed by the representatives of International organizations? No Order in Council has been made or brought to my attention for such organization under English Law to enjoy immunity from judicial processes. Mr. Muthoga for the Bank did not cite either to us or to the superior court what the relevant law of England was on this point. Nor did the superior court make any finding of what such law was. None was ascertained or brought to my attention and none was applied in accordance with the express agreement of the parties that the agreement shall be construed and governed in accordance with the Law of England. It seems to me, with respect, to have been completely overlooked. This was perhaps the first and fundamental flaw in the decision of the learned judge.

The defence of immunity was accordingly not available to the Bank because it was not the Law of Kenya that was applicable. The proper law of the contract and the law the parties had selected to construe and govern the contract was the Law of England. It follows that the application and the suit before the superior court could not be dismissed by application of the Law of Kenya as the learned judge, with respect, erroneously did. No other ground for dismissing the application and the suit was advanced before the superior court or relied on by counsel before this court. In my judgment, therefore, the preliminary issue before the superior court should have been rejected.

This is in itself sufficient to dispose of the appeal and the other points do not arise; but as they were fully argued I think it right and important that I should deal with them, no matter even if briefly.

Whatever else may or may not be the effect of this clause, in my judgment, it does not oust the jurisdiction of this Court. The learned judge, in holding as he did, that the jurisdiction of this Court was ousted was, with respect, clearly in error. He said: -

“By clause 16.10 the loan agreement shall be and is governed by the Laws of England. Consequently the law of Kenya does not apply to this dispute in which event this court will have no jurisdiction to entertain the suit and the application.”

This is, with respect, another error in the decision of the learned judge. It is a well settled general rule

recognized in the English Courts, which prohibits all agreements purporting to oust the jurisdiction of the courts. The leading case on this principle is Scott v. Avery [1856] 5 H L Case 811. It is also a principle in common law that the parties to a contract may make it one of the express or implied terms of the contract that they will submit in respect of any alleged breach thereof or any matter having relation thereto, to the jurisdiction of a foreign court and a person who has thus contracted is bound by his own submission. It appears from this that the respondent in the instant appeal, the original defendant, instead of pleading as it did in paragraph 7 of the defence that the Kenya Court has no jurisdiction and that the suit accordingly should be dismissed for want of jurisdiction, should have made an application under section 6 of the Arbitration Act, 1995 for a stay of proceedings. No such application was made in this case. The respondent followed a wrong procedure and it is manifest from the record that section 6 of the Arbitration Act was not referred to by counsel and is not referred to by the learned trial judge in this ruling. Indeed, it was not mentioned in the arguments on this appeal, but being a matter of jurisdiction is clearly one, which should now be taken. If an application had been made at the proper time under section 6 it seems probable that the Court would have been satisfied as to the requisite matters set out in the section and would have made an order staying the proceedings. As, however, no such application was made, I am of the opinion that the order made should be quashed. I may perhaps add that the court will lean against a construction, which would purport to oust its jurisdiction.

Yet another error, with respect, in the ruling of the learned judge to which it is appropriate at this point to mention is that he failed to give any proper consideration to the effect of Legal Notice No. 265 of 1991 pleaded in the defence in Paragraph 4 thereof in the following terms: -

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.

This was also relied upon by Mr. Muthoga in his submission before the learned judge. There is no power to enact rules depriving any party of his access to the courts. If Mr. Muthoga's submission is correct (and I find that it is not), that the jurisdiction of the court was ousted and the defendant is immune from its process, then there is no power to make such a rule. If, as the learned judge held, Legal Notice No. 265 of 1991 gives immunity to the defendant from the judicial process and "ousts the jurisdiction of the court to hear such a dispute." it was bad, in that the jurisdiction of the court can only be ousted by the Act itself: see Davis & Another v Mistry 1973 E.A. 463. I would repeat the words of Viscount Simonds in the English case of Pyx Granite Co. v Ministry of Housing. 1960 AC 260: -

It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.

Like Spry, V.P. in Davies v Mistry, ante, I would adopt those words substituting only "the Courts of the Republic" for "Her Majesty's Courts", to Kenya and hold that the right of access to the Courts of the Republic may only be taken away by clear and unambiguous words of the Parliament of Kenya.

The conclusion to which I have reached must now be obvious. I reach that conclusion without reluctance. I cannot bring myself to suppose that the defendant can be immune from the consequences of its acts. As the Bank shifts to private sector financing and if it is to be like an ordinary commercial bank, businesses that borrow money from the Bank should not face a legal minefield should they ever feel aggrieved. My conclusion therefore enables effect to be given to the manifest intention and consequences that flow from purely commercial transaction. Immunity from judicial processes is certainly enjoyed by a sovereign for immunity is at its highest when claimed by a sovereign but even there, to a sovereign immunity, the exceptions are several and they are important. Some are already recognized; others are coming to be recognized. I will only mention two of them.

First, a foreign sovereign under English Law has no immunity when it enters into a commercial transaction with a trader in England and a dispute arises, which is properly within the territorial jurisdiction of the English Courts. If a foreign government incorporates a legal entity which buys commodities on the London market, or if it has a state department which charters ships on the Baltic

Exchange, it thereby enters into the market places of the world, and international comity requires that it should abide by the rules of the market. Usually the contract contains an arbitration clause, in which case, of course, there is a voluntary submission to the jurisdiction of the arbitrators and the supervision of them by the courts.

Secondly, even if there is no arbitration clause-or any reason it is inapplicable-a foreign government which enters into an ordinary commercial transaction with a trader in England must honour its obligations like other traders, and if it fails to do so, it would be subject to the same laws and amenable to the same tribunals as they.

Accordingly and, for the reasons above stated, I would allow this appeal with costs, set aside the order and decree of the superior court appealed from and substitute the order granting the relief No. 3 sought in the plaintiff's Chamber Summons dated 26th February, 1993 with costs and order the trial of the action in the superior court to proceed to a hearing before another judge. Costs of the application and the suit in the superior court, if paid, shall be refunded within 30 days with interest at Court rates by the defendant to the plaintiff.

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

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR