26 April 2002
Reference No. 1B/2000

COMESA COURT OF JUSTICE

EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (PTA BANK) AND DR. MICHAEL GONDWE
v.
MARTIN OGANG

JUDGMENT

BEFORE: LORD PRESIDENT: K. R. A. Korsah
LORD JUSTICE: A. Nyankie; J. B. Kalaile; E. L. Sakala; J. J. Mutsinzi

Citation: PTA Bank v. Ogang, Reference No. 1B/2000, Judgment (COMESA-CJ 2, Apr. 26, 2002)

Represented By: FIRST APPLICANT: Mr. Peter S.G. Leon
SECOND APPLICANT: Mr. Salim Dhanji; David Mulira; Antali Thowri; Robert Simeza
RESPONDENT: Mr J. Nangwala; Mr R. Okallany

JUDGMENT OF THE COURT

Lord Justice KORSAH delivered the Judgement of the Court.

[1] On 15 April, 2002 the Applicants filed in the Registry of this Court an application for stay of proceedings in Reference No. 1B/2000 and praying for an order that the matter be heard de novo. The application is purported to be made under Rules 2(2), 74(1)(i) and 82 of the Rules of the COMESA Court of Justice, and Article 22 of the Treaty establishing COMESA.

[2] The affidavit in support of the application alleges (a); that the proceedings in Reference 1B/2000 are fatally flawed because of non-compliance with Rule 37 of the Rules of Court; (b) that the Judge President Lord Justice Akiwumi and Lord Justice Ogoola recuse themselves on the ground of apparent bias; and (c) attacking the competency of some of the findings of the panel of Judges hearing Reference No. 1B/2000.

[3] The Court was of opinion that the proper procedure for challenging the findings of a panel would be to have the matter concluded and if a party is aggrieved and dissatisfied with the

Judgement to take the matter on review. To seek a review of every finding of a panel on an interlocutory matter is an abuse of the process of the Court, which would lead to protracting the proceedings, and ought not to be countenanced. This Court, therefore, decided to entertain only the first two complaints of the application i.e. the procedural issue made under Rule 37 and the recusals for bias, and the success of either of which, would necessitate an order setting aside the proceedings in Reference No. 1B/2000.

[4] For ease of reference the particular Rules of Court and Article 22 upon which the Applicants rely for relief are set out in extenso hereunder.

[5] Rule 2 is entitled "Scope of Application," and sub rule (2) reads: -

"Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court."

[6] Rule 74 is entitled "Stay of proceedings" and Rule 74(1)(i) recites that: -

"1. The Court may stay proceedings at its own instance or on the application of a party to the proceedings or a party who, not being a party to the proceedings, establishes that it has a substantial interest in the subject matter of the action or will be adversely affected by the decision in the matter; or in any case, where -
(i) the Court finds it appropriate."

[7] Rule 82 deals with "Preliminary Applications" generally and only the first two subrules need concern us. They are as follows: -

"1. A party applying to the Court for a decision on a preliminary objection or other preliminary plea not going to the substance of the case shall make application by a separate document. The application must state the pleas of fact and law relied on and the form of order sought by the applicant and annex any supporting documents."

[8] Finally, in relevant part, Article 22 of the Treaty of COMESA provides that: -

"4. If a judge is directly or indirectly interested in a case before the Court, he shall immediately report the nature of his interest to the President, and if in his opinion the President considers the Judge's interest in the case prejudicial, he shall make a report to the Authority, and the Authority shall appoint a temporary Judge to act for that case only in place of the interested Judge.
5. If the President is directly or indirectly interested in a case before the Court he shall, if he considers that the nature of his interest is such that it would be prejudicial for him to take part in that case, make a report to the authority and the Authority shall appoint a temporary President, chosen in the same manner as the substantive President, to act as President for that case only in place of the substantive President."

[9] Returning then to Rule 37 of the COMESA Court rules (as amended), the non-compliance with which is said to vitiate the proceedings in Reference No. 1B/2000, the Rule reads:

PRELIMINARY REPORT AFTER REJOINDER

"1. (a) After the rejoinder provided for in subrule (1) of Rule 34 has been filed, the President may, if he thinks it desirable, determine a date on which he or any Judge designated by him shall present his preliminary report to the Court.
(b) The report under paragraph (a) shall contain recommendations as to whether a preparatory inquiry or any other preparatory step should be undertaken and whether the case should be referred to the full Court.
2. The Court shall decide, after hearing the parties what action to take upon the recommendation of the President or the Judge designated to make a preliminary report.
3. The same procedure shall apply-
(a) where no reply or rejoinder has been filed within the time limit determined in accordance with subrule (2) of Rule 34;
(b) where the party concerned waives his right to file a reply or rejoinder.
4. Where the Court decides to commence the proceedings without an inquiry, the President shall determine the commencement date.
5. Without prejudice to any special provisions laid down in these Rules, and except in the specific cases in which, after the pleadings referred to in subrule (1) of rule 33 and, as the case may be, in subrule (1) of Rule 34 have been filed, the Court, acting on a preliminary report after hearing the parties and with the express consent of the parties, decides otherwise, the submission before the Court shall also include an oral submission."

[10] Rule 34 merely provides that the Reference initiating the proceedings may be supplemented by a reply from the Applicant and by a rejoinder from the Respondent, and that the President shall, by order determine the time limits within which those pleadings are to be filed. So that, it is only if a reply and a rejoinder have been filed that the President may determine whether a preliminary report by a judge to the Court is necessary. In this Reference since no reply or rejoinder was filed the President did not have to order a preliminary enquiry under subrule 1 of the Rule 37. And under subrule 3 of Rule 37, the same procedure shall apply, where no reply or no rejoinder has been filed by the parties; that is to say the President may or may not order a preliminary enquiry. Subrule 4 of Rule 37 by providing that the President shall determine the commencement date of the Reference, where the Court decides to commence the proceedings without an enquiry, makes it abundantly clear that the determination of ordering a preliminary enquiry is a matter within the discretion of the President even when a reply and a rejoinder have been filed. It is fallacious to argue that a Preliminary inquiry shall be held under subrule 3 of Rule 37 when no reply or rejoinder have been filed. Indeed such an argument reduces the whole of Rule 37 to absurdity.

[11] The President is not enjoined by Rule 37 to hold a preliminary enquiry in every case where a reply or a rejoinder have been filed, a fortiori, he is not required to order a preliminary enquiry when no reply nor rejoinder have been filed by the parties. A gratuitous explanation of this rule was given by the Registrar of this Court in paragraph (b) of his letter dated 3 April 2001, addressed to the Applicant's solicitors at the time. It is clear to us that rule 37 in fact provides for the commencement of proceedings without the holding of a preliminary enquiry. Thus rule 37 was fully complied with and the want of a preliminary enquiry before the commencement of proceedings in Reference No. 1B/2000 does not vitiate the proceedings.

[12] This argument is nothing but a red herring intended to delay the expeditious hearing of Reference 1B/2000 for reasons that we cannot fathom. It is unmeritorious and accordingly fails.

[13] We now turn to the issue of bias levelled against the specified Judges of this Court. In support of their allegations against the Judges the Applicants averred that the Court has failed

to comply with the peremptory provisions of Article 22 of the COMESA Treaty above cited. However, Mr. Leon for the First applicant took us on an excursion through the English authorities, commencing with R v Gough [1993] 2 All E.R. 724 at 725 b – c where it was held that:

"Except were a person acting in a judicial capacity had a direct pecuniary interest in the outcome of the proceedings, when the court would assume bias and automatically disqualify him from adjudication, the test to be applied in all cases of apparent bias, whether concerned with justices, members of other inferior tribunals, jurors or arbitrations was whether having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard or have unfairly regarded with favour or disfavour the case of a party to the issue under consideration by him."

[14] It appears at page 728b of the report that in their deliberations, the Court of Appeal identified two tests, which had been variously described. The first was, whether there was a real danger of bias on the part of the person concerned or secondly, whether a reasonable person might reasonably suspect bias on his part. The second of these approaches is based on the principle of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[15] In Halsbury's Laws of England, 4th edition, 2001 Reissue, Volume 1(i), under the head "The rule Against Bias" at page 226 in paragraph 97 appears the following: -

"97. Direct personal interest and apparent bias. It is a fundamental rule, often expressed in the maxim nemo judex in causa sua, that, in the absence of statutory authority or consensual agreement or the operation of necessity no man may be a judge in his own cause.
At common law the above rule is applied in two broad categories of cases: first where an adjudicator has either a direct pecuniary or proprietary interest in the outcome of the matter or can otherwise by reason of a direct personal interest be regarded as being a party to the action, and second, where either by reason of a direct form of interest or by reason of his conduct or behaviour there is a 'real danger' of bias on his part."

[16] We now turn to the allegations made by the Applicants against Mr. Justice Akiwumi.

[17] According to the Respondent (Martin Ogang), at a Board of Directors meeting in April 1995 held in Nairobi, Kenya, the 2nd Applicant delivered an opinion, which the Respondent was unhappy with. The Respondent then addressed an internal memo dated 29th September, 1995 to the 2nd Applicant – Annexure A. That memo reads in relevant part:

"You will recall that Management had been requested to render opinion on who can vote at the Board and the procedures for the vote. I was not happy with the opinion and the way it was rendered; but at that time we had more urgent and important things to tackle. It was evident that the opinion was politically motivated and this is also confirmed by the clandestine manner in which it was distributed. Essentially, the opinion concluded that any member of the Board can vote. The undesirable implication of this is that:
1. The Board of Director's meeting becomes a Shareholders meeting; and
2. The principle of rotation has no meaning, particularly for the small countries who cannot exercise the votes of the major shareholders.
For the good of this institution going forward, this unfortunate conclusion will have to be corrected and can only be done legitimately by an independent person. Consequently, you are

hereby directed to put together all the material on this subject for me to review on my return. Then I will decide on the next course of action.
cc. Mr. E. Bizabigomba
Corporate Secretary"

[18] The Respondent said he solicited a second opinion from Mr. Bizabigomba, who was a lawyer and corporate Secretary of the 1st Applicant and that Mr. Bizabigomba delivered a contrary view on the same matter. The Respondent averred that the 2nd Applicant informed him that Mr. Justice Akiwumi was instrumental in preparing the first draft of the Charter of the 1st Applicant, and that he, the 2nd Applicant, had the opportunity to work with Mr. Justice Akiwumi on the draft Charter. The Respondent said it was this information that prompted him to seek an opinion from Mr. Justice Akiwumi to resolve the issue. We are inclined to believe this averment by the Respondent, as working with Mr. Justice Akiwumi on the draft Charter was, then, information peculiarly within the knowledge of the 2nd Applicant.

[19] The Respondent's account receives support from the following letter dated 28th May, 1996 addressed to the Attorney General on behalf of the 1st Applicant.

"28th May, 1996
Hon. Amos Wako
Attorney General
Attorney General's Chambers
Sheria House
P.O. Box 40112
NAIROBI
Dear Hon. Attorney General,
RE: REQUEST FOR LEGAL SERVICES FROM THE
HON. MR. JUSTICE A.M. AKIWUMI
I have the honour to submit a request for legal services from Hon. Mr. Justice A. M. Akiwumi. For some time now the operations of the Eastern and Southern African Trade and Development Bank (the PTA Bank) has been severely hamstrung by the conflicting interpretations that have been given with respect to the composition and voting powers of the members of the Board of Directors of the Bank which has the important function of being responsible for the conduct of the general operations of the Bank.
It is fortunate that the author of the PTA Treaty which gave birth to the Charter of the PTA Bank, the Hon. Mr. Justice A.M. Akiwumi, is in Nairobi. He is more than anybody else, better placed to give an authoritative interpretation of the relevant provisions of the Charter and so put an end to the existing wrangling and debilitating state of affairs at the Bank.
I am told that you are the right person through whom the necessary permission of the Chief Justice for the Hon. A.M. Akiwumi to render to the Bank the necessary assistance as a Consultant, can be obtained. There is precedence for this when he rendered invaluable service to the PTA in the drafting of the COMESA Treaty. It is envisaged this time, that the Judge will only be required to spend one day namely on June 16, 1996 in attending the next meeting of the Board of Directors to explain the legal effect of the Articles of the charter concerned. The Bank will be responsible for the expenses that would be involved in the services that will be rendered by the Judge.
I would be most grateful, therefore, if you would secure for the Bank, the services of the Hon. Mr. Justice A. M. Akiwumi to prepare the necessary legal opinion and to present it to the Board of Directors of the Bank. Please let me hear from you at your earliest convenience.
Yours sincerely,

Martin Ogang
President"

[20] This is an official letter requesting the Attorney General to release Mr. Justice Akiwumi to render special service to an institution of COMESA. And after Justice Akiwumi had performed the service required of him by the 1st Applicant, the Respondent wrote to thank the Attorney General on behalf of the 1st Applicant.

"5th October, 1996
The Hon. Amos Wako EBS EGH MP
Attorney General
Attorney General's Chambers
Sheria House
P.O. Box 40112
NAIROBI
Dear Hon. Attorney General
RE: BOARD OF DIRECTORS OF THE EASTERN AND SOUTHERN AFRICA TRADE AND DEVELOPMENT BANK - COMPOSITION, PROCEDURE AND VOTING POWERS
I have the honour to thank you most sincerely for releasing the Hon. Mr. Justice Akiwumi to look into the existing legal and constitutional problems concerning the composition and jurisdiction of the Board of Directors of the Eastern and Southern Africa Trade and Development Bank. Justice Akiwumi has produced an impeccable legal analysis of these problems and made proposals for their solution. This is not surprising, having regard to the important role which the judge played in the establishment of the Bank and with respect to the subsequent Treaty Establishing the Common Market for Eastern and Southern Africa. Thank you very much for your making possible Justice Akiwumi's assistance to the Bank.
As I had earlier intimated in my letter of 28th May 1996, it may be necessary for Justice Akiwumi to attend the meeting of the Board of Governors and Board of Directors of the Bank where the above issue will be discussed. As soon as I know when such a meeting will take place, I will let you know well in advance so that Justice Akiwumi can attend. Your continued co-operation is appreciated with thanks.
Yours sincerely,
Martin Ogang
President
c.c. Chief Justice
The Hon. Mr. Justice A.M. Cockar, Nairobi"

[21] Copies of these letters must be in the records of the 1st Applicant. The 2nd Applicant, with the exercise of the little diligence, could have unearthed them and discovered the true position as to the fact that Mr. Justice Akiwumi was released by the Attorney-General and the Chief Justice to render professional services to the 1st Applicant. Has either of them refused, Mr. Justice Akiwumi could not have rendered those services to the 1st Applicant. In the result, Mr. Justice Akiwumi was not performing services to the 1st Applicant because he was a friend of the Respondent, but because he was obliged to do so at the request of the Attorney General and the Chief Justice. There is no doubt in our minds that the 2nd Applicant was being mischievous and mendacious when he deposed that:

"In any event, I thought it extremely odd that a sitting Judge of Appeal Court in Kenya was providing legal opinion to the Respondent in his capacity as the President of the 1st Applicant."

[22] If he did not already know, the true facts were in the records of the 1st Applicant and he could, with due diligence, have accessed them, instead of making spurious unfounded allegation against the reputation of a Judge.

[23] The Respondent denies that he asked the 2nd Applicant to discus with Mr. Justice Akiwumi the matter of the immunity of the 1st Applicant. In a statement filed by Mr. Justice Akiwumi, he states that in September 1999, the 2nd Applicant, and not the Respondent, invited him to lunch, during which he asked Mr. Justice Akiwumi what could be done in respect of the Kenya Court of Appeal decision given in the case of Tononoka Steels Ltd v. The Eastern and Southern Africa Trade and Development Bank Civil Appeal No. 255 of 1998. Mr. Justice Akiwumi states that he told the 2nd Applicant that if the Bank was so inclined, it could seek redress under the COMESA Treaty.

[24] The mendacity of the 2nd Applicant inclines us to believe what the respondent says in this regard. In any event the Tononoka case is not before this Court for adjudication and what was said about that case has nothing to do with the present application and need not tax our minds.

[25] Mr. Leon, for the Applicants contended, in support of bias on the part of Mr. Justice Akiwumi, that the Judge signed the Record of the Court's proceedings of 16th and 17th October, 2001, in accordance with Article 37(2) of the COMESA Treaty and Rule 46(1)(b) of the Rules of the Court, as the official record of such proceedings, when the record was inaccurate and untrue in significant and material aspects and thus false. When Mr. Leon was asked whether he was present at those proceedings he replied in the negative. When also asked whether he had listened to the tape recording of the proceedings which the Applicants seek to impugn, Mr. Leon confessed that he had not. The Court was appalled that counsel, who was not present at the proceedings, nor listen to a tape recording of the proceedings, could glibly aver that the Judge President has appended his signature to proceedings that were false as a true record of proceedings. Counsel was, in the circumstances, obliged to withdraw this submission and apologise to the Court. It is such deeds of mischief that make manifest the mendacity of the 2nd Applicant in alleging bias against Mr. Justice Akiwumi.

[26] There is no evidence on record in substantiation of the allegation by the 2nd Applicant that Mr. Justice Akiwumi and the Respondent were bosom friends. In the fact the evidence tends to suggest that they were dealing with each other professionally and at arms-length.

[27] Even if the principles regarding bias enunciated in the English cases were applied to the allegations levelled against Mr. Justice Akiwumi, it cannot be said that any reasonable person might reasonably suspect bias on his part.

[28] Furthermore, in paragraph 101 of Halsbury's Laws of England 4th edition (supra), dealing with Waiver and acquiescence, appears the following: -

"The right to challenge proceedings conducted in breach of the rule against bias may be lost by waiver, either express or implied. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. However, once these conditions are met a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity. The same principles apply where an adjudicator is subject to a statutory disqualification if that disqualification is merely declaratory of an existing common law disqualification. In the case of a new statutory

disqualification, there appears to be a presumption that regularity cannot be conferred by waiver or acquiescence, but a party failing to take objection may be refused relief if he seeks a discretionary remedy when subsequently impugning the proceedings." (emphasis added)

See R V., Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (2) [1999] 1 AII E.R 577 at 581g.

[29] This reference was filed on 20th January, 2000. Several applications have been entertained in respect thereof over the past two years. The 2nd Applicant has at all times been conversant with allegations of the link or lack of it, between Mr. Justice Akiwumi and the Respondent, but failed to raise the issue of the likelihood of bias. Even if we had found, which we have not, that Mr. Justice Akiwumi was disqualified, as a result of the likelihood of bias, to sit on this Reference as an adjudicator, as the 2nd Applicant was fully aware of the nature of the disqualification alleged, and had an adequate opportunity of objecting, but failed to do so, at the earliest practicable opportunity, the Applicants have lost, by waiver, their right to challenge under the common law, the proceedings conducted in this Court in respect of which Mr. Justice Akiwumi, in any way, participated.

[30] The allegations made against Mr. Justice James Ogoola are different from those against Mr. Justice Akiwumi. The 2nd Applicant's allegations are, essentially to the effect that Mr. Justice Ogoola is a friend to the Respondent.

[31] The facts to be gleaned from the papers before us are that during the period that the Respondent worked at the African Development Bank from December, 1977 to June, 1992, Mr. Justice Ogoola worked in the Legal Department of the Bank as a Deputy Director for a period of 2 years. Mr. Justice Ogoola left the African development Bank to return to the International Monitory fund in the Untied States in 1991. Thus Mr. Justice Ogoola and the respondent were colleagues at the African Development Bank from around 1989 to 1991. Since their A.D.B. days Mr. Justice Ogoola and the Respondent had met only once or twice, and only fleetingly.

[32] The 2nd Applicant averred that soon after the inauguration of the COMESA Court of Justice in or around September 1999, he was requested by the Respondent to take Mr. Justice Ogoola to a Sunday lunch in Nairobi and to seek Mr. Justice Ogoola's advice as to what cause of action the 1st Applicant should take regarding the reclaiming of the immunity of the 1st Applicant since the decision of the Kenya Court of Appeal stripped it of such immunity in the Tononoka Case (supra). The 2nd Applicant averred that he was advised by the Respondent that Mr. Justice Ogoola was passing through Nairobi en route to Kampala and that he had spent the night at the house of the Respondent. This piece of information was not denied by either the Respondent or Justice Ogoola and we therefore accept it as true.

[33] Knowing that Mr. Justice Ogoola and the Respondent were colleagues at the A.D.B. as far back at 1989, and knowing also that Mr. Justice Ogoola stayed at the Respondent's house while en route to Kampala, the question to be asked is: whether a reasonable person might reasonably suspect bias, if a matter in which the Respondent as a party was being adjudicated by a tribunal whereof Mr. Justice Ogoola is a member.

[34] The test is not whether Mr. Justice Ogoola can disabuse his mind of any knowledge he may have of the Respondent. But rather that: whether a reasonable man, having this background information, would reasonably suspect the possibility of bias on the part of Justice Ogoola. We do not for a moment doubt that Mr. Justice Ogoola is a man of integrity and would

not allow his prior acquaintanceship with the Respondent to cloud his judgement, but the fundamental rule of the law that: justice should not only be done, but should be manifestly and undoubtedly be seen to be done, must apply. We are therefore of the opinion that Mr. Justice Ogoola should have recused himself or disclosed his interest in matter to the Court, that he enjoyed bed and board at the Respondent's home.

[35] However, under the Common Law, two years or more have elapsed since the matter was commenced. The 2nd Applicant should have objected to Mr. Justice Ogoola's presence on the panel at the earliest practicable opportunity or forever afterward hold his peace, for he is deemed to have waived his right to object, or acquiesced in the continuance of the proceedings. Thus under the Common Law the 2nd Applicant cannot be heard to object to the presence on the panel of Mr. Justice Ogoola.

[36] In our view, under paragraph 5 of Article 22 (supra) the judge President Mr. Justice Akiwumi, had no personal, pecuniary or proprietary interest in the subject matter of this case which would make it prejudicial for him to take part in the adjudication of the case. His participation in the drafting of the Applicant's Charter, and, indeed, of the Treaty of COMESA rather than disqualifying him from sitting, fortifies the Court in its understanding of the provisions of these pieces of legislation.

[37] We have stated earlier that Mr. Justice Ogoola should either have recused himself or, at the very least, disclosed his acquaintanceship with the Respondent to the Court, because justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[38] We are of the view that Mr. Justice Ogoola should have disclosed the nature of his acquaintanceship with the Respondent to the President for his consideration. We are of opinion that the interests of justice would be better served if Mr. Justice Ogoola takes no further part in this Reference.

[39] Paragraph 4 of Article 22 is a disqualification imposed by Statute, therefore, as stated in Halsbury (supra),

"In the case of a new statutory disqualification, there appears to be a presumption that regularity cannot be conferred by waiver or acquiescence, but a party failing to take objection may be refused relief if he seeks a discretionary remedy when subsequently impugning the proceedings."

[40] It follows, therefore, that the proceedings, thus far, in Reference 1B/2000 in which Mr. Justice Ogoola participated, are irregular and must be set aside. Reference No. 1 B/2000 is referred to the Judge President for his consideration under Article 22.

[41] It is so ordered.

[42] Dated 26th day of April, 2002

K. R. A Korsah
Lord Justice

A. Nyankiye
Lord Justice

J.B. Kalaile
Lord Justice

E. L. Sakala
Lord Justice

J.J. Mutsinzi
Lord Justice