



REPUBLIC OF KENYA



East African Development Bank v Thousand Palms Beach Hotel Ltd (Civil Appeal E069 of 2021) [2024] KECA 639 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 639 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E069 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 7, 2024**

BETWEEN

EAST AFRICAN DEVELOPMENT BANK APPELLANT

AND

THOUSAND PALMS BEACH HOTEL LTD RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (P. J. Otieno, J.) dated 6th June 2016 in H.C.C.C No. 8 of 2011)

JUDGMENT

1. The interlocutory appeal before us arises from the ruling of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) dated 6th June 2016 delivered in Mombasa HC Civil Suit No. 8 of 2011 in which the respondent, Thousand Palms Beach Hotel Limited, sued the appellant, the East African Development Bank, praying for special damages in the sum of Kshs. 8,980,000; general damages; exemplary damages; and costs of the suit and interest thereon.
2. The precis of the respondent's case as pleaded in its plaint dated 19th April 2011 is that it approached the appellant for a credit facility by way of a loan of Kshs. 10,200,000 to be secured by a legal charge registered over the respondent's property known as No. LR MN/III/736 Kilifi (CR 16392) (the charged property).
3. By a Loan Agreement dated 30th July 1986 (the Agreement), the appellant agreed to advance to the respondent a sum of Kshs. 10,200,000 (the mortgage debt), whereupon the respondent duly executed the requisite security document, to wit, a Charge dated 15th June 1987 (the Charge) in favour of the appellant and, in return, the appellant extended the credit facilities to the respondent in terms of the Agreement.



4. Clause 7.03 of the Loan Agreement constitutes an arbitration agreement and reads:

“Any dispute or difference which may arise touching the meaning of this Agreement or the rights or obligations of the parties hereunder or any other rights or obligations of the parties hereunder or any other matter or thing in connection with this Agreement shall be subject to arbitration under the provisions of the Kenya [Arbitration Act](#) or any statutory modification or re-enactment thereof for the time being in force.”

5. The respondent’s case is that it was an express term of the Agreement, and as is the custom and practice, that once the respondent redeemed the facility to the appellant’s satisfaction, the appellant was obligated to unconditionally discharge the security and release to the respondent the title document to the charged property unless otherwise legally held; that, in the course of time, the respondent made due payment of the mortgage debt; that, on 13th September 2008, the appellant discharged the security over the charged property and released the title document to persons allegedly unknown to the respondent without the respondent’s consent; and that, by doing so, the appellant acted in breach of the express terms of the Agreement and Charge.
6. The respondent further claimed that the appellant’s action of discharging and releasing the security to a stranger and a person other than the respondent without ascertaining their identity or capacity amounted to gross negligence and/or carelessness on its part; that its action amounted to conversion; and that, as a result, the respondent suffered loss and damage as particularised in the Plaintiff. Hence the afore-mentioned reliefs sought in the plaintiff.
7. In its Statement of Defence dated 12th October 2011, the appellant denied the respondent’s claim and stated that it reserved its right to apply for an order that the Plaintiff be struck out on the grounds that the suit was bad in law; that it was misconceived and disclosed no reasonable cause of action against the appellant; that the suit was scandalous, vexatious and/or constituted an abuse of the court process; and/or that the court did not have jurisdiction to entertain the suit on the ground that the appellant was immune from legal process under the terms of Articles 44 and 45 of the Treaty and Charter of the East African Development Bank (the Charter) as incorporated into the [East African Development Bank Act](#).
8. On the other hand, the appellant admitted that the final payment due under the Loan Agreement was made by the respondent on 20th August 1997. It averred that it wrote to the respondent a letter dated 26th September 1997 confirming that the respondent had discharged its debt to the appellant, and that the title deed relating to the property was available for collection from its Resident Office in Nairobi; that, in releasing the title deed in respect of the charged property, it acted in utmost good faith and on the express written instructions of one Mr. Salau Dean, a director of the respondent; that Mr. Salau Dean was party to and had executed the Charge and Guarantee in favour of the appellant; and that he was the one the appellant had dealt with throughout its dealings with the respondent.
9. In addition to the foregoing, the appellant denied, inter alia: that it acted in breach of any contractual or other legal obligation owed to the respondent; that it released the title deed to the property without proper authority; that it was negligent or failed to exercise reasonable care, skill or diligence in releasing the title deed to the property; and that its action constituted an act of conversion as pleaded in the Plaintiff. It prayed that the suit be dismissed with costs.
10. Subsequent to its defence, the appellant filed a Notice of Motion dated 15th November 2013 seeking orders that the Plaintiff be struck out and the suit be dismissed with costs to the appellant. The grounds for the application were principally that the appellant enjoys complete and absolute immunity from



legal process pursuant to the relevant provisions of the following statutes and documents: the EADB Act (Cap 493A Laws of Kenya); the *Privileges and Immunities Act* (Cap 179 Laws of Kenya); the Statute Law (Miscellaneous Amendments) Act No. 7 of 2007; and the Treaty and Charter of the EADB, 1967 and 1980.

