**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*

**JUDGMENT**

**LAKHA JA:** This is an appeal by the unsuccessful Plaintiff from the ruling of the superior court (Ole Keiwua J) given on 8 May 1998. By it the court ordered that the Plaintiff’s suit against the Defendant, the Eastern and Southern Africa Trade and Development Bank (“The bank”) and its interlocutory application for injunction should be struck out and dismissed with costs of the suit and of the application to the Defendant. The Plaintiff is a limited liability company incorporated in the Republic of Kenya with its registered office also within the Republic. The Defendant is a body corporate established by Charter pursuant to Chapter 9 of the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States whose principal and operational offices are in Nairobi, Kenya. By a loan agreement (“the loan agreementa) dated 1 December 1994 the Plaintiff was granted by the Defendant a term loan in various foreign currencies equivalent to US$ 675 000 to be utilized for the implementation of the Plaintiff’s project described therein against specified securities. By another agreement (“The facility agreement”) dated 4 December 1996 the Plaintiff was provided with an import credit facility by the Defendant in an aggregate amount not exceeding US$ 1 million. There was a term (clause 16.12) referring any dispute thereunder to arbitration of the International Chamber of Commerce sitting in London. There was the further term (clause 16.10) which provided that the loan agreement shall be construed and governed in accordance with the laws of England. In or about December 1997 the Defendant repudiated the facility agreement. On 26 February 1998, the Plaintiff filed a suit in the superior court against the Defendant. It claimed damages, injunction and costs. On the same day, the Plaintiff also made an application to the superior court for an interlocutory injunction supported by an affidavit. The Defendant entered an appearance under protest and in its defence the Defendant pleaded that the Defendant enjoyed immunity under the Privileges and Immunities Act Chapter 179 of the Laws of Kenya read together with Legal Notice Number 265 of 26 May 1991, that the loan agreement had an arbitration clause and therefore the court had no jurisdiction to hear the suit and also because the agreed law of contract was the law of England and not the law of Kenya. At the hearing of the application and by way of a preliminary issue, Ole Keiwua J found, in a reserved ruling, in favour of the Defendant, holding that the court had no jurisdiction to entertain the application and the suit. He therefore struck out both the application and the suit and dismissed them with costs. The Plaintiff has now appealed to this Court. On such appeal, the first and fundamental question for this Court is to consider the effect of clause 16.10 of the loan agreement, which provides: “This agreement shall be construed and governed in accordance with the laws of England”. But before I do so, I must deal at the outset with the objection by Mr *Muthoga* who appears for the Defendant that this point was not pleaded, raised or canvassed before the superior court. That is partly true but not entirely so because this matter was, in fact, raised by the Defendant in its defence in paragraph 7 as follows: “This Honourable court has no jurisdiction to hear this suit for the reasons stated above and also for the reason that the agreed law of contract was the Law of England and not the Laws of Kenya. Paragraph 49 of the Plaint is specifically denied”. Apart from that, it was specifically mentioned by the Learned Judge in his ruling when he referred to the arbitration being subject to the laws of England. Mr *Muthoga*, for the Defendant, did not in the first instance object to this point being argued. No application was therefore made for leave to argue the point, which had not been argued before the superior court. Nor did it decide the preliminary issue relying on this ground. But Rule 101 of the Rules of this Court makes provision that such a point may be argued with leave of the Court, absence of such pleading notwithstanding. The correct position in the instant case, however, is that it was in fact the court itself that raised the point as it was of such fundamental importance. But whether and when a point of law may be taken for the first time, on appeal, without having been argued before the superior court, has been the subject of much discussion and case law. The general principles on this subject are not in dispute and they may be summarized as follows: (1) Generally, the attitude of the Court in such circumstances has been to allow a new question of law to be raised where it concerns the legal effect of pleaded facts and does not require the investigation of disputed facts which were not tested in the trial court: *Overseas Finance Corporation Ltd v Administrator-General* [1942] 9 EACA 1. (2) Where no question of evidence arises, as, for example, where the new question concerns the construction of a document or the legal effect of admitted facts, it will usually be regarded as expedient in the interest of justice to entertain it. As was stated by Scrutton LJ in *Lever Bros v Bell* [1931] 1 KB 557 at 582 and 583: “In my opinion the practice of the Courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial”. Again, Lord Watson stated in *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480: “When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea”. *A fortiori* when it is being raised as a point of law based upon admitted facts at a hearing before the court. (3) Where it is not certain whether all the evidence necessary to support the new submission is before the Court, the Court may allow it to be argued *de bene esse* and then decide whether leave should be given: *Visram and Karsan Bhatta* [1965] EA 789. (4) The Court will itself in certain circumstances raise of its own motion and consider points of law that were not considered or relied upon in the superior court. This is almost invariably done where there is any question as to jurisdiction: *Damodar Jihanbhai and Co Ltd v Eustace Sisal Estates Ltd* [1967] EA 153 at 158 or where the Court is asked to give a judgment which would be contrary to a statute: *Jagat Singh Bains v Chogle* [1949] 16 EACA 27. Applying the above principles to the facts of the present appeal, I am inclined to the view that the fact upon which reliance is placed to raise the question of law is not in dispute as it forms part of the agreement between the parties and does not require any investigation of disputed facts, thus the point must be allowed. Indeed, it is also in the interest of justice to entertain it apart from it being a jurisdictional point. What then is the effect of clause 16.10 of the loan agreement applying the English law to the dispute between the parties? Clause 16.10 of the loan agreement above referred to provides for the appropriate law of the contract by express selection for, as here, where the parties expressly stipulate that a contract shall be governed by a particular law, that law will be the proper law of the contract. If there had been no express choice of the proper law, the court will consider whether it can ascertain that there was the inferred or implied choice of law by the parties. If the parties agree, for example, that arbitration shall take place in a particular country, it can be concluded that the parties have chosen the law of the country of arbitration as the proper law. In the instant case, that again would be the law of England. If the contract between the parties herein is to be applied in accordance with the English law, what is the English law in relation to immunity enjoyed by representatives of international organisations? No Order in Council has been made or brought to my attention for such organisation under English law to enjoy immunity from judicial processes. Mr *Muthoga* for the bank did not cite either to us or to the superior court what the relevant law of England was on this point. Nor did the superior court make any finding of what such law was. None was ascertained or brought to my attention and none was applied in accordance with the express agreement of the parties, that the agreement shall be construed and governed in accordance with the law of England. It seems to me, with respect, to have been completely overlooked. This was perhaps the first and fundamental flaw in the decision of the Learned Judge. The defence of immunity was accordingly not available to the bank because it was not the law of Kenya that was applicable. The proper law of the contract and the law the parties had selected to construe and govern the contract was the law of England. It follows that the application and the suit before the superior court could not be dismissed by application of the law of Kenya as the Learned Judge, with respect, erroneously did. No other ground for dismissing the application and the suit was advanced before the superior court or relied on by counsel before this Court. In my judgment, therefore, the preliminary issue before the superior court should have been rejected. This is in itself sufficient to dispose of the appeal and the other points do not arise; but as they were fully argued I think it right and important that I should deal with them, no matter even if briefly. Whatever else may or may not be the effect of this clause, in my judgment, it does not oust the jurisdiction of this Court. The Learned Judge, in holding as he did, that the jurisdiction of this Court was ousted was, with respect, clearly in error. He said: “By clause 16.10 the loan agreement shall be and is governed by the laws of England. Consequently the law of Kenya does not apply to this dispute in which event this Court will have no jurisdiction to entertain the suit and the application”. This is, with respect, another error in the decision of the Learned Judge. It is a well-settled general rule recognised in the English Courts, which prohibits all agreements purporting to oust the jurisdiction of the courts. The leading case on this principle is *Scott v Avery* [1856] 5 HL Cases 811. It is also a principle of the common law that the parties to a contract may make