



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & SICHALE, JJ.A)

CIVIL APPEAL NO 135 OF 2002

BETWEEN

AFRICAN DEVELOPMENT BANK..... APPELLANT

AND

BEATRICE AGNES ACHOLLA ROSEMARY AMBALO ACHOLLA

(REPRESENTATIVES OF THE ESTATE OF THE LATE

BONAVENTURE ERIC ACHOLLA..... RESPONDENTS

*(Appeal from a ruling and order of the High Court of Kenya (Rimita, J.)
dated 20th December 2001*

in

H.C.C.C No 3157 of 1996)

JUDGMENT OF THE COURT

In an amended plaint dated 1st September 2000 filed in the High Court, **Bonaventure Eric P. Acholla** (now deceased), had a plethora of complaints against the **African Development Bank** (the appellant herein). In the amended plaint, the deceased claimed, *inter alia*, that the appellant failed to give him a promotion yet he was deserving; that instead he suffered a demotion in rank; that he was retired prematurely and that certain sums of money were illegally recovered from him. For all these infractions and others, the deceased claimed money owed to him, general damages, and special damages.

The suit was opposed by way of a defence dated 12th April 2001. The defendant denied the deceased's claim and maintained that no action could lie in the High Court, or any other court in Kenya, against the appellant by dint of Article 52 (1) of the Schedule to the African Development Bank Act (ADB Act) which ousted the jurisdiction of the court in Kenya to hear the suit. Shortly thereafter, the appellant filed a chamber summons application dated 6th June 2001, seeking an order that the amended plaint be struck out. The application was grounded on the reasoning that the appellant enjoys immunity by virtue of Article 52 of the Schedule to the ADB Act and as such, the amended plaint was an abuse of the process of the court.

The application was determined by Rimita J, who in a short ruling dated 20th

December 2001, dismissed the application in the following terms:

“The plaintiff was an employee of the defendant, the dispute between the two is a domestic affair. I do not think that the immunity provided under article 52 of the schedule to the act by any stretch of interpretation cover the bank in its disputes with its domestic staff. I am afraid I am not able to find any merits in the application dated 6th June 2001. The same is dismissed with costs to the respondent.”

The appellant being aggrieved with the ruling of Rimita J, filed a memorandum of appeal dated 29th May 2002. The grounds contained therein are that the learned judge erred in law in:

- a. ***“the interpretation of the meaning and application of Article 52 (1) of the schedule to the African Development Bank Act;***
- b. ***finding that the provisions of Article 52 (1) above mentioned did not apply to the dispute between the appellant and the respondent herein;***
- c. ***failing to address himself to Article 50 of the Agreement Establishing the African Development Bank produced in evidence at the hearing;***
- d. ***failing to address himself on the rationale governing the immunity of certain international organisations as set out in the judgment of this Honourable Court in Tononoka Steels Limited versus the Eastern and Southern Africa Trade and Development Bank Civil Appeal no 255 of 1998 (unreported).”***

For the above reasons, the appellant sought orders that the appeal be allowed and the ruling appealed from be set aside. Unfortunately after the ruling of the High Court, the deceased passed on. However by a consent dated 20th January 2005, his widows **Beatrice Agnes Acholla** and **Rosemary Ambalo Acholla**, were substituted as respondents. There were various attempts to have the appeal heard but for a multiplicity of reasons, the appeal was not heard until 1st December 2014 when the Court with the consent of the parties directed that the appeal be disposed by way of written submissions. In the meantime, the Attorney-General had come on board as *amicus curiae* due to the fact that the appeal raised substantial issues of public interest on the immunity of International Organisations. The appellant filed its submissions on 14th February 2014; the respondent on 15th December 2014 and the Attorney General on 1st December, 2014. The matter thereafter came before us for the highlighting of the submissions on 21st April, 2015.

In urging the appeal, Mr. Ojiambo learned Senior Counsel, for the appellant pointed out that the respondent’s claim was fully settled on a without-prejudice-basis and that this appeal related only to the status of immunity of an international organisation.

Firstly, the appellant urged us to find that the court did not comply with the then mandatory requirements of Rules 4 and 5 of Order XX of the Civil Procedure

Rules, 1968 which rules compel a court to give reasons for a decision it reaches on any point determined by it. In their view, the learned judge did not provide any reasons in arriving at his decision that the dispute between the appellant and the respondent was a domestic affair.

