Shah & another v Chase Bank Limited (In Liquidation) & another (Civil Case E703 of 2021) [2024] KEHC 9205 (KLR) (Commercial and Tax) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9205 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E703 OF 2021

JWW MONG'ARE, J

JULY 30, 2024

BETWEEN

RASHIK KUMAR PUNJA SHAH .... 1ST PLAINTIFF

MITTUN SHAH .... 2ND PLAINTIFF

AND

CHASE BANK LIMITED (IN LIQUIDATION) .... 1ST DEFENDANT

KENYA DEPOSITOR INSURANCE CORPORATION .... 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. On various dates in 2015, the Plaintiffs, as customers of the 1st Defendant ("the Bank") opened and operated current and fixed deposit accounts with the Bank. Subsequently, the Plaintiffs took out loans of Usd 1,300,000.00 and Usd 1,050,000.00 from HDFC Bank, Bahrain ("HDFC"), both secured by Stand By Letters of Credit (SBLC) issued by the Bank. As collateral for the SBLCs, the Bank took liens as well as pledges over the fixed deposits. Exercising its powers under sections 43(1), 43(2) and 53(1) of the *Kenya Deposit Insurance Act*(Chapter 487C of the Laws of Kenya) ("the KDI Act"), on 7th April 2016, the Central Bank of Kenya ("CBK") placed the Bank under receivership and appointed the 2nd Defendant ("KDIC") as its Receiver Manager'', triggering a moratorium on payments and interest. On 8th October 2018, HDFC wrote to KDIC calling for payment of the then outstanding amounts of the loans advanced to the Plaintiffs in accordance with the terms of the SBLCs. The Plaintiffs claimed that in November 2016 CBK announced that the Bank's depositors would receive up to Kshs.1,000,000.00/= of their deposits. By their joint Press Release dated 17th April 2018, CBK and KDIC informed depositors of the Bank that the 75% of the value of deposits had been transferred to SBM Bank (Kenya) Limited ("SBM Bank").

2. By an amended Plaint dated 11th August 2021, the Plaintiffs filed this suit against the Defendants claiming that further to the aforementioned announcement, the Plaintiffs were informed that their deposits could not be released until such time as the Bank would be released from its obligations as a Guarantor under the SBLC facilities. However, that the Defendants did not recognize the Plaintiffs as depositors but "secured creditors" and yet the aforementioned press release did not make any exceptions for certain depositors whether classified as "secured creditors" or some other designation being exempt from this. That neither Plaintiffs was informed that they did fall within this scheme, on KDIC's reading of the provisions of the *KDI Act*, that they were not regarded as depositors, but "secured creditors."

3. The Plaintiffs claimed that six months later, neither of them had received anything, or for that matter, any communication as to the status of their deposits and that on 16th October 2018, the 1st Plaintiff wrote to the CEO of KDIC to release his unencumbered amount of the deposit but nothing materialized. The Plaintiffs claimed that they were then informed that they were to be paid their deposits once the Bank was discharged from its obligations under the SBLCs to HDFC. However, the Plaintiffs claim that these were fraudulent misrepresentations as the Defendants never intended to pay the said deposits and they further accused the Defendants of breach of contract, unlawful discrimination, breach of duty, loss and damage. For these reasons, they pray for the following:-

   a. A declaration that the Plaintiffs are Depositors rather than Creditors of the 1st Defendant Bank;

   b. An order halting any planned or pending liquidation of the 1st Defendant Bank pending the settlement of the prayers awarded;

   c. In the alternative and without prejudice to prayer (b) above preservation of the plaintiff's deposits, or an amount equivalent to the plaintiff's deposits;

   d. The value of the deposits placed in the Plaintiffs bank account held with the 1+ Defendant Bank being Kshs .145,864,438.35/= and Kshs .122,821,366.45/=;

   da) The sum of Kshs .197,606,022.00/= for the 1st Plaintiff and Kshs .195,986,304.00/= for the 2nd Plaintiff in compound interest as at 31st July 2021(computed as per the attached schedule) on their deposits above at the rate of 16% and 18% respectively from the date of deposit of the amounts as damages for loss of use of the sums deposited;

   db) Further interest on said deposits at the rate of 16% and 18% from 1st August 2021 until payment in full as damages for loss of use of the sums deposited;

   e. Damages for breach of contract;

   f. Damages for breach of the defendant's statutory duty to the plaintiffs.

   g. Interest over the deposits at (c) and (d) above at the rate of 16% and 18% from the date of deposit of the amount until payment in full;

   h. Costs; and

   i. Any other relief that this Honourable Court may deem fit to grant

4. The Defendants entered appearance and filed a statement of defence dated 14th September 2021. The Bank stated that it was under obligation to HDFC for the whole amount demanded under the SBLCs. That on 6th December 2016 and 27th January 2017, HDFC wrote to the Bank informing it that it was drawing under the said SBLCs due to the default of the Plaintiffs and called on the entire sums secured therein. As such, the Defendants state that the Plaintiffs' fixed deposits were therefore not assumed by

SBM Bank as SBM Bank only acquired unencumbered deposits in the acquisition. The Defendants also disputed the Plaintiffs' claim that the matured funds were placed back under fixed deposit terms for a period of 91 days with auto-rollover and they state that the same were only placed under fixed deposit terms upon express and written instructions of the Plaintiffs.

5. The Defendants denied that they made representations to the Plaintiffs that their deposits would be released to them once the Bank was released from its obligations as guarantor under the SBLCs. They instead state that there was already a moratorium on all payments while the Bank was under receivership effective 7th April 2016 vide Gazette Notice No. 2321. The Defendants state that the Plaintiffs were secured creditors and that they could only lodge a claim for payment with the liquidator as other creditors of the Bank subject to sections 33 and 57 of the *KDI Act*. The Defendants averred that although the deposits were no longer held as lien by the Bank after HDFC released it from its obligations under the SBLCs, the amounts remained secured credits.

6. The Defendants state that there was no demand for repayment of contractual interest rates on the Plaintiffs' deposits and that no interest was payable after the moratorium was in force. As such, there was no refusal to pay and the Defendants reiterated that the Plaintiffs ought to have lodged a claim for payment with the Liquidator as secured creditors. The Defendants deny the aforementioned claim by the Plaintiffs that the CBK announced in November 2016 that they were to release deposits to the Bank's depositors in two tranches. The Defendants state there was already a moratorium on all payments while the Bank was under receivership and that in any event, the Plaintiffs would not have been entitled to the alleged scheme of release of deposits as their deposits were still held as lien and were thus encumbered funds.

7. The Defendants thus denied the allegations of misrepresentation, breach of contract, unlawful discrimination, breach of duty and loss and damage as presented by the Plaintiffs. KDIC averred that it is a reputable institution that "would not purport to mislead a depositor in the gross manner alleged by the Plaintiffs". The Defendants state that the value of the Plaintiffs' deposits held with the Bank are Kshs . 145,864,438.35 and Kshs .121,000,000.00/= respectively and that this suit is premature as the Plaintiffs ought to lodge a claim for payment with the Liquidator as other creditors of the Bank subject to sections 33 and 57 of the *KDI Act*. The Defendants further state that the Plaintiffs are not entitled to any interest over and above the terms of the Term Deposit Contract advices to the Plaintiffs dated 30th March 2015 and 14th March 2016 which advices the Defendants claim were relied on by the Plaintiffs in HC Misc. Application No. E1200 of 2020. That the Plaintiffs were only entitled to interest in the net sum of Kshs .4,932,290.41/= and Kshs .4,603,374.76/= respectively and not Kshs .197,606,022.00/= and Kshs .195,986,304.00/= as claimed as the matured funds would only be placed back under fixed deposit terms on the express and written instructions of the Plaintiffs. That as at the time the said funds matured on 10th June 2016, the Bank was already under receivership and as a result, the same could not be placed back under fixed deposit terms and therefore, no interest could accrue on the deposits. Further, that 2nd Plaintiff had not given any express and written instructions to the Bank to place back his matured funds under fixed deposit terms.

8. For these reasons, the Defendants stated that the suit lacks merit, is an abuse of the court process and that it is contra statute as the Plaintiffs seek preferential treatment in consideration of claims by all creditors of the Liquidator. They thus urge the court to dismiss the suit with costs.

9. At the hearing, the Plaintiffs testified on their own behalf as PW 1 and PW 2 respectively whereas the Defendants called Geoffrey O. Nyakundi, the Bank's liquidation agent (DW 1). The parties also produced their respective list and bundle of documents as evidence. In addition to their pleadings and after the hearing, they also filed written submissions. Since the parties gave evidence and submitted

along the lines I have already highlighted above, I do not wish to rehash the same but I will make relevant references in my analysis and as per the list of agreed issues dated 14th June 2022.

Analysis and Determination

10. In determining this suit, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* which provides that:- "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". In *Miller .v. Minister of Pensions* 1947 ALL E.R 372, Lord Denning aptly summarised the application of the standard in the following terms:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

11. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd* CA Civil Appeal No 365 of 2017 [2019] eKLR simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'

12. As stated, the parties agreed on the issues to be determined by the court and I will deal with each of them sequentially as follows:-

    1. Whether the 1st and 2nd Defendants have breached their contractual obligations to the Plaintiffs
    2. Whether :-
        i. the Defendants are guilty of misrepresentation as alleged in the Amended Plaint
        ii. If the answer to 2(i) is in the affirmative, what relief are the Plaintiffs entitled to
    3. Whether the 2nd defendant has breached its statutory duty to the Plaintiffs
    4. Whether the Defendants have discriminated against the Plaintiffs in the discharge of their duties in the course of the receivership
    5. Whether the Plaintiffs are seeking preferential treatment contrary to section 50(9) of the *KDIA Act*
    6. Whether the Plaintiffs are entitled to the reliefs sought
    7. Who bears the costs of this suit

Whether the Defendants have breached their contractual obligations to the Plaintiffs

13. It is common ground that as per the Gazette Notice No. 2321 of 2016 dated 7th April 2016, KDIC declared that "...with effect from the 7th April 2016 and until such a time as normal operations of Chase Bank Limited shall have resumed, a moratorium shall apply equally and without discrimination

to the liabilities of Chase Bank Limited. Accordingly – (a) no deposits on any types of accounts operated by Chase Bank Limited (in receivership) shall be paid nor shall any claims by any other class of creditors be met". The Defendants stated that they could not pay out the Plaintiffs' deposits owing to this moratorium in as such much as the Plaintiffs had settled their loan with HDFC and the Bank released from its obligations. Going through the aforementioned Gazette Notice, I am in agreement. Indeed, the Bank was expressly directed, without exception, not to pay any deposits on any type of accounts(including fixed deposit accounts) until such a time when the moratorium was lifted. By the time the Plaintiffs' fixed deposits were not under a lien by the Bank in 2019, the moratorium was still in effect. The Defendants produced evidence that as of 2021, the Bank's financial position was still precarious and there was no indication that the April 2016 moratorium had been lifted to allow for the payment of deposits. The Defendants further produced evidence of a press release of May 2021 whereby it called for eligible depositors to apply to the Liquidator for payment of "protected deposits". It was communicated that only insured deposits up to a maximum of Kshs .500,000.00/= would be paid immediately upon verification and that balances of deposits above the insured threshold and other creditors' claims would be paid equitably as and when the Liquidator accumulates sufficient funds from the liquidation process.

14. Whereas the Plaintiffs pleaded that there was an announcement by the CBK in the month of November 2016 that there would be a release of deposits of the Bank's depositors in two tranches, no such evidence was presented. Further, whereas the Plaintiffs stated and submitted that some depositors like themselves were being paid by the Defendants at this time when the moratorium was still in effect and thus discriminatory, no such evidence was also produced. There was also no evidence that the Defendants ever represented to the Plaintiffs that the deposits would be paid during the period of the moratorium. The Plaintiffs' evidence of an SMS from one Javan Ndonga was disowned by DW1 who stated that all formal communication between the parties was by way of email and that by DW 1's letter of 17th November 2018 on behalf of KDIC, the Defendants' position remained that the Plaintiffs were classified as "secured creditors".

15. It is therefore my finding that there was no breach of contract, discrimination or misrepresentation by the Defendants when they did not pay the Plaintiffs' deposits during the time when the moratorium of 7th April 2016 was still in effect. This finding collapses all the other agreed issues for determination and I find in the affirmative that the Plaintiffs are indeed seeking preferential treatment contrary to section 50(9) of the *KDI Act* which ranks liabilities of different entities and persons with "any other creditors" falling last in the ranking. Since there was no other evidence by the Plaintiffs to displace them from their classification as "secured creditors" by the Defendants, they could not be ranked any higher or be given any preferential treatment. It would also be an affront of section 50(2)(a) of the *KDI Act* to order KDIC to pay the Plaintiffs' deposits and interest therein as this would amount to usurping the powers of KDIC as the Liquidator and going against the moratorium which is to be applied equally and without discrimination to all classes of creditors (see *Doshi & another v Central Bank of Kenya (CBK) & another* (Commercial Case 36 of 2016) [2022] KEHC 17070 (KLR)]

16. To this end, I am in agreement with the Defendants that this suit was premature and the Plaintiffs ought to follow the procedure set out in the *KDI Act* and KDIC's notice of 10th May 2021 of applying for the payment of their deposits.

Conclusion and Disposition

17. For these reasons, I find that the Plaintiff's suit against the Defendants lacks merit and ought to be dismissed in its entirety with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of

Mr. Mwangi for the Plaintiff.

Ms. Ahomo for the Defendant.

Amos - Court Assistant