it one of the express or implied terms of the contract that they will submit in respect of any alleged breach thereof or any matter having relation thereto, to the jurisdiction of a foreign court and a person who has thus contracted is bound by his own submission. It appears from this that the Respondent in the instant appeal, the original Defendant, instead of pleading as it did in paragraph 7 of the defence that the Kenya Court had no jurisdiction and that the suit accordingly should be dismissed for want of jurisdiction, should have made an application under section 6 of the Arbitration Act, 1995 for a stay of proceedings. No such application was made in this case. The Respondent followed a wrong procedure and it is manifest from the record that section 6 of the Arbitration Act was not referred to by counsel and is not referred to by the Learned trial Judge in his ruling. Indeed, it was not mentioned in the arguments on this appeal, but being a matter of jurisdiction is clearly one which should now be taken. If an application had been made at the proper time under section 6 it seems probable that the court would have been satisfied as to the requisite matters set out in the section and would have made an order staying the proceedings. As, however, no such application was made, I am of the opinion that the order made should be quashed. I may perhaps add that the court will lean against a construction, which would purport to oust its jurisdiction. Yet another error, with respect, in the ruling of the Learned Judge which it is appropriate at this point to mention is that he failed to give any proper consideration to the effect of Legal Notice Number 265 of 1991 pleaded in the defence in paragraph 4 thereof in the following terms: “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 (Chapter 179) read together with Legal Notice Number 265 of 26 May 1991 and The Charter”. This was also relied upon by Mr *Muthoga* in his submission before the Learned Judge. There is no power to enact rules depriving any party of his access to the courts. If Mr *Muthoga’s* submission is correct (and I find that it is not), that the jurisdiction of the court was ousted and the Defendant is immune from its process, then there is no power to make such a rule. If, as the Learned Judge held, Legal Notice Number 265 of 1991 gives immunity to the Defendant from judicial process and ousts the jurisdiction of the court to hear such a dispute it was bad, in that the jurisdiction of the court can only be ousted by the Act itself: see *Davis and another v Mistry* [1973] EA 463. I would repeat the words of Viscount Simonds in the English case of *Pyx Granite Co v Ministry of Housing* [1960] AC 260: “It is a principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s courts for the determination of his rights is not to be excluded except by clear words”. Like Spry VP in *Davies v Mistry Ante* I would adopt those words substituting only “the courts of the Republic”, for “Her Majesty’s Courts”, to Kenya and hold that the right of access to the courts of the Republic may only be taken away by clear and unambiguous words of the Parliament of Kenya. The conclusion which I have reached must now be obvious. I reach that conclusion without reluctance. I cannot bring myself to suppose that the Defendant can be immune from the consequences of its acts. As the bank shifts to private sector financing and if it is to be like an ordinary commercial bank, businesses that borrow money from the bank should not face a legal minefield should they ever feel aggrieved. My conclusion therefore enables effect to be given to the manifest intention and consequences that flow from purely commercial transactions. Immunity from judicial processes is certainly enjoyed by a sovereign for immunity is at its highest when claimed by a sovereign but even there, to a sovereign immunity the exceptions are several and they are important. Some are already recognised, others are coming to be recognised. I will only mention two of them. First, a foreign sovereign under English law, has no immunity when it enters into a commercial transaction with a trader in England and a dispute arises which is properly within the territorial jurisdiction of the English courts. If a foreign government incorporates a legal entity which buys commodities on the London market, or if it has a state department which charters ships on the Baltic Exchange, it thereby enters into the marketplaces of the world, and international comity requires that it should abide by the rules of the market. Usually the contract contains an arbitration clause, in which case, of course, there is a voluntary submission to the jurisdiction of the arbitrators and the supervision of them by the courts. Second, even if there is no arbitration clause or for any reason it is inapplicable a foreign government which enters into an ordinary commercial transaction with a trader in England must honour its obligations like other traders, and if it fails to do so, it would be subject to the same laws and amenable to the same tribunals as they. Accordingly and, for the reasons above stated, I