**Tononoka Steels Ltd v The Eastern and Southern Africa Trade and**

**Development Bank**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 13 August 1999

**Case Number:** 255/98

**Before:** Kwach, Tunoi and Lakha JJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Arbitration – Proper procedure to apply for arbitration – Arbitration Act 1995.*

*[2] Conflict of laws – Applicable law clause – Whether the same ousts court’s jurisdiction*

*[3] Immunity – Immunity granted to PTA bank – Whether the same is absolute immunity – Whether PTA*

*bank’s commercial transactions immune to civil process – Privileges and Immunities Act*

**Editor’s Summary** Tononoka Steels Limited, a limited liability company, entered into a commercial facility agreement with The East and Sothern Africa Trade and Development Bank, a body corporate established under a multilateral treaty. Tononoka Steeks Ltd subsequently filed suit against the East Africa and Southern Africa Trade and Devlopment Bank claiming breach of contract and seeking damages, injunction and costs. Tononka Steels Ltd simultaneously made an application for interlocutory relief. The East and Southern Africa Trade and Development Bank entered appearance and filed a defence claiming immunity from civil process and contending that the applicable law by virtue of an arbitration clause was the law of England. At the hearing of the interlocutory application, The East and Southern Africa Trade and Development Bank raised the aforesaid preliminary objections and the court concurred, striking out the application and the suit. Tononoka Steels Ltd now appealed. The Court considered the effect of the arbitration agreement and the immunity granted to PTA Bank under the Privileges and Immunities Act. Article 43 of the PTA Charter stated that the bank shall enjoy immunity from every form of legal process except insofar as in any particular case it had through its president expressly waived its immunity. The Minister of Foreign Affairs had subsequently promulgated an order under the Privileges and Immunities Act that applied various immunities, including immunity from suit and legal process, to the bank.

**Held** – Parliament did not intend to extend an absolute immunity from suits and legal process to the PTA Bank. Such an extension would be against public policy and in breach of international law. The only immunity the Minister could validly extend to the bank under section 9 of the Act would be qualified immunity that would not cover its operations as a bank. *Trendex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881, *Mukuro v European Bank for Reconstruction and Development* [1994] 1 CR 897 adopted. The fact that the arbitration clause provided that English law would be applicable did not completely oust the jurisdiction of the local courts. The Kenyan courts would still retain residual jurisdiction to deal with peripheral matters and see to it that any disputes or differences were dealt with in the manner agreed. *Scott v Avery* [1856] 5 HL Cases 811 adopted. In any case, the Minister under the Privileges and Immunities Act had no power to make a rule that completely ousts the jurisdiction of the courts*. Davis v Mistry* [1973] EA 463 followed*; Pyx Granite v Ministry of Housing* [1960] AC 260 adopted. Where the arbitration clause specified the applicable law, the agreement was to be construed and governed in accordance with that law. In the instant case, the defence of immunity was not available to the bank because the applicable law was the law of England and not Kenyan law. Under English law, immunity does not extend to commercial transactions. *Per curiam*: On the question of whether and when a point of law may be taken for the first time on appeal, the general principles are: (1) to allow the issue to be raised where it does not require investigation of disputed facts; (2) to allow the issue where no question of evidence arises; (3) where it is not clear if all evidence is present, the court may allow the issue to be raised *de bene esse* and then decide whether to grant leave; (4) the court may raise a point of law of its own motion, especially where there is a question of jurisdiction. Appeal allowed. Suit reinstated and injunction granted.

**Cases referred to in judgment** (“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled) ***East Africa***

*Damodar Jihanbhai and Co Ltd v Eustace Sisal Estates Ltd* [1967] EA 153 *Davis and another v Mistry* [1973] EA 463 – **F** *Jagat Singh Bains v Chogle* [1949] 16 EACA 27 *Overseas Finance Corporation Ltd v Administrator-General* [1942] 9 EACA 1 *Visram and Karsan v Bhatta* [1965] EA 789 ***United Kingdom*** *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 *Lever Bros v Bell* [1931] 1 KB 557 *Mukuro v European Bank for Reconstruction and Development* [1994] 1 CR 897 – **A** *Pyx Granite Co v Ministry of Housing* [1960] AC 260 – **A** *Scott v Avery* [1856] 5 HL Cases 811 – **A** *Trendex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 981 *–* **A**