Secondly, the appellant’s submission was that the learned judge failed to give **Article 52 (1)** of the Schedule to the **ADB Act**, its plain, natural and ordinary meaning. In its view, **Article 52 (1)** enacts a very specific and easily defined immunity for the appellant bank **“to enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers”** and that **section 52** represents the Law of Kenya, which by virtue of section 4 of the ADB Act, has the force of law in

Kenya. The section provides that ***“the provisions of the Bank Agreement set out in the schedule to the Act have the force of law in Kenya.”*** As such, the appellant submitted that the duty to observe and enforce section 52 in Kenya is not discretionary, but obligatory and mandatory, and is therefore binding to all state institutions including the courts.

It was the appellant’s case that the dispute in this case arose from an employment contract, which had no relevance to the appellant bank’s exercise of its borrowing powers.

The appellant justified the immunity by submitting that the appellant bank worked in different countries and if it was to be subjected to domestic courts of each of the host countries, then it would be impossible for it to run its affairs.

In support of this proportion Mr. Ojiambo cited the case of ***Bertolucci v European Bank of Reconstruction & Development & Others [1997] UKEA and Mukuro vs European Bank of Reconstruction & Development & Another [1994] UKEAT.***

The appellant pointed out, that in both the ***Bertolucci v European Bank of Reconstruction and Development & Others*** (supra) as well as ***Mukuro V European Bank of Reconstruction and Development & Another*** (supra) ***UKEA and Broadbent V Organisation of American States 628 F. 2d 27 [1980]*** the alleged infractions complained of arose out of an employment relationship, and in all the cases the tribunal upheld the diplomatic immunity of the international organisations.

Based on these authorities and others, the appellant submitted that the appellant was clothed with immunity and the respondent’s suit against it ought to have been dismissed.

The appellant distinguished the decision of ***Tononoka Steels Ltd v The Eastern and Southern Africa Trade and Development Bank [2000] 2 EA 536*** which appears to contradict the general principles governing the immunity of international organisations. The appellant submitted that the central dispute in that matter was on a commercial transaction, and as such, it differs substantially from the present appeal which is a dispute arising from an employment contract. Unlike the ***Tononoka case***, the appellant states that the matter before the Court is similar to the ***Mukuro case*** and the ***Broadbent case*** cited above, both of which were employment disputes and underscored the principle that employment disputes are not commercial activities for the purposes of immunity.

The appellant further submitted that unlike in the ***Tononoka case***, (where the basis of the immunity was an article in the PTA Charter the immunity of the

ADB Bank is embodied in the ADB Act itself.

Mr. Ojiambo concluded his written submissions by stating thus ***“Due to the peculiar circumstances of this case, and events subsequent to the lodgement of this appeal, the appellant bank does not seek costs as against the respondent, in the event of the appeal succeeding.”***

The Attorney General adopted the submissions made by the appellant. Its case was urged by Mr Muiruri who made forceful submissions on the obligations of Kenya in the comity of nations and further argued that the ADB Act is a codification of Kenya’s undertakings in the international fora.

Mr. Muiruri drew a distinction as regards the facts obtaining in the ***Tononoka case*** which was a private commercial transaction and further that the immunity therein was conferred by a ministerial act in a legal notice, not in an Act of Parliament. He invited us to find that the immunity pleaded by the appellant was statutory and was not immunity granted through an administrative fiat.

Counsel relied on the decision of the Court of Appeal of Tanzania in ***African Development Bank v Blueline Enterprises Ltd Civil Appeal No 111 of 2009***

where it was held that:

“In our considered judgment, the appellant like the UN or the ADB, etc., derives its immunity from the Treaty/Charter which established it and fortunately the Tanzania Government does not deny this fact. It is imperative, therefore, that it’s claimed immunity must be judged only on the basis of its Charter provisions and not on customary international law doctrine of sovereign immunity.... For the foregoing reasons we have no lurking presentiment in holding that via Article 44 of the schedule to the Act, the EADB, has been granted absolute immunity from all forms of legal process in all cases arising out of the exercise of its lending powers.”