would allow this appeal with costs, set aside the order and decree of the superior court appealed from and substitute the order granting the relief number 3 sought in the Plaintiff’s chamber summons dated 26 February 1998 with costs and order the trial of the action in the superior court to proceed to a hearing before another judge. Costs of the application and the suit in the superior court, if paid, shall be refunded within 30 days with interest at court rates by the Defendant to the Plaintiff. **TUNOI JA:** The Appellant, Tononoka Steels Ltd, the Plaintiff in the suit, is a limited liability company incorporated in the Republic of Kenya. It is engaged in the manufacturing and selling of steel products, especially steel pipes. The Respondent, the Defendant in the suit, is a body corporate established by Charter pursuant to Chapter 9 of the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States and its operational offices are at Nairobi, Kenya. I shall hereinafter refer to the Respondent as “the PTA Bank”. The Appellant was desirous of setting up in Kenya a plant for manufacturing steel products. By a loan agreement dated 1 December 1994 the PTA Bank agreed to finance the implementation of the project as well as the freight costs of the plant from India to the Port of Mombasa. Pursuant to the agreement, the Appellant received from the PTA Bank a term loan in various currencies equivalent to US$ 675,000-00 against certain specified securities. Another loan agreement (“the facility agreement”) was entered into by the parties on 4 December 1996. The purpose of this further loan was to enable the Appellant to finance working capital requirements, expand and undertake trade activity for the project. By this facility the Appellant was provided with an import credit facility in an aggregate amount not exceeding US$ 1 million. As for settlement of disputes the parties agreed that the agreement shall be governed by and construed, not in accordance with the laws of any member state, but with the laws of England. I may observe here that this is a standard provision in many international trade agreements where a borrower is either a developing country or one of its citizens or corporations. Probably, such a clause is inserted in loan agreements in order to safeguard the interest of the lending institutions against supposed or perceived vagaries of the judicial systems of developing nations. By a plaint dated 26 February 1998, the Appellant averred that having fulfilled all the relevant conditions and terms of the loan agreement and on the strength of the facility agreement it procured goods from suppliers in the Republic of South Africa through the Nedband line of credit which bank, as the nominated or negotiating bank, required the Authority to Negotiate (ATN) from the PTA Bank in order to be able to contact the suppliers and to induce them to commence the process of shipping the goods to the Appellant. On 27 November 1997 the Appellant forwarded to the PTA Bank an application for the issue of an ATN, but the latter, it is further contended, refused to honour its part of the agreement and instead introduced new terms and conditions to the existing facility which terms were alleged to be extortionate, *mala fide* and unreasonable. Thus, it was pleaded, the PTA Bank was in fundamental breach of the agreement and was dishonest in its dealings, in word and deed, and had openly demonstrated commercially unacceptable conduct towards the Appellant in consequence of which it had suffered severe injury to its credit and reputation. It is also alleged that it suffered loss of profits. The Appellant sought, *inter alia* (a) injunctions against the PTA Bank restraining it from recalling or taking possession of the project; (b) special damages; and (c) general damages. On the same day of lodging the plaint, the Appellant took out a chamber summons under Order 39, Rules 1, 2, 3, 7 and 9 of the Civil Procedure Rules, seeking a temporary injunction against the PTA Bank from invoking the provisions of section 8.01 of the loan agreement which section mandated The PTA Bank, *inter alia*, to realise the securities issued under the loan agreement. The PTA Bank entered appearance under protest and on 10 March 1998, it filed its written statement of defence. It averred that: “ … 4. N o 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 (chapter 179) read together with legal notice number 265 of 26 May 1991 and The Charter. 