



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO. 255 OF 1998**

**TONONOKA STEELS
LIMITED
.....APPELLANT**

VERSUS

**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

JUDGMENT OF KWACH,JA

TONONOKA STEELS LIMITED , the appellant in this appeal, (hereinafter called *Athe Borrower @*), sued the **EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK**, the respondent herein, to which I shall hereinafter call *APTA Bank @*, in the superior court, to recover damages (special and general) for alleged breach of contract and a perpetual injunction restraining *PTA Bank* from appointing a receiver to manage the Borrower=s factory or exercising any of the options available to it under the Loan Agreement dated 1st December, 1994 and Facility Agreement dated 4th December, 1996. The plaint is a rumbling document running into some 50 odd paragraphs.

The Loan and Facility Agreements were secured by a Further Charge on the plaintiff=s piece of land Plot L.R. No . 9042/164/5 Embakasi, Nairobi, a Deed of Guarantee issued by First American Bank Limited and Personal Guarantees of all the directors of the Borrower. It was a term of the contract that the facility would run for 12 months from the effective date which was to be stipulated by *PTA Bank* with notice to the Borrower. At some point *PTA Bank* declined to give the Borrower a facility called Authority To Negotiate (*ATN*) and it is alleged the refusal resulted in colossal loss to the Borrower. For this the Borrower claimed Shs 79,125,838.00 as special damages.

In a short defence dated 10th March, 1998, filed by Muthoga Gaturu & Company Advocates on behalf of *PTA Bank*, the Borrower=s claim was denied. In paragraphs 4 and 5 of the defence it was

averred-

A(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 thereunder to arbitration in accordance with clause 16.12, thereof or Article XIV of the Facility Agreement pleaded in paragraph 6 of the plaint. @

In paragraph 7 of the defence it was pleaded that the superior court had no jurisdiction to hear the suit for the reasons stated and also because the agreed law of contract was the law of England not Kenya.

On 26th February, 1998 the Borrower applied for a temporary injunction under Order 39 of the Civil Procedure Rules to restrain PTA Bank from invoking the provisions of section 8.01 of the Agreement dated 1st December, 1994. The supporting affidavit, some 52 paragraphs long, was sworn by Elesh Natwarlal Ghelani, a director of the Borrower. From paragraph 5 of his affidavit it transpired that the loan was additionally secured by a First Debenture on all movable assets of the Borrower. Section 8, which deals with IMMEDIATE REPAYMENT, is to be found in the Agreement dated 1st December, 1994 not in the Facility Agreement of 4th December, 1996 which is drawn in Articles and in Roman numerals.

PTA Bank filed grounds of opposition along the lines pleaded in the defence and the replying affidavit was sworn by Michael Gondwe who carries the title of the Director of Legal Affairs in PTA Bank. In paragraphs 7 and 8 of his affidavit dated 5th March, 1998 he deponed-

A(7) It is provided in both the said agreements that they shall be governed by and construed in accordance with the Laws of England.

(8) I verily believe that on a true construction of the aforementioned Charter, laws, notices and agreements this honourable court lacks jurisdiction to entertain the suit or the application supported by the said affidavit. @

The application was heard by Ole Keiwua, J who by his ruling dated 8th May, 1998 held that the court had no jurisdiction in the matter. He dismissed the application and struck out the suit with costs. The Borrower now appeals to this Court against that decision. The learned Judge found as a fact that the Republic of Kenya is a signatory to the Charter, which pursuant to Article 43 thereof had been given effect vide Legal Notice No 265 of 1991 by Kenya's Minister for Foreign Affairs and International Cooperation. That legal notice provided for privileges and immunities of PTA Bank and this had conferred on PTA Bank absolute immunity from legal process in Kenya. The Judge also held that since the Agreements provided for disputes to be settled by arbitration in accordance with the Laws of England, Kenya courts have no jurisdiction in the matter.

The issue of jurisdiction was raised before the Judge in limine by way of a preliminary objection and his decision on the point in favour of PTA Bank finally disposed of the suit. The issue in this appeal is whether the preliminary objection was sustainable in law. Although the Borrower has put forward 6 grounds of appeal, I intend to deal only with the issues of immunity from legal process and arbitration. Article 4 of the Charter sets out the objectives of PTA Bank which include-

A(a) to 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;

(e) to cooperate, within the terms of this Charter, with other institutions, public or private,

national or international, which are interested in the economic and social development of the Member States. @

Article 43 of the Charter deals with the Status, Capacity, Immunities and Privileges of PTA Bank. Paragraphs 1 and 3 provide-

A(1) To enable the Bank to achieve its objectives and perform the functions with which it is entrusted, the status, capacity, privileges, immunities and exemptions set out in paragraphs 3 to 10 of this Article shall be accorded with respect to the Bank in the territory of each Member State.

(3) The Bank, its property and assets shall enjoy immunity from every form of legal process except in so far as in any particular case it has, through the President, expressly waived its immunity. @

In purported exercise of powers conferred by section 9 of the Privileges and Immunities Act (Cap 179), (the Act) the Minister for Foreign Affairs and International Cooperation by Legal Notice No. 265 dated 20th May, 1991, promulgated the Privileges and Immunities (Eastern and Southern African Trade Development Bank) Order, 1991, by paragraphs 2 and 3 of which he decreed-

A(2) The Eastern and Southern African Trade Development Bank established by the member states of the Preferential Trade Area for Eastern and Southern African States, hereinafter referred to as the Bank @, being an organisation of which the Government of Kenya and other foreign Governments are members is declared to be an organisation to which section 9 of the Act applies.

(3) The Bank shall have -

(a) the legal capacity of a body corporate; and

(b) the privileges and immunities specified in Part I of the Fourth schedule to the Act. @

Section 9 of the Act empowers the Minister to extend privileges to certain international organisations and persons connected therewith. By that Order the Minister applied to PTA Bank the immunities contained in Part 1 of the Fourth Schedule to the Act, which includes immunity from suit and legal process. In extending to PTA Bank what amounts to an absolute immunity from suits and legal process, the question which arises is whether, having regard to the nature of the business and operations of the PTA Bank, Parliament could have intended that it should be granted absolute immunity from suits and legal process across the board to cover even purely commercial transactions pertaining to its activities as a bank. I would think that such an extension would not only be against public policy but also in breach of international law. I know of no country which would allow a bank to provide banking and financial services with absolute immunity from suits and legal process and with absolutely no protection for its hapless customers. In my opinion, the only immunity the Minister could validly extend to the PTA Bank under section 9 of the Act could only be qualified immunity which would not cover its commercial operations as a bank.

The decision by the Minister to grant PTA Bank absolute immunity from suits and legal process even in purely commercial transactions seems to me to be contrary to international law. In Trendex Trading Corporation Ltd v Central Bank of Nigeria [1977] 1 All ER 881, a decision of the Court of Appeal in England, Shaw LJ said in the course of his judgment at page 908 -

A There has been put before the court a wealth of material comprising decisions of foreign courts and the writings of international jurists which tends to show that over the last half century there has been a shift from the concept of absolute immunity to a narrower

principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity notwithstanding the sovereign status of a party to those transactions.

Here again I can add nothing to Lord Denning MR's and Stephenson LJ's recapitulation and analysis of the impressive body of international authority. I am content to say that it convinces me that the preponderant contemporary rule of international law supports the principle of qualified or restrictive immunity which takes account not only of the sovereign status of a party but also of the nature of the transaction in respect of which the issue of immunity arises. If the English courts are free to apply this current concept to the present proceedings the inescapable result would be that even if the defendant bank were held to be a government department this status would not avail to confer on it immunity from suit in respect of their subject-matter.

The question does, however arise as to whether this court is free to fall into line with and to follow this modified concept even if it be the case that it has achieved such substantial acceptance as to be recognised as the operative rule of international law.

It is perhaps right to consider first whether the narrower principle is in better conformity with contemporary international relationships than the doctrine of absolute immunity. It seems undeniable that it is. So long as sovereign institutions confined themselves to what may in general terms be described as the basic functions of government a total personal or individual immunity from suit was unobjectionable since the area in which it operated had its own inherent limits. The comity of nations was aided by such a doctrine confined as it was, broadly speaking, to acts which could be properly described as an exercise of sovereign power. The radical changes in political and economic and sociological concepts since the first world war have falsified the very foundations of the old doctrine of sovereign immunity. Governments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial in their nature. To apply a universal doctrine of sovereign immunity to such activities is more likely to disserve than to conserve the comity of nations on the presentation of which the doctrine is founded. It is no longer necessary or desirable that what are truly matters of trading rather than of sovereignty should be hedged about with special exonerations and fenced off from the process of the law by the attribution of a perverse and inappropriate notion of sovereign dignity.

In the conditions of international relations which now prevail the restrictive principle which has emerged is manifestly in better accord with practical good sense and with justice. This is indeed the motive force which has brought about its establishment in place of the old rule. Can this court not merely recognise the new principle but also adopt and apply it?

Lord Denning MR has given affirmative answer to this question. Stephenson LJ considers that this court is precluded from giving effect to the new principle. I am in agreement with the view expressed by Lord Denning MR for the reasons I shall endeavour to explain. @

Kenya is an important member of the international community and is therefore bound by the rules of international law. It is inconceivable that the Government of Kenya could knowingly disregard such an important rule of international law and grant PTA Bank absolute immunity from every form of legal process extending to even its commercial activities. I am entitled to assume that the Minister did not intend to break the law and that he issued the Legal Notice in complete ignorance of the law and without the benefit of competent legal advice.

In my judgment, even if PTA Bank is an international organisation entitled to immunities and privileges including immunity from suits and legal process, it is not immune from suit in respect of the subject matter of this case. In coming to this conclusion I have taken into account the intrinsic nature of the transaction as the material consideration in determining whether entering into that transaction is a commercial activity or an exercise in sovereign authority. I entertain no doubt at all that the transaction

under consideration here was purely commercial and was not covered by the absolute immunity granted by the Minister under the Legal Notice.

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 realise 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 what I have said on these two points, I am left in no doubt at all that the learned Judge was plainly wrong to have declined jurisdiction and to have made an order striking out the suit. At the very least, he should have dismissed the preliminary objection raised on behalf of PTA Bank and issued a temporary injunction in favor of the Borrower restraining PTA Bank from seeking immediate repayment pending reference and final determination of the dispute by the International Chamber of Commerce in London. And instead of striking out the suit, he should have simply stayed further proceedings.

For these reasons, I would allow this appeal, set aside the ruling and order of Ole Keiwua, J and substitute therefor an order reinstating the suit. I would also dismiss the preliminary objection taken by PTA Bank and grant the Borrower a temporary injunction in terms of prayer No.3 of the plaintiff's Chamber Summons dated 26th February, 1998. I would grant the Borrower the costs of the Chamber Summons and also the costs of this appeal. I would order that any costs paid by the Borrower to PTA Bank under the decree be refunded to the Borrower within 30 days and with interest at Court rates.

As Tunoi and Lakha, JJA also agree this appeal is allowed in terms of the orders proposed by Lakha, J.A.

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

1999.

R. O. KWACH

JUDGE OF APPEAL