It was Mr. Muiruri’s submission that the appellant Bank has an internal dispute resolution mechanism for employment disputes of which the respondent had availed himself.

Mr. Namada for the respondents opposed the appeal. Firstly, he took issue with the appellant’s contention that the learned judge failed to bring his ruling within the ambit of the Civil Procedure Rules as this was not one of the grounds of appeal. He argued that the appellant is simply attempting to introduce a new ground of appeal through the back door. In his view, this is a point of law that the appellant should have raised in the memorandum of appeal if it intended to argue it and asked that this ground be disregarded. The respondents’ position is that in any event, the court is only required to give reasons for its decision, and those reasons need not be lengthy, and that it suffices for the court to give brief precise reasoning. In the respondents’ view, it was sufficient that the judge noted that there was a dispute between the appellant and the employee, and that it was a domestic dispute where the immunity of the appellant could not apply. It was the respondent’s submission that the court cannot arrive at a correct interpretation of section 52 of the ADB Bank if it does not read section 51 which provides as follows:

“In the territory of each member the Bank shall possess full juridical personality and, in particular, full capacity:

- 1. To contract;***
- 2. To acquire and dispose of immovable and movable property; and***
- 3. To institute legal proceedings.”***

Mr Namada posited that to determine the true legislative intention, the two sections must be read together. Under **Article 51**, the appellant has full capacity in the territory of each member state to institute legal proceedings, but on the other hand, **Article 52 (1)** purports to grant the appellant absolute immunity from every form of legal process. In the respondent’s view, the sections are contradictory because the effect of section 52(1) is that parties who are dealing with the appellant are left without recourse to a court of law. In the respondent’s view, it could not have been the intention of the legislature to give blanket immunity in all matters that relate to the bank.

The respondent further submitted that the principle holding in the case of **Tononoka** is that any law or provision that completely ousts the jurisdiction of the court is bad in law. The respondents submitted that **Article 52** is such a provision by purporting to completely oust jurisdiction of the court without giving any judicial or quasi-judicial avenue for redress to aggrieved parties, thus leaving such aggrieved parties at the mercy of the appellant.

In addition, the respondent maintained that in the **Tononoka** case it was held that the decision by the Minister to grant the PTA bank absolute immunity from suits and legal process even in purely commercial transactions, was contrary to international law. For this proposition, counsel cited the judgment of Kwach JA who stated therein that:

“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.”

The respondents therefore submitted that in line with this principle, the section purporting to grant the appellant absolute immunity is contrary to Kenyan and international law, and that the learned judge’s interpretation of that article was correct. Counsel further argued that employment contracts are in essence commercial undertakings contracted at a personal level between the appellant and the respondent thus the appellant cannot enjoy immunity. Counsel contended that unlike State Parties getting into business with the bank, who are purely and absolutely aware that they are contracting with another sovereign, when a private individual contracts with the bank pursuant to an open advertisement for a job opportunity where the immunity of the bank is not even mentioned, then that individual cannot be closed out by the immunity clause as he entered the contract in equal capacity with the bank simply as between an employer and an employee.

The letter of appointment does not make any reference to the immunity of the bank. In any event, in the **Tononoka case**, the court held that immunity cannot be extended **“to even its commercial activities”** which implies that the judges did not hold that immunity should be upheld only for commercial activities.

The respondents further contended that even if at the time of the enactment of the ADB Act it was intended to give immunity, there have been many changes in the Kenyan circumstances since 1964 which was just after independence and when the Constitution in force was the Lancaster Constitution and which contained no labour rights. This is unlike the present day where we have a drastically changed rights regime since the enactment of the Constitution of Kenya, 2010. Under Article 41 of the Constitution, fair labour practices are enshrined as a fundamental right, which merge with the socio-economic rights under Article 43.

Under Articles 22, 48 and 50, citizens have a right to access courts and the State has a corresponding obligation to ensure that courts are accessible for the enforcement of rights and resolution of any grievance.

We have carefully considered the law, the well researched authorities, the written and oral submissions made by the appellant, the Attorney-General as well as the respondents.