11. In addition to pleading immunity under and by virtue of the statutory and treaty instruments aforesaid, the appellant averred that, pursuant to the provisions of Articles 2(5) and (6) of *the Constitution*, the rules of international law and provisions of any Treaties and Conventions ratified by Kenya form part of the law of Kenya; that EADB had not waived its immunity to legal process in the matter, and that the suit was accordingly incompetent, misconceived and bad in law; and that, in the premises, the High Court had no jurisdiction to entertain the suit.
12. The appellant's Motion was supported by the affidavit of Loise Muigai, the appellant's Principal Investment Officer, sworn on 15th November 2013. The officer deponed that the appellant was founded by Kenya, Uganda and Tanzania pursuant to Articles 21 and 22 of the Treaty for East African Co-operation dated 6th June 1967; that the appellant survived the collapse of the original East African Community; that, by a Treaty entered into on 23rd June 1980, the three States amended and re-enacted the Charter of the EADB; that, since its establishment, the appellant was expressly granted such status, immunities and privileges as would enable the bank to effectively fulfil its objectives and carry out its functions; that, by virtue of Article 44 of the Treaty and Charter of the EADB as incorporated in section 3 of the EADB Act, the appellant is clothed with absolute immunity against every form of legal process; and that, pursuant to Article 45 of the Treaty and Charter of the EADB, the appellant's property and assets enjoy absolute immunity from interference, search, requisition attachment, confiscation, expropriation, nationalisation or execution, and from any other form or measure of taking or foreclosure by execution or other form or measure of taking or foreclosure by executive, legislative, judicial or administrative action, or by any other action, and that any premises used by the business of the bank shall be immune from search process.
13. The officer aforesaid deponed further that, in view of the aforementioned immunities and privileges, the suit was incompetent, misconceived and bad in law; that the court lacked jurisdiction to entertain, hear or determine the suit; that, for want of any adjudicative jurisdiction over the appellant and/or its assets, the court would be acting in vain in proceeding to entertain, hear or determine the suit; that the jurisdiction of the court would ordinarily only come into play if, and only if, pursuant to Article 51 of the Treaty and Charter of the EADB, the appellant had waived its immunities and privileges in writing; and that the EADB had not issued or granted such waiver, and nor did it intend to do so in the matter.
14. In response to the Motion, the respondent filed a replying affidavit of Nadir Jessa, a Director of the respondent, sworn on 3rd February 2014. He deponed that the appellant's application was an abuse of the court process, and that it should be dismissed with costs; that, under Chapter X of the EADB Act, Article 44 of the Charter provided that the bank shall have full juridical personality and, in particular, full capacity to contract, acquire and dispose of immovable and movable property, and to institute legal proceedings; that Article 45(1) of the Charter provided that actions may be brought against the bank in the territories of the Member states only in a court of competent jurisdiction in a member state in which the bank has an office, has appointed an agent for the purpose of accepting service and notice of process, or has issued or guaranteed securities; and that Article 45(2) of the Charter provided that no action shall be brought against the bank by members or persons acting for or deriving claims from members; and that, on the other hand, members shall have recourse to such special procedures for the settlement of

controversies between the bank and its members as may be prescribed in the Charter, in the regulations of the bank, or in contracts entered into with the bank.



15. Nadir Jessa further deponed that Article 44 of the Charter does not give any immunity to the appellant; that the Charter only binds Governments of the member states and not their citizens or private bodies; that, if the appellant would have been given full immunity from prosecution, then Article 45(1) would not have been included in the Charter; that the proper interpretation of Article 45(2) should be that it is only members of the EADB who should not file suits against the appellant, and that members should be interpreted as the state Government and not ordinary citizens; that, otherwise, the purpose of Article 45(1) would be defeated; that the proper interpretation of Article 46 of the Charter should be that it is only the executive and legislature of the respective member states that cannot move against the property and assets of the appellant; and that, therefore, the respondent had the right to sue and recover damages against the appellant as provided for under Article 45(1) of the Charter.
16. According to Nadir Jessa, there being no immunity against the appellant, the *Privileges and Immunities Act* (Cap. 179 Laws of Kenya) and the Statute Law (Miscellaneous Amendments) Act No. 7 of 2007 did not apply in the circumstances; that, for the appellant to have entered into a private commercial arrangement with the respondent and subjected itself to the laws of Kenya, the so-called immunity was waived and that, otherwise, the respondent would not have a recourse once its rights and obligations were trampled upon; and that commercial activities which had nothing to do with member states have to be ventilated in the local courts for parties to access justice.
17. In response to the respondent's replying affidavit, the appellant filed a Supplementary Affidavit of Loise Muigai sworn on 25th February 2014 stating, inter alia: that the provisions of the EADB Act and the Charter of the EADB referred to in the replying affidavit were plainly erroneous; that what was originally Articles 45 and 46 of the Charter were renumbered as Articles 44 and 45 respectively and amended at the 29th Governing Council meeting of the appellant's members on 29th April 2005 vide the Governing Council Minute 8/2005, Resolution 6/2004; and that the amendments were mirrored in the amendments to the EADB Act by enactment of the Statute Law (Miscellaneous Amendments) Act No. 7 of 2007, which came into force on 15th October 2007.
18. The appellant further deponed that Articles 44 and 45 of the Charter were again amended by the Governing Council under Governing Council Minute 8/2012, Resolution 2/2012; that the EADB Act was subsequently amended under the provisions of the Finance Act 2013 to mirror the amendments made pursuant to Resolution 2/2012 with respect to the bank's immunity; that the correct position is that the appellant enjoys absolute immunity from suits or other legal process by virtue of the fact that it is an international organization established by sovereign States pursuant to the terms of an international treaty, the relevant provisions of which have been domesticated into statute law in the form of the EADB Act; that the provisions of the EADB Act at the time the cause of action arose and, at the time the suit was filed, clearly afforded absolute immunity to the appellant; and that those provisions constituted binding law in Kenya.
19. Pursuant to leave granted on 11th November 2014, the Attorney General was joined in the proceedings as amicus curiae. Accordingly, he filed an amicus brief on 26th November 2014 stating that the Government of Kenya was a primary shareholder of up to 27.17% shares in the appellant; that it was clear that anything that puts the bank at stake shall affect the economy or the Government's investment in the bank; that, in accordance with the provisions of the EADB Act, the appellant enjoyed immunity from judicial proceedings; and that the appellant's property and assets were immune from attachment, unless such immunity was expressly waived by the bank.
20. According to the amicus, the EADB Act (Cap. 490 Laws of Tanzania) (as amended by Tanzania's Finance Act, 2005) were



identical to the EADB Act (Cap. 493A) (as amended by the Finance Act No. 7 of 2007); and that the statutory immunity of the appellant was affirmed by the Court of Appeal of the United Republic of Tanzania in *Blueline Enterprises Limited vs. East African*

Development Bank (Civil Application No. 21 of 2012), and in *East African Development Bank vs. Blueline Enterprises Limited* (Civil Appeal No. 110 of 2009). The amicus stressed that denial of immunity, if granted, would lead to a floodgate of litigation, which would distract the bank from its core mandate of lending for the purposes of development; and that, if the appellant had not waived any of its immunities, privileges and exemptions with respect to the matter, no other or further procedural or substantive steps were available to the respondent to proceed in any manner against the appellant.

21. In its ruling dated 6th June 2016, the High Court (P. J. O. Otieno, J.) dismissed the appellant's Motion with costs to the respondents. In his view, section 3 of the EADB Act sets out the provisions of the Charter that have the force of law in Kenya as specified in the schedule to the Act. Relevant among them were Articles 43, 44 and 45. According to the learned Judge, Article 44 of the Charter provided that the bank could be sued in cases where it waives its immunity in relation to its borrowing powers. As the learned Judge observed:

“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 fight 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.”

22. The court concluded that Article 44(1) of the Charter gave the impression that the appellant could be sued, 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 before delivery of a final judgment against the bank by the highest court of competent jurisdiction. The court also formed the view that Article 44(2) of the Charter only limits the suits against the bank by its members and or persons acting for or deriving claim from members, stating that:

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- “21. How about the challenge of immunity appointed against the plaintiff's claim before this court? Article 44(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.

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 INTENATIONAL 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.’

I am persuaded and guided to follow this decision having taken note that the preamble 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 re-enacting the charter. To me the working and effects of the statute and provisions on immunity are very similar and of same effect.”

23. In addition to the foregoing, the court held that the Charter must conform to the values and principles of *the Constitution*, particularly the provisions relating to the rights and fundamental freedoms that cannot be limited. In this regard, the trial court stated:

“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 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

It has bothered 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 some rights 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.

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 ate the Charters and the Act as shutting out the plaintiff from seeking to protect the right in a chose 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.”



24. On the question as to whether the trial court had jurisdiction to entertain the respondent’s suit, the court held that:

“ 31. 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 defendant’s 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 par with over general law but cannot to be at par with *the constitution* not to override its clear provision under Article 165.”

25. In conclusion, the trial court found that the appellant’s application lacked merit for having been subscribed and founded on what the learned Judge viewed as misapprehension of the law. He dismissed the Motion with costs to the respondent.

26. Aggrieved by the learned Judge’s decision, the appellant moved to this Court on 12 grounds set out in its Memorandum of Appeal dated 16th August 2021 principally faulting the learned Judge for, inter alia: failing to have regard to the immunities extended to international organizations as articulated, for instance, by the Court of Appeal of Tanzania in East African Development Bank vs.

Blueline Enterprises Limited (2011) 1 TLR and by the Brussels Court of Appeal in Sciment SPRI vs. The African Development

Bank No. Rep 2002/2939; for arriving at a decision that is contrary to the well-established principles of privileges and immunities enjoyed by international organizations, a category that defines the appellant; for finding that the appellant does not enjoy absolute or any immunity from “suit and legal process”; for finding that Article 45(1) of the Charter as incorporated in Section 3 of the EADB Act implied that the appellant could be sued and proceedings taken and appeals filed, save that immunity on its assets and property shall apply to the extent that the legal proceedings are brought within the terms of the Charter; for misapprehending the Supreme Court of Uganda’s judgment in Corncorp International Limited vs. EADB Civil Appeal No. 11 of 2009, and in finding that the immunity governed by the EADB Act is only restricted to transactions between the appellant and the Government of Kenya and does not extend to transactions of a commercial nature between the appellant and the respondent; for finding that Article 44(2) of the Charter only limits suits against the appellant by its members and/or persons acting for or deriving claim from its members; for finding that the provisions of the 1980 Treaty which were adopted by the EADB Act to the exclusion of the other provisions of the Treaty were the only provisions intended to be given effect despite the provisions of Articles 2(5) and 2(6) of *the Constitution*; for failing to consider the fundamental principles enhanced by a long history of development in numerous foreign jurisdictions justifying the treaty of “functional necessity” which buttresses the appellant’s position; for finding that the Articles of the appellant’s Treaty and Charter purportedly omitted from the EADB Act are not in conformity with the values and principles of *the Constitution*; for anchoring his finding on the constitutional right to a fair hearing when, in fact, the issues presented by the parties were founded on the court’s jurisdiction to entertain the suit on grounds of statutory privilege and immunity; for framing the respondent’s suit as being in respect to arbitrary deprivation of property as an issue for determination that did not arise either from the party’s pleadings or their submissions before the court; for finding that the court had jurisdiction to hear and determine the suit; for failing to consider the key provisions of the relevant statutes; for failing to substantively consider and appreciate the issues raised and authorities cited in the amicus brief; and



for concluding that the appellant's application lacked merit for having been prescribed and founded on a misapprehension of the law.

27. In support of the appeal, learned counsel for the appellant, M/s. Daly Inamdar Advocates LLP, filed written submissions and a list of authorities dated 12th January 2024. Counsel reduced the 12 grounds of appeal to 3 main heads, namely: whether the appellant as established as an international organization enjoys immunity from the proceedings of the Superior Court; whether the learned Judge misinterpreted the authority of the Supreme Court of Uganda in the case of Concorp International Limited vs. East and Southern African Development Bank Limited, Civil Appeal No 11 of 2009; and whether the Learned Judge erred in finding that the EADB Act did not intend to give Articles 44 and 45 of the Charter the full force of law in Kenya. Citing various provisions of the Charter, the EADB Act, regional and international treaty instruments, *the Constitution*, statute law and relevant judicial authorities to which we will shortly return, counsel urged us to allow the appeal.
28. Opposing the appeal, learned counsel for the respondent, M/s. Kinyua Muyaa & Co. filed written submissions dated 18th January 2024. According to counsel, the real issue in this appeal is the interpretation of relevant articles of *the Constitution* of Kenya, 2010. They paid particular attention to, inter alia: (i) Articles 2, 10, 24, 25(c), 40, 48, 50(1), 159(2) (e) and 160 of *the Constitution*; and (ii) section 7 of the 6th Schedule to *the Constitution*. According to counsel, the dispute between the appellant and the respondent arises out of a commercial contract in the realm of private law. Counsel argued that the respondent had no role to play in the creation of the governing policy of the appellant, or in the passage of the resolutions and enactments in issue. In their opinion, there can be no immunity from suits in commercial dealings between a bank and its customers.
29. Counsel submitted further that the appellant defending suits filed by its customers would not affect the purpose of the enactment or otherwise interfere with the appellant's fulfilment of its mandate under the Charter; that other banks involved in commercial transactions with their customers and third parties are liable to be sued; that the appellant cannot be given special status when it is involved in the same business for profit as do other commercial banks; and that the fact that it counts State parties among its members does not of itself alter that character.
30. Counsel cited various judicial authorities, treaty instruments, *the Constitution* and statute law, which we have duly considered. Among them is Article 27 of *the Constitution*, which guarantees the right to equality and equal protection of the law. They urged us to dismiss the appeal.
31. According to the amicus brief, the appellant's members are States, local and foreign commercial banks. Those States and banks, when acting individually, are not immune from suits and do not acquire immunity merely by forming joint or common ventures amongst themselves.
32. Having considered the record as put to us, the impugned ruling, the impressively comprehensive rival submissions of learned counsel for the appellant and for the respondent, the cited authorities and the law, we settle the following to be the main issues that fall for our determination, namely: (i) whether, by virtue of Articles 44 and 45 of the Charter of the EADB and section 3 of the EADB Act, the appellant enjoys absolute immunity from all legal proceedings; (ii) whether the immunity conferred under Articles 44 and 45 of the Charter is limited to suits against the appellant by its members and/or persons acting for or claiming under the members; (iii) if the immunity is not limited to suits against the appellant by its members, whether the appellant waived its immunity from the suit to which the impugned ruling relates; (iv) whether the provisions of the Charter and the EADB Act are in conflict with *the Constitution* of Kenya and, in particular, the provisions relating to the rights and fundamental



freedoms or to limitation of those rights and fundamental freedoms; and (v) what orders ought we to make in determination of this appeal, including orders on costs.

33. On the 1st issue as to whether Articles 44 and 45 of the Charter confer on the appellant absolute immunity from all legal proceedings, including the suit to which the impugned ruling relates, learned counsel for the appellant posit that they do. According to counsel, the appellant enjoys the status of an inter-governmental organisation of the three member States, namely Kenya, Uganda and Tanzania, and that the three are bound in terms of the EADB Charter; that, by reason of being signatory to the Charter, Kenya is thereby bound by virtue of the Vienna Convention, 1969 (the Convention) to which Kenya is a member state; that the Convention forms part of the law of Kenya under and by virtue of Article 2(5) and (6) of *the Constitution*; that Articles 11 and 26 of the Convention necessarily renders the Charter binding on Kenya by reason of being signatory thereto, and having domesticated the Charter in the EADB Act (Cap. 493A); that, having expressed their consent to be bound by the provisions of the Charter as amended under Resolution 2/2012, the appellant's member states, including Kenya, are bound to perform and enforce the provisions of the Charter in good faith; and that, unless the appellant waives its immunity in writing, Article 2(6) of *the Constitution*, the re-amended provisions of the EADB Charter, the Finance Act, 2013 and the EADB Act, read together, expressly confer immunity upon the appellant against any legal process.
34. The appellant cited the case of *Karen Njeri Kandie vs. Alassane Ba & another* [2017] eKLR where the Supreme Court held that Shelter Afrique, an organization established in a similar manner as the appellant and its Charter ratified and adopted in the Shelter Afrique Act (Cap 439C Laws of Kenya), enjoyed immunity from legal process and stated that:
- “The question that then arises is this: in this Constitutional era, should the Shelter Afrique Act be considered superior to the agreements that Kenya concluded which gave rise to certain international obligations including grant of immunity to the respondents in the terms expressed elsewhere above? We think not. We state so because the provision on immunity against legal processes in the agreements Kenya entered into are in tandem with the objectives set out in the Shelter Afrique Act, which in fact recognized the agreements that Kenya ratified in order to host Shelter Afrique in Kenya. In addition, by virtue of Article 2(6) of *the Constitution*, the Shelter Afrique Act cannot be read to be derogating from the obligations Kenya entered into at the time of ratifying the relevant agreements. This is irrespective of the fact that, the said agreements and conventions were concluded before the promulgation of *the Constitution*.”
35. On the authority of the Tanzanian Court of Appeal decision in *East African Development Bank vs. Blueline Enterprises Limited*, Civil Appeal No.110 of 2009; and the Ugandan High Court case of *Nelson Dhibikirwa vs. Agro-Management (U) Ltd*, Misc Application No. 651 of 2010, counsel submitted that the appellant had absolute immunity from all legal process. According to counsel, the Treaty and legislative provisions of the EADB Act, 2013 expressly provide that the Appellant is immune from any legal process unless so waived in writing, and that it is not open to this Court or the Superior court to question sovereign states on the rationale of their decision to clothe the appellant with such immunity.
36. Finally, counsel for the appellant cited the case of *Samuel Kamau Macharia & Another vs. Kenya. Commercial Bank & 2 Others*, SC Application No. 2 of 2011; [2012] eKLR for the proposition that a court must be satisfied that it has jurisdiction before proceeding to pronounce itself on any matter before it.