5. W ithout 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. … 7. T his honourable court has no jurisdiction to hear this suit for the reasons stated above and also for the reason that the agreed law of contract was the Law of England and not the Laws of Kenya. Paragraph 49 of the plaint is specifically denied”. When the application was called to hearing in the superior court Mr *Muthoga*, counsel for the PTA Bank, raised the issue of jurisdiction. He argued that the PTA Bank cannot be impleaded in the municipal courts as it enjoyed statutory immunity from all suits and legal processes. The Learned Judge, Ole Keiwua J, acceded to the preliminary objection. He held that the superior court has no jurisdiction to entertain the suit since Parliament had knowingly and deliberately conferred upon the PTA Bank absolute immunity and therefore the court had no right whatsoever to override such a provision. It mattered not that the PTA Bank was engaged in commercial transactions. The Learned Judge then struck out both the application and the suit and dismissed them with costs. The gravamen of this appeal is that the Learned Judge was wrong so to hold. It is urged that he gravely erred in invoking absolute immunity for court process to a transaction of a private commercial nature; and that he ought to have considered current International Law trends on immunity from suits for both international organizations and sovereigns. The Charter of the PTA Bank sets out the following objectives: “The objectives of the bank shall be, among other things, to: (a) 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; (b) Promote the development of trade among the member states conducted in accordance with the provisions of the Treaty by financing, where appropriate, activities related to such trade; (c) Further the aims of the Common Market by financing, wherever possible, projects designed to make the economies of the Member States increasingly complimentary to each other; (d) Supplement the activities of National Development Agencies of the Member States by joint financing operations and by use of such agencies as channels for financing specific projects; (e) Co-operate, within the terms of this Charter, with other institutions and organizations, public or private, national or international, which are interested in the economic and social developments of the Member States; and (f ) Undertake such other activities and provide such other services as may advance the objectives of the Bank”. Legal Notice Number 265 of 1991, issued under the Privileges And Immunities Act, Chapter 179, Laws of Kenya (“the Act”) cited as “The Privileges of Immunities (Eastern and Southern African Trade Development Bank) Order 1991” gave to the PTA Bank the privileges and immunities specified in Part 1 of the Fourth Schedule to the Act limiting such privileges and immunities to the extent of exemptions made under article 23 of the First Schedule to the Act. Mr *Nyaencha*, counsel for the Appellant, submitted that since the PTA Bank had entered into a private (as opposed to public) commercial loan agreement with the Appellant it could not claim immunity from suits and legal process since it had drastically moved away from its stated objects and had acted as a private bank. He placed reliance on the following decisions: 1 *P lanmount Ltd v Republic of Zaire* [1981] 1 All ER 1110 2 *T rendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881. These cases referred to and reviewed several other cases relating to immunity from suits and legal processes. They discussed the doctrines of absolute and restrictive immunity and the modern trend in international law. They decided in the main that if a sovereign government-owned trading entity enters into private contracts, that entity is not immune from proceedings, that is, there is immunity for acts of a governmental nature but no immunity for acts of a commercial nature. Kenya is a party to numerous international arrangements providing for the legal status, privileges and immunities of international organizations and persons connected with them. The Charter of the United Nations stipulates that they should enjoy in the territory of each of the member states such privileges and immunities as are necessary for the fulfilment of their purposes, and that representatives of member states and officials of these bodies are similarly to enjoy such immunities as are necessary for the independent exercise of their functions. Local examples are, for instance, The World Bank, UNEP, IMF, WHO, *etcetera*. Where an organization is declared by the Act to be one of which Kenya and one or more foreign sovereign powers are members, then to the extent specified by the Act certain immunities and privileges may be conferred on such an organization. The immunities and privileges which may be conferred include, amongst others, immunity from suit and legal process. The order for conferment shall be effected by means of notice in the *Gazette* and by section 17 of the Act any order made thereunder must be laid in draft before Parliament and approved by resolution. Immunity from suit and legal process conferred on the PTA Bank and other similar organizations was necessary for the fulfilment of their purposes, for the preservation of their independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of their multinational functions only and not private functions. See *Mukuro v European Bank for Reconstruction and Development* [1994] 1 CR 897 at 903. Clause (f ) aforesaid of the objects of the PTA Bank is *ejusdem generis* with clauses (a) to (e) thereof, so that it can be said to widen the scope of the PTA Bank’s objects within the limits set out by clauses (a) to (e). This loophole enables the PTA Bank to also act and operate as a private bank. In my view, if The PTA Bank operates outside its mandate and objectives and acts as a private bank then it must, *a fortiori,* be subject to the laws of this country. I do not think that Parliament in its wisdom could have granted absolute immunity from suit and legal process to such a body or organisation if it was going to engage in purely private commercial activities and which had nothing whatsoever to do with member states. This would be prejudicial to the interests of Kenya and would be contrary to public policy. Looking at the matter as a whole, from another angle, the Minister by Legal Notice Number 265 of 26 May 1991, has deprived the High Court of Kenya of jurisdiction to hear and determine a suit whose cause of action properly arose in Kenya and the subject matter of the dispute being an immovable property situated in Kenya. By so doing, the Minister is effectively amending section 60 of the Constitution which gives the High Court unlimited original jurisdiction in civil matters. I would think that this is a dispute which properly belongs to the courts of this country and it should be adjudicated here. In *The Fehmarn* [1957] 2 Lloyd’s Report 551, Lord Denning said: “I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them”. I would adopt those words in full, substituting only, “the Courts of Kenya” for “the English courts”. I agree with Lakha JA that the right of access to the courts of this country may only be taken away by clear and unambiguous words of the Parliament of Kenya. For these reasons, I agree that this appeal succeeds, and I concur in the orders proposed by Lakha JA. **KWACH JA:** Tononoka Steels Ltd, the Appellant in this appeal (hereinafter called “the borrower”), sued the Eastern and Southern African Trade and Development Bank (the Respondent herein), which I shall hereinafter call “PTA 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 1 December 1994 and facility agreement dated 4 December 1996. The plaint is a ruling 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 LR number 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 KShs 79 125 839-00 as special damages. In a short defence dated 10 March 1998, filed by Muthoga Gaturu and Co Advocates on behalf of PTA Bank, the borrower’s claim was denied. In paragraphs 4 and 5 of the defence it was averred – “(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 Number 265 of 26 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 of 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 26 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 1 December 1994. The supporting affidavit, some 52 paragraphs long, was sworn by Elesh Natwarlal Ghalani, 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 9, which deals with Immediate Repayment, is to be found in the agreement dated 1 December 1994 not in the facility agreement of 4 December 1996 which is drawn in articles and in Roman numericals. 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 91 of his affidavit dated 5 March 1998 he deponed: “(7) It is provided in both the said agreements that they shall be governed by and construed in accordance with the Laws of England. … (9) 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 5 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 Number 265 of 1991 by Kenya’s Minister for Foreign Affairs and International Co-operation. 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 in whether the preliminary objection was sustainable in law. Although the borrower has put forward six 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) 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 co-operate, 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: “(1) To enable the Bank to achieve its objectives and perform the functions with which it is entrusted, the status, immunities and exemptions set act 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 legal 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 (Chapter 179) (“the Act”) the Minister for Foreign Affairs and International Co-operation by Legal Notice Number 265 dated 20 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: “(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 governments are members is declared to be an organisation to which section 9 of the Act applies. (3) The Bank shall have: ( *a*) t he legal capacity of a body corporate; and ( *b*) t he privileges and immunities specified in Part 1 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 981, a decision of the Court of Appeal in England, Shaw W said in the course of his judgment at page 909: “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 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 their 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 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 exoneration 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 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 favour 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 number 3 of the Plaintiff’s chamber summons dated 26 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 JA. For the Appellant: *Mr Nyaencha* For the Respondent: *Mr Muthoga*