As pointed out by Mr. Ojiambo, the respondents were fully compensated and this appeal turns on the issue of whether the appellant bank has immunity in a court of a host country. In determining this issue, we are guided by **Article 52** of the schedule to **ADB Act** which provides as follows:-

“The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers ---”

The above provisions are clear and unambiguous. The appellant enjoys ***“immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers.”*** The plain, natural and ordinary interpretation of this provision is that the appellant bank cannot be sued in a domestic court, unless the dispute arises out of an exercise of its borrowing powers, which is not the case here.

Mr. Namada drew out attention to **section 51** that seems to suggest that the appellant bank was not immunized from domestic suits. However, we find the arguments for the appellant and the Attorney-General forceful and persuasive more so when it comes to the rationale for the immunity.

In the **Mukuro case** (supra) the Court underscored the need and rationale for the immunity by stating thus:-

“--- immunity from suit and legal process may be justified on the ground that it is necessary for the fulfilment of the purposes of the Bank, for the preservation of its independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of its multi-national functions through its representatives.”

If this would not to be the case, one may well imagine the various laws of the host courts that the employees of the bank would be subjected to. More so, if it is considered that these international employees are not confined to one host country but like all other employees and for good measure are subject to transfers. In **Bertolucci v European Bank of Reconstruction and others** (supra) it was stated:

“an international organisation like the ITC, whether incorporated or not is merely the means by which a collective enterprise of the member states is carried on, and through which there are relations with each other in a particular sphere of common interest are regulated. Any attempt by one of the member states to assume responsibility for the administration of the organisation would be inconsistent with the arrangements made by them as to the manner in which the enterprise is to be carried on and the relations with each other in the sphere is regulated. Sovereign states are free, if they wish, to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of their members. But if they choose instead to carry it on through the medium of an international organisation, no one member state, be executive, legislative or judicial action can assume the management of the enterprise and subject it to its own domestic law. For if one could, then all could; and the independence and international character of the organisation would be fragmented and destroyed.”

In both **Mukuro** and the **Bertolucci case** the observations of **Millet J in Re: International Tin Council [1994] ICR 897** were approved to the effect that if sovereign states choose to carry on a collective enterprise “through the medium of an international organization, no one member state, by executive, legislative or judicial action can assume the management of the enterprise and subject it to its own domestic law.”

A similar situation obtains in the US. In **Susana Mendaro v The World Bank 717. F.2d 610 [1983]** the United States Court of Appeals, District of Columbia Circuit was required to determine whether the International Bank for Reconstruction and Development may be sued in the United States courts by employees of the Bank seeking redress of employment related grievances. In the US, the International Organisations Immunities Act confers judicial status and immunities upon those international organisations by providing that they shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organisations may expressly waive their immunity for the purposes of any proceedings or by the terms of the contract. When the court was examining the policies that underlie the immunity of international organisations the court observed that:

“One of the most important protections granted to international organisations is immunity from suits by employees of the organisation in actions arising out of the employment relationship. Courts of several nationalities have traditionally recognised this immunity and it is now a doctrine of customary international law.

“Like the other immunities accorded to international organisations, the purpose of immunity from employee actions is rooted in the need to protect international organisations from unilateral control by member nations over the activities of the international organisation in its territory. The sheer difficulty of administering multiple employment practices in each area in which an organisation operates suggests that the purposes of an organisation would be greatly hampered if it could be subjected to suits by its employees worldwide.”

This has been the principle that has been applied in **Broadbent v Organisation of American States 628 F.2d 27 (1980)** where the court highlighted the importance, under international law, to safeguard the immunity of

international organisations from suits by holding that:

“An attempt by the courts of one nation to adjudicate the personnel claims of international civil service would entangle those courts in the internal administration of those organisations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations and decisions of the international bodies. Undercutting uniformity in the application of the staff rules or regulations would undermine the ability of the organisation to function effectively.”

The court further held that:

“the relationship of an international organisation with its internal administrative staff is non-commercial and absent waiver, activities defining or arising out of that relationship may not be the basis of an action against the organisation regardless of whether international organisations enjoy absolute or restrictive immunity.

It is also important to point out that the immunity is granted to the International Organisation and not to the individual and again for the reasons advanced in the cases cited before us. We do not see a conflict between Articles 51 & 52 of the Schedule to the African Development Bank Act.

