



REPUBLIC OF KENYA



Chase Bank Limited (IR) & another v Nanda Properties Limited (Civil Appeal E429 of 2023) [2024] KEHC 13336 (KLR) (Civ) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E429 OF 2023

AN ONGERI, J

OCTOBER 29, 2024

BETWEEN

CHASE BANK LIMITED (IR) 1ST APPELLANT

KENYA DEPOSIT INSURANCE CORPORATION 2ND APPELLANT

AND

NANDA PROPERTIES LIMITED RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 6/12/2023 brought under Article 50 and 159 of *the Constitution* of Kenya, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 rule 1 and Order 51 rule 1 of the Civil Procedure Rules, 2010, Section 44(2) (b), Section 45(5) and Section 56(1) and (3) of the *Kenya Deposit Insurance Act* and all enabling provisions of the law seeking the following orders;
 - i. That on the grounds more specifically set out in the Certificate of urgency filed herewith this Application be certified urgent and service thereof be dispensed within the first instance.
 - ii. That this Honourable Court be pleased to vacate, set aside, review and/or vary the order issued by Honourable Lady Justice Asenath Ongeri on 10th August, 2023 and all consequential orders to wit,

“That stay of execution is granted on condition that the entire decretal sum is deposited in court within forty-five days of this date.”
 - iii. That this Honourable Court be pleased to grant an unconditional order of stay of execution of the Judgement of the Honourable Lady Justice Wendy K Micheni delivered on 28th April, 2023 in CMCC No. 4648 of 2017-Nanda Properties vs. Chase Bank Limited (In



Receivership) & 2 Others and all consequential orders arising therefrom pending the hearing and determination of the Appeal.

- iv. That the costs of and incidental to this Application be provided for.
2. The application is based on the following grounds;
3. That the Respondent herein instituted the suit being CMCC No. 4648 of 2017 -Nanda Properties vs. Chase Bank Limited (In Receivership) & 2 Others vide an Amended Plaintiff and judgement was delivered on 28th April, 2023 in favour of the Respondent as prayed for in their Plaintiff.
4. That being aggrieved by the said decision, the Appellants/Applicants lodged an Appeal vide the Memorandum of Appeal dated 26th May, 2023 and subsequently, filed the Notice of Motion Application dated 9 August,2023 seeking stay of execution of the judgement delivered at the lower court pending hearing and determination of the lodged Appeal.
5. That pursuant to the said Application, the Honourable Lady Justice Asenath Ongeru issued an order on 10th August, 2023 granting stay of execution of the judgement delivered by Honourable Micheni on condition that the entire decretal sum be deposited in court within forty-five days from the date of the order.
6. That the Appellant/Applicants' efforts to comply with the Honourable Court's conditional orders of depositing the decretal amount in court within Forty-Five (45) days have proved futile as the 1st Appellant/Applicant is no longer an existing entity in law by virtue of the appointment of the 2nd Appellant/Applicant as its liquidator and the revocation of its license vide Gazette Notice No. 3651 and 3652 of 16th April, 2021 respectively.
7. That as it stands, the 1st Appellant/Applicant is not in any capacity to comply with the court's order of depositing the decretal sum in court.
8. That worthy of note is that the issues in contention and the backbone of the suit at the lower court were issues between the 1st Appellant/Applicant and the Respondent.
9. THAT the 2nd Applicant/Appellant was joined to the suit vide leave of court granted on 1st April, 2019 pursuant to the Respondent's Notice of Motion Application dated 18th February, 2019.
10. That the Respondent only sought to have the 2nd Appellant/Applicant and SBM Bank(K) Limited joined to the suit as a way of securing their interests as they were not aware who between the 2nd Appellant/Applicant and SBM Bank (K) Limited had taken over the Plaintiff's claim.
11. That the role of the 2nd Appellant/Applicant in the suit was in its capacity as the receiver of the 1st Appellant/Applicant in accordance with section 44(2)(b) of the [Kenya Deposit Insurance Act](#) as it assumed control as a receiver of some of the assets, liabilities, businesses and affairs of the 1st Appellant/Applicant.
12. That having assumed control of the 1st Appellant/ Applicant, the 2nd Appellant/applicant is deemed an agent of the 1st Appellant/applicant and thus cannot be held to have assumed or incurred any obligation or liability of the 1st Appellant/Applicant.
13. That moreover, according to section 56 of the [Kenya Deposit Insurance Act](#), no cause of action which subsisted against the directors, management or the 1st Appellant/Applicant prior to liquidation shall be maintained against the liquidator.



14. That the said section further provides that execution cannot take place against the 1st Appellant/Applicant.
15. That in view of the foregoing, there are sufficient reasons for this Honourable Court to review its Ruling and Orders as sought by the Applicant so as protect the interests of all parties in resolution of the issues raised while the Appeal is still pending before Court.
16. That if the orders sought herein are not granted, the Respondent will seek to execute against the Applicants whereas they are precluded by law from doing so.
17. That such extreme and highly prejudicial consequences before the hearing and determination of the Appeal would subvert the ends of justice and render the Appeal nugatory.
18. That the Respondent will not be prejudiced in any way whatsoever if the instant Application is allowed.
19. That the Applicants have the right to be heard on appeal as envisioned under Article 50 of *the Constitution* and pursuant to the rules of natural justice.
20. The application is supported by the affidavit of Geoffrey Nyakundi dated 6/12/2023. In it he deponed that on 10/8/2023 this court granted a stay of execution of judgement delivered in the lower court on condition that the entire decretal sum be deposited in court within 45 days from the date of the order. The applicants/appellants efforts to comply with the court's orders were futile as the 1st appellant is no longer an existing entity in law by virtue of the appointment of the 2nd appellant as its liquidator and the revocation of its licence vide Gazette Notice No. 3651 and 3652 of 16/4/2021.
21. He stated that the issues in contention and the backbone of the suit at the lower court were issues between the 1st appellant/applicant and the respondent. the 2nd appellant/applicant was joined to the suit vide leave of court granted on 1/4/2019.
22. That the respondent only sought to have the 2nd appellant/applicant and SBM Bank (k) Limited join the suit as a way of securing their interests as they were not aware who between the 2nd appellant/applicant and SBM Bank has taken over the Plaintiff's claim. the role of the 2nd appellant/applicant in this suit was in its capacity as the receiver of the 1st appellant/applicant.
23. That having assumed control of the 1st appellant/applicant the 2nd appellant/applicant is deemed an agent of the 1st appellant/applicant and thus cannot beheld to have assumed or incurred any obligation or liability of the 1st appellant/applicant.
24. He stated that section 56 of the *Kenya Deposit Insurance Act*, no cause of action which subsided against the directors, management or the 1st appellant/applicant prior to liquidation shall be maintained against the liquidator. The same section further provides that execution cannot take place against the 1st appellant/applicant. In light of this, there is sufficient reason for the court to review its orders as sought by the appellant/applicant so as to protect the interests of all the parties in resolution of the issues raised while the appeal is still pending before court.
25. He deponed that if the orders sought herein are not granted the respondent will seek to execute against the appellant/applicant which would subvert the ends of justice and render the appeal nugatory. The appellant/applicants are still following up with copies of the typed proceedings at the lower court registry. It is therefore in the interest of justice that the orders sought be granted.
26. The respondent opposed the application vide a replying affidavit sworn by Edwin Gitau on 26/1/2023 in which he deposed that from the onset, the instant application is defective and has been effectively



- overtaken by events as the applicant's main application dated 9/8/2023 seeking stay of execution pending appeal was dismissed on 7/12/2023 for want of prosecution.
27. That the orders sought for reviewing and setting aside of conditional orders of stay cannot be granted given the fact that the application from which the orders were granted has since been dismissed.
 28. He averred that the court gave orders on 10/8/2023 allowing the applicants application seeking stay of execution pending the appeal. On 7/11/2023 when the application came up for hearing, the applicant had failed to deposit the decretal sum in court within 45 days as directed and thus the applicants requested an extension of 30 days within which to deposit the decretal sum. Upon the lapse of 30 days, the applicants had yet again failed to deposit the decretal sum in court within the 45 days as directed but this time they have filed the instant application seeking review.
 29. He stated that the applicants are guilty of inordinate delay in filing the instant application as the ought to have filed the application before the expiry of the 45 days period granted by the orders made on 10/8/2023. There is no explanation that has been tendered why this application has been filed 4 months after the order to deposit the decretal sum was made.
 30. He stated further that under Order 42 Rule 6 of the Civil Procedure Rules, no order for stay of execution can be made unless such security as the court orders for the due performance of such decree or order may ultimately be binding in him has been given by the applicant. The instant application does not meet the legal requirements and purview espoused under section 80 of the [Civil Procedure Act](#) 2010 and Order 45 rule 1 of the Civil Procedure Rules 2010.
 31. He deponed further that the instant application has failed to disclosed the grounds in which it seeks to review as they applicants have failed to demonstrate whether there is discovery of any discovery of new information or a mistake apparent on the record or such other sufficient cause.
 32. The parties filed submissions as follows; the applicant submitted that the 1st applicant is no longer an existing entity in law by virtue of the appointment of the 2nd applicant as its liquidator.
 33. That previously, the 1st applicant had gone into receivership pursuant to Section 44 of the [Kenya Deposit Insurance Act](#) where the Central Bank of Kenya had appointed the 2nd applicant as the 1st applicant's receiver
 34. Once the 2nd applicant assumed control over the affairs of the 1st applicant, it acted as an agent of the 1st applicant. The respondent only sought to have the 2nd applicant and SBM Bank (k) Limited joined to the suit as a way of securing their interests as they were not aware who between the two had taken over the plaintiffs claim. The applicant argued that the 2nd applicant cannot held to have taken over any liabilities as against the 1st applicant such as the decretal sum.
 35. The applicant submitted that parties be allowed to proceed with the appeal and await the determination of the court without furnishing ay security for costs as the applicants lack the capacity to furnish the same. In the event the appeal is not successful, the respondent will have recourse against the 1st applicant and will become a creditor being a decree holder and be entitled to sums claimed to the extent that they can be payable.
 36. The respondent alternatively submitted that the court on 7/12/2023 dismissed the applicant application dated 9/8/2023 for want of prosecution because the applicant failed to deposit the decretal sum. The respondent argued that the orders of 10/8/2023 and all other consequential orders extinguished at the dismissal of the main application on 7/12/2024.



37. The respondent further submitted that the application filed herein has failed to meet the requisite conditions for review. The arguments raised by the applicants do not disclose the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passes or the order made.
38. The respondent argued that the applicants contention that the 2nd applicant was appointed as its liquidator and that it is no longer an existing entity under the law was a fact that was well within the appellants knowledge all along and thus cannot be construed to be new and important facts to warrant review.
39. The respondent further argued that the 2nd appellant having been appointed as a receiver took over the control of the 1st appellant including the liabilities of the 1st applicant. The respondent relied on Case Bank (K) Ltd v Peter Karung Kariuki [2019] eKLR where it was held

”29. Section 44 of the [Kenya Deposit Insurance Act](#) provides as follows:-

- (1) The Central Bank shall notify the Corporation in writing where an institution has ceased, or, is likely to cease, to be viable.
- (2) Upon receipt of a notification under subsection (1), the Corporation may-
 - (a) Require the institution-
 - (i) To take any action within such time as the Corporation may consider necessary or expedient;
 - (ii) To stop receiving, or paying of deposits or from carrying on any of its businesses or part thereof; or
 - (iii) To restructure the whole or part of its businesses, as may be specified by the Corporation;
 - (b) Assume control as a receiver of the whole of the assets, liabilities, businesses and affairs of the institution; and
 - (i) Carry on the whole of its businesses and manage the assets, liabilities and affairs; or
 - (ii) Assume control of such part of its assets, liabilities, businesses and affairs including disposal of assets, and carry such part of its business and affairs; or
 - (iii) Appoint any person to carry on the whole of the businesses and manage the assets, liabilities and affairs of the institution on its behalf.” (emphasis added).

30. Section 45(5) thereof provide as follows:-

“Where the Corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall-

- (a) Be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, businesses and affairs, including disposal of assets; and (emphasis added).



(b) Not, by reason of having assumed control of the institution or any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account.”

31. The above provisions clearly indicate that either the Kenya Deposit Insurance Corporation or the person appointed as Receiver Manager is empowered by the law to run the affairs and business of a company or institution that has been placed under receivership and to take over any liabilities that may accrue during receivership or any that may have accrued before receivership. The applicant is therefore is not wholly insulated from meeting its liabilities.”

40. The sole issue for determination is whether this court should vary orders made on 10/8/2023 that the entire decretal sum be deposited.

41. I find that the application dated 9/8/2023 was dismissed on 7/12/2023 for want of prosecution and therefore the orders sought in this application have been overtaken.

42. The orders the applicant is seeking to review were terminated upon dismissal of the application dated 9/8/2023.

43. I find that the application dated 6/12/2023 lacks in merit and I dismiss it with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