37. On their part, learned counsel for the respondent made submissions on the fundamental rights and freedoms guaranteed under, inter alia, Articles 10, 24, 25(c), 27, 40, 48, 50(1), 159(2) (e) and 160 of *the Constitution*, which espouse and incorporate international human rights standards into our statute law under and by virtue of Article 2(5) and (6) of *the Constitution*. According to counsel, it is indisputable that the General Rules of regional and International Law, Treaties and Conventions ratified by Kenya form part of the law of Kenya, but do not necessarily add to or enjoy the status or supremacy of *the Constitution*.
38. Addressing themselves to the 1st and 4th issues before us, and more specifically to the pivotal issue of the extent of EADB's immunity from legal proceedings in domestic courts; and to the issue as to whether Articles 44 and 45 of the Charter are in conflict with *the Constitution*, counsel underscored the principle that when the General Rules of International Law, Treaties and Conventions conflict with *the Constitution*, they are deemed as invalid under and by virtue of Article 2(4) of *the Constitution*. Accordingly, the Charter, the EADB Act, Cap 493A and The EADB Act No. 38 of 2013 are invalid to the extent that they purport to confer on the Appellant absolute immunity from suits in violation of Articles 25(c), 48 and 50(1) of *the Constitution*.
39. Counsel submitted further that the National Values and Principles of Governance, including equity and equality enshrined in Article 10 of *the Constitution*, cannot accommodate an interpretation permitting the appellant to sue while at the same time immunising it from suits after entering into contracts that cannot be enforced by its counterparts in any judicial proceedings.
40. According to counsel, the immunity invoked under and by virtue of Articles 44 and 45 of the Charter offends the provision of Article 25 of *the Constitution*, which guarantees the "Fundamental rights and freedoms that may not be limited" despite any other provision in *the Constitution*, including Article 24 (which makes provision for statutory limitation of certain rights and freedoms), which are liable to derogation in certain circumstances.
41. In this regard, learned counsel submitted that any law conferring absolute immunity against any suit in business dealings is an attempt to curtail or limit the right to a fair trial and is therefore null and void. Counsel cited Article 48 of *the Constitution*, which guarantees the right of access to justice, submitting that all provisions on EADB's immunity in the Charter and statute law derogate from Article 48 of *the Constitution*, and are therefore null and void.
42. On the right to fair hearing, counsel cited Article 50(1) of *the Constitution* which guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or tribunal. According to counsel, any statute purporting to limit the right to have that dispute resolved in Court is null and void under and by virtue of Article 2(4) of *the Constitution*. In their view, limitation of that right would in turn permit arbitrary deprivation of property contrary to Article 40 of *the Constitution*. They drew the Court's attention to the definition of "property" under Article 260 of *the Constitution*, which includes a chose in action to wit the right of proceeding in a court of law to obtain a sum of money or to recover damages, including rights under a debt and rights under a contract.
43. In conclusion, learned counsel hailed the learned Judge for taking to mind the provision of Article 159(2) (e) of *the Constitution*, which calls for the promotion and protection of the purpose and principles of *the Constitution* in, among other things, the exercise of judicial authority pursuant to Article 160.
44. With reference to the immunity accorded EADB under Article 44(2) of the Charter, the learned Judge held that the Charter only limits suits against the bank by its member States and/or persons acting



for or deriving claims from them. According to the learned Judge, the provisions on immunity are designed to protect the bank against any coercive action by member states in view of the fact that the treaty and the charter constitute them promoters and contributors to its capital. The learned Judge made reference to the decision of the Supreme Court of Uganda in *Concott International*

Ltd vs East and Southern African Development Bank Ltd, Civil Appeal No. 11 of 2009 where G. M. Okelo, JSC. Observed that the phrase “every form of legal process” in Article 44(2) of the Charter was restricted to transactions between the Respondent bank and the Government of Uganda in view of the fact that the objects of the Act by which “absolute immunity” is accorded the bank was specifically designed to regulate the relationship between them.

45. While that might be the position taken by the court in the afore- cited case in Uganda, we are not persuaded by the learned Judge’s view that to confer absolute immunity on the appellant would be contrary to public policy in Kenya. It is instructive that section 3 of the EADB Act incorporates Article 44 of the Treaty and Charter of the EADB under which the appellant is clothed with absolute immunity against every form of legal process with the exception of cases where it expressly waives its immunity. It did not.
46. It is noteworthy that the statute giving effect to Articles 44 and 45 of the Charter is suitably designed to make provision for Kenya to effectively meet her obligations under the Treaty amending and re-enacting the charter. To our mind, this purposive interpretation does not exclude non-State parties with whom the appellant enters into contracts on terms other than those contemplated in the Charter, in which case such a contract would be construed on its own terms as to the manner in which disputes between the parties would be resolved as was the case here.
47. In the circumstances of this case, the respondent’s submission as erroneously upheld by the trial Judge to the effect that the appellant’s statutory immunity to legal proceedings runs against the grain of public policy and offend the constitutional right, inter alia, to property and fair hearing, does not hold. To our mind, the fact that the appellant has the legal capacity to contract under and by virtue of Article 43 of the Charter does not of itself erode the appellant’s statutory immunity to legal proceedings. Article 43 reads:

Article 43 – Legal Status

The Bank shall possess full juridical personality and, in particular, full capacity—

- a. to contract;
 - b. to acquire, and dispose of, immovable and movable property; and
 - c. to institute legal proceedings.
1. Our reading of Article 43 of the Charter as re-enacted under Cap. 493A(a) is that the appellant has juridical/legal personality with capacity “to contract” and “to institute legal proceedings”. It defeats reason to contend, as the appellant argues, that the appellant has “absolute immunity” from legal proceedings, which it is empowered by the Charter and statute law of a member State to institute. To our mind, legal capacity to contract and to institute legal proceedings (presumably in a bid to assert its contractual rights) must of necessity be attended by the corresponding rights of those with whom it contracts to enforce their contractual rights in equal measure subject, however, to: (i) the strict provisions of Article 44 with regard to immunity in relation to its members and persons claiming on their behalf or under them; and (ii) in accordance with the express terms of such a contract with regard to the agreed mode of dispute resolution.



49. Article 44 reads:

Article 44 – Judicial Proceedings

1. The Bank shall enjoy immunity from every form of legal process except in any case where it has expressly waived its immunity in writing, when it may be sued in a court of competent jurisdiction in a Member State in which the Bank has an office, and has appointed an agent for the purpose of accepting service or notice of process. It is however understood that no waiver of immunity shall be implied or extend to any measure of execution.
2. No action shall be brought against the Bank by members or persons acting for or deriving claims from members. However, members shall have recourse to such special procedures 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 contracts entered into with the Bank.

50. While Article 44(1) confers on the appellant immunity from “every form of legal process” unless waived in writing, the question arises as to the effect of the arbitration agreement contained in clause

7.03 of the Loan Agreement. To our mind, clause 7.03 of the loan agreement in issue makes provision for an effective dispute resolution mechanism open to the parties in the face of the absolute immunity that bars judicial proceedings otherwise than in the enforcement of the arbitration agreement aforesaid or in support of the arbitral process as contemplated in the [Arbitration Act](#).

51. It is to this end that the appellant raised its objection to the proceedings by pleading statutory immunity and want of the court’s jurisdiction to entertain the suit, a challenge raised in its defence right at the outset, followed by the Motion leading to the impugned ruling and orders. The precis of its case was that the court did not have jurisdiction to entertain the suit on the ground that the appellant was immune from legal process under the terms of Articles

44 and 45 of the Treaty and Charter as incorporated into the [East African Development Bank Act](#).

52. Our reading of Article 44(1) of the Charter suggests that clause 7.03 of the loan agreement expressly provides for a defined alternative dispute resolution mechanism to which the [Arbitration Act](#) applies, and does not erode the “absolute immunity” properly invoked by the appellant in its defence and Motion leading to the impugned ruling. Put differently, the arbitration clause does not operate as a waiver of the immunity as pleaded in reliance on Article 44(1) of the Charter. Indeed, we find nothing on record to suggest that the appellant waived its immunity to court process, or that the parties were barred from recourse to arbitration pursuant to their express agreement.

53. In *Eagle Star Insurance Company Limited vs. Yuval*

Insurance Company Limited [1978] Lloyd’s Rep 357, Lord Denning MR observed that:

“... it seems to me that in order to deprive a defendant of his recourse to arbitration a “step in the proceedings” must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.”

54. In *Groupement d’Enterprises Fougerolle vs. CERN* [1996] 102 ILR 209, the European Organization for Nuclear Research (CERN) entered into a contract with a consortium of companies for the construction of a circular tunnel as the site for a large electron/positron collider. The contract



provided for any dispute to be submitted to ad hoc arbitration. After an arbitration award following a dispute between the parties, the consortium was dissatisfied and applied to appeal to the Swiss Federal Tribunal. CERN claimed absolute jurisdictional immunity in relation to every form of legal process before national courts. The court declined to review the award and held that the immunity of CERN prevented the intervention of a national court in arbitral proceedings without an express waiver of immunity. The court observed (as translated by Gaillard & Pingel-Lenuzza in 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass' (2002) 1 ICLQ

1) that:

“... contrary to the situation of States, the submission of an international organisation to an arbitration agreement does not entail a waiver of its immunity. The arbitration in which it participates shall be shielded from any intervention of the national courts, unless the organisation waives its immunity or its headquarters agreement provides otherwise, or if the organisation accepts that the arbitration be governed by a national law, usually the law of the seat. (Dominicé, RCADI, 1984, p. 204). Only where the arbitration refers to a national law can the national courts potentially intervene in the proceedings. However, such reference is, in practice, never made by the major international organisations (Dominicé, RCADI, 1984 p.182).”

55. Even though Article 44(2) makes reference to a category of players independent of State parties in the appellant's business arena, its statutory immunity is by no means limited or waived by sub-article (2) to “members or persons acting for or deriving claims from members,” and who may enforce their claims under such special procedures for settlement of disputes between the Bank and its members as may be prescribed in the Charter. Simply put, the immunity extends to other persons or body corporates, such as the respondent, with whom the appellant may contract in exercise of its powers under Article 43.

56. No doubt, the EADB Act, read together with the Treaty and relevant Resolutions, is intended to give Articles 44 and 45 of the charter the full force of law in Kenya. That explains the approach in clause 7.03 of the loan agreement to provide for a dispute resolution mechanism that does not outrightly exclude judicial intervention in proper cases where courts may intervene to give effect to the arbitral process under the *Arbitration Act* (Cap. 49); provided always that the law of arbitration in Kenya is invoked to support the process. We hasten to add that the very inclusion of such arbitration provision as a method for dispute resolution is in strict adherence to Article 159

(2) (c) of *the Constitution* which enjoins courts and tribunals to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

57. In the same vein, the Court of Appeal in *Ministry of Defence of the Government of the United Kingdom v Ndegwa* [1983] eKLR, Civil Appeal 31 of 1982 held that:

“the court will not issue its process against a statutory immune party unless the immunity is waived or that the immune party consents to submit to the jurisdiction of the courts of Kenya in a matter in dispute.”

58. Likewise, in *Dari Limited & 5 Others Vs. East African Development Bank* [2023] KECA 454 (KLR, this Court (differently constituted) considered the appellant's statutory immunity from judicial



proceedings, took to mind the existence of an arbitration agreement as is the case here, and had this to say:

“ 47. To determine whether a foreign judgment should be set aside on account of the above issues would not require reopening the judgment and re-evaluating its merits in the manner suggested by the appellants. For example, issues such as whether the judgment debtor enjoys immunity, would require the applicant to merely show the basis of the immunity.” *[Emphasis added]*

59. In addition to the appellant’s absolute immunity from any legal process, it is also noteworthy that Article 45(1) of the Charter and the Act shield the appellant’s assets from execution in any legal process. It reads in part:

Article 45 – Immunity of Assets

1. Property and other assets of the Bank, wheresoever located and by whomsoever held, shall be immune from interference, search, requisition, confiscation, expropriation, nationalization or execution or any other form of taking or foreclosure by executive, legislative, judicial or administrative action ...

60. Having carefully considered the provisions of Articles 44 and 45 of the Charter of the EADB and section 3 of the EADB Act, the rival submissions of learned counsel for the parties, the cited authorities and the law, we hold that the appellant enjoys absolute immunity from all legal proceedings, including proceedings between the appellant and its member States, and to persons claiming on their behalf or under them. In effect, the immunity conferred on the appellant under Articles 44 and 45 of the Charter is not limited to suits against the appellant by its members and/or persons acting for or claiming under such member States. Such immunity extends to third parties, such as the respondent. And that settles the 1st and 2nd issues before us.

61. Turning to the 3rd issue as to whether the appellant had waived its immunity from the suit to which the impugned ruling relates, we find that nothing turns on this issue having reached the conclusion that the immunity pleaded by the appellant under Articles 44 and 45 of the Charter and the Act extends to the respondent to whom legal proceedings are barred curtesy of clause 7.03 of the loan agreement, which provides the parties with an alternative dispute resolution mechanism. Accordingly, nothing more needs to be said on this issue.

62. On the 4th issue as to whether the provisions of the Charter and the EADB Act are in conflict with *the Constitution* of Kenya and, in particular, the provisions relating to the rights and fundamental freedoms or to limitation of those rights and fundamental freedoms, we form the view that this touches on the merits of the suit in the trial court, and that we need not pronounce ourselves thereon lest we pre-empt or embarrass the trial court in determination of the competing claims in the suit. Neither do we find it appropriate to address ourselves substantively to the effect of the arbitration clause 7.03 contained in the loan Agreement, and in respect of which certain substantive issues may be raised touching on the law of arbitration for determination by the trial court. Suffice it for the moment to observe that the respondent is not left without access to justice, and neither is it bereft of a dispute resolution mechanism as claimed.

63. In conclusion, we find that the appeal herein succeeds and is hereby allowed with costs to the appellant. Consequently, the Ruling and Orders of the High Court of Kenya at Mombasa (P. J. Otieno, J.) dated 6th June 2016 are hereby set aside. Orders accordingly.



DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