In the recent decision of this Court namely **Karen Njeri Kandie v Alssanne Ba Shelter Afrique C.A. No. 20 of 2013** (unreported), the Court differently constituted and in reference to the preamble to the Vienna Convention on Diplomatic Relations acknowledging the status of diplomatic agents had this to say:

“The States were there (sic) expressing a self-evident imperative of cooperation by way of granting to each other mutual and reciprocal privileges and immunities which, in their own words, they realized are for the purpose of not benefitting individuals; but to ensure the efficient performance of the function of diplomatic missions as representing States.”

There is no gainsaying in stating that immunity relates the international organization and not the individual.

We are also in agreement that the facts of this case are dissimilar with the facts obtaining in the **Tononoka case**. In the latter, there was a ministerial fiat contained in a gazette notice. Not so in this case where the immunity is provided in an Act of Parliament. The other dissimilarity is that the case of the respondent was an employer/employee dispute, whilst in the **Tononoka case** the dispute was of a commercial nature. To stretch the argument that the respondents claim against the appellant being an “employment transaction” was also of a commercial nature, in our view in to over-stretch the meaning and purport of a commercial transaction.

The respondents contended that even if at the time of the enactment of the ADB Act it was intended to have immunity, there have been many changes in the Kenyan circumstances. Mr Namada contended that this was in 1964, just after independence when the constitution in force was the Lancaster Constitution, which contained no labour rights. This is unlike the present day whereby Kenyans live under a drastically changed rights regime since the enactment of the Constitution of Kenya, 2010. Under Article 41, fair labour practices are enshrined as a fundamental right, which merge with the socio-economic rights under Article 43. Under Articles 22, 48 and 50, citizens have a right to access courts and the state has a corresponding obligation to ensure that access for the enforcement of rights and resolution of any grievance by the courts.

It is correct, as pointed out by counsel for the respondents, that the constitution of Kenya, 2010 contains a

wide range of rights, including labour rights and the right to access justice. However, under Article 2 (6) of the Constitution, international treaties and legal instruments upon which Kenya has ratified form part of the law of Kenya. The Articles of Agreement are such legal instruments and have been ratified through the enactment of the ADB Act; they are therefore a part of Kenyan law. **Section 7** of the Sixth Schedule on Transitional and Consequential Provisions requires that all existing laws enacted before the promulgation of the Constitution of Kenya, 2010 be construed in conformity with the provisions of the Constitution. Labour rights and fair hearing are enshrined in the Constitution. Of particular note is **Article 50 (1)** which stipulates that:

“50. (1) Every person has 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, if appropriate, another independent and impartial tribunal or body.”

However, these rights can be limited. The right to a fair hearing, under **Article 50 (1)** and the rights to fair labour practices can be limited. In particular, **Article 24** provides for the limitation of these rights in the following terms:

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- a. the nature of the right or fundamental freedom;***
- b. the importance of the purpose of the limitation;***
- c. the nature and extent of the limitation;***
- d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

Article 41 which guarantees a right to fair labour practises and Article 50 which guarantees a right to fair hearing have to be read together with Article 2 (5) which provides that the general rules of International Law shall form part of the Law of Kenya.

The reasons for limiting access to domestic courts have been well explained in the authorities cited above. It would be undesirable to have a situation where every employee in an international organisation who perceives that they have been wronged approach different courts in different jurisdictions. This would not only lead to challenges in execution, where an order against such an organisation is given, but would also create ***“sheer difficulty of administering multiple employment practices in each area in which an organisation operates suggests that the purposes of an organisation would be greatly hampered if it could be subjected to suits by its employees worldwide.”*** [See the *Mendaro case (supra)* and the *persuasive opinion of Mugo J in Gerald Killeen v International Centre of Insect Physiology & Ecology*]. The situation is remedied by the fact that there are internal dispute resolution mechanisms through which an employee can agitate claims against the appellant.

We have therefore come to the inevitable conclusion that the appellant is vested with diplomatic immunity. Having come to this conclusion we do not consider it necessary to address the issue that the learned judge gave reasons for his findings and as to whether this should have been included in the memorandum of appeal. The upshot of the above is that the appeal is allowed, the ruling of the learned judge set aside, and in its place, an order made allowing the chamber summons application dated 6th June, 2001.

As the appellant did not wish to have costs, we order that each party shall bear their own costs.

Dated and delivered at Nairobi this 3rd day of July, 2015

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR