



**Gitau v Central Bank of Kenya & 3 others (Commercial Case E154 of 2022)
[2023] KEHC 1597 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E154 OF 2022
DO CHEPKWONY, J
FEBRUARY 24, 2023**

BETWEEN

WILLIAM KABOGO GITAU PLAINTIFF

AND

CENTRAL BANK OF KENYA 1ST RESPONDENT

ROSE DETHO 2ND RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION 3RD RESPONDENT

CHARTERHOUSE BANK LIMITED 4TH RESPONDENT

RULING

1. There are two applications pending in this matter and subject of this Ruling. The 1st application is the Notice of Motion application dated 4th May, 2022 filed by the Plaintiff and for purposes of discussion in this ruling it shall be referenced as “the Plaintiff’s application”. The second application is the 1st and 2nd Defendant’s Notice of Motion application dated 20th May, 2022 herein, the 1st and 2nd Defendants’ application, and which for purposes of this ruling, it shall be referred to as “the Defendants’ application”. Since the prayers sought by the parties in the two applications are related, I have decided to determine them jointly.
2. The Plaintiff’s application seeks for the following orders: -
 - a. Spent;
 - b. Spent;
 - c. The Honourable Court be pleased to and hereby grants the Plaintiff leave to institute/proceed with this suit in the representative capacity on his own behalf



and on behalf of the depositors of the Charterhouse Bank Limited pursuant to Order 1 Rule 8 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

- d. The Honourable Court be pleased to and hereby grant leave to the Plaintiff to publish notice of this suit in at least two Daily Newspapers with the widest circulation in Kenya to all persons on whose behalf or whose benefit the suit is filed to be made party to the suit.
 - e. The costs of the application be in the cause.
3. The Application is premised on among other grounds that the Plaintiff is a depositor of the Charterhouse Bank Limited, the 4th Respondent herein, and together with other creditors held deposits and other assets with the said bank. That the Plaintiff as well as the other depositors are on the verge of losing and being deprived of their deposits and assets arbitrarily, illegally and in bad faith by the Defendant/Respondents' move to liquidate the 4th Respondent bank. That the Defendants have also ignored the fact that the banks' depositors and creditors are a special class protected under various provisions of the Banking Act and the most adequate cure would lie in granting the leave as sought herein. The Plaintiff further implores the court to take note that the redress and sanction sought is provided for under Section 56 of the Kenya Deposit Insurance Act and its invocation would not prejudice the Defendants at all.
 4. The above grounds are explicated in the Plaintiff's affidavit sworn in support of the application on 4th May, 2022. However, he adds that the 1st Defendant/Respondent appointed the 2nd Defendant on 23rd June, 2006 as the manager of the 4th Respondent Bank and immediately thereof, a moratorium was issued on all the accounts held by the depositors but with assurance that interests would accrue on the deposits. Now the 3rd Defendant/Respondent has been appointed as a liquidator of the said Bank vide a Press Release dated 7th May, 2021 without paying the deposits and interest thereon to the detriment of the Plaintiff and other depositors. In the aforementioned state of affairs, the Plaintiff avers that under Section 56 of Kenya Deposit Insurance Act, the depositors of a bank can institute an action against the bank and its assets to protect their interests.
 5. The 1st & 2nd Defendants/Respondents opposed the Plaintiff's application vide the Grounds of Opposition dated the 30th January, 2023. The grounds are: -
 - a. The Plaintiff's application is *sub-judice* considering the subsisting proceedings in HCCC No.E708 of 2021 – Sanjay Ramniklal Shah & Others v Central Bank of Kenya & Others (the first suit) and ought to be struck out, or in the alternative stayed pending the determination of the first suit.
 - b. The application has failed to meet the test for a representative suit as outlined under Order 1 Rule 8 of the Civil Procedure Rules 2010 (the CPR) as the Relationship between depositors of the 4th Defendant bank and the Bank itself is contractual in nature, with the result that each depositor undoubtedly has to prove, individually, their claim for deposits held by the Bank.
 - c. The Plaintiff's suit and application are devoid of merit, an abuse of the process of this Honourable Court, and ought to be dismissed with costs to the 1st and 2nd Defendants.



6. The 3rd and 4th Respondents opposed the application vide the affidavit of David Irungu, the 3rd Defendant/Respondent's General Manager. He confirms that the 3rd Respondent Corporation was appointed as liquidator of the 4th Respondent Bank but the liquidation process did not even run owing to injunctive orders obtained by the Bank's Directors in HCCC No.E708 of 2021. In his view, in the course of liquidation process, the Corporation operates as an agent of the Bank without assuming any rights of the bank. As such, liability cannot attach against the Corporation unless it is shown that the corporation abused its power and discretion to warrant institution of suit against it pursuant to Section 55 of the *Kenya Deposit Insurance Act*.
7. The Deponent further states that the Plaintiff has not shown any abuse of discretion and power by the Corporation rather his claim seems to lie more against the 1st and 2nd Respondents' misuse of power. He adds that the Plaintiff's claim is personal and distinct from what other depositors may hold. A fair perusal of the Plaintiff and the application at hand, disclose that the Plaintiff majorly wishes to secure his deposits held with the 4th Defendant Bank. Further, it is his case that one of the 3rd Corporation's mandate is to pay all depositors their deposits held with the Bank and the Plaintiff can wait on the que just like the other depositors and creditors. Based on the foregoing, the court has been asked to dismiss the Plaintiff's claim for not only failing to disclose any cause of action against the 3rd Respondent Corporation but also for having been filed prematurely.
8. The second application as earlier mentioned is the 1st and 2nd Defendants' Notice of Motion application dated 20th May, 2022 and they seek for the following orders: -
 - a. The suit herein, instituted by way of Plaintiff dated 4th May, 2022, be struck out for being an abuse of the court process.
 - b. In the alternative to prayer No.(i) above, the proceedings herein be stayed pending the hearing and determination of HCCC No.E708 of 2021 – Sanjay Ramniklal Shah & 2 Others v Central Bank of Kenya & 4 Others.
 - c. The costs of and incidental to the instant application be provided for.
9. The application is premised on Nine (9) grounds on its face and further supported by the affidavit of Kennedy Kaunda Abuga sworn on even date. His case is that there is substantially a similar case against the 1st and 3rd Respondents herein instituted vide a Plaintiff dated 26th July, 2021 in HCCC No.E708 of 2021 which seeks to challenge the placement of the 4th Respondent Bank under statutory management as well as its liquidation. That the Plaintiff has been aware of that suit by dint of his demand letter dated 20th December, 2021 and being aware of the grievances sought in the previous suit, the Plaintiff ought to have sought to be enjoined in that suit instead of filing a separate suit seeking similar reliefs. The 1st & 2nd Defendants thus view the present suit as collateral attack to the first suit and an abuse of the court process by the institution of several proceedings, hence a possibility of the courts arriving at conflicting decisions. It is proposed that since the 1st suit is pending before a three Judge bench it would only be in the interest of justice that the present suit is either struck out or stayed to await the determination of the first suit.
10. The Plaintiff filed a replying affidavit sworn on 18th July, 2022 in opposition of the 1st and 2nd Defendants' application. He averred that HCCC No.E708 of 2021 was initiated by the Directors of the 4th Defendant Bank acting on their own behest whilst the present suit is initiated by a depositor. Thus, according to the Plaintiff it has not been established that the cause of action in the two suits is similar, they are pending before courts of competent jurisdiction and are between the same parties for a successful plea of *sub-judice* to pass.



11. The Plaintiff endeavors to differentiate the present suit from HCCC No.E708 of 2021 by pointing out that the parties in the two suits are different and whereas in this suit he seeks an account for his deposits held with the 4th Defendant bank, the same cannot be addressed in HCCC No.E708 of 2021. In his view, the 1st and 2nd Defendants are objecting to the present suit to evade accounting for the interests on the deposits as they undertook to before the closure of the 4th Defendant Bank.
12. The Plaintiff denies having any knowledge of the first suit as alleged since the same is not disclosed in the demand letter. Further, he avers that the plea of *sub-judice* is neither here nor there, and without annexing any pleading from the said HCCC No.E708 of 2021, the plea cannot stand.
13. The averments in the said Replying Affidavit triggered the 1st and 2nd Defendant's further affidavit sworn by Kennedy Kaunda Abuga. In the further affidavit, he avers that it is immaterial that the present suit has been initiated by a depositor while the first suit was initiated by the Directors. To him, the form does not matter but it is the substance which determines the whether a suit is *sub-judice*. He avers that the reliefs sought in the two suits are substantially similar, and the only difference is the inclusion of the Plaintiff and the 2nd Defendant in this suit. With that view, Mr. Kaunda expresses the Plaintiff as a proxy of the Directors of the bank who are now turning to engage the 1st and 3rd Defendants in multiple suits.
14. As regards the Plaintiff's prayer to institute the present suit as representative of the other depositors, the 1st and 2nd Defendants concur with the 3rd and 4th Defendants' submissions that each depositor's relationship with the bank is contractual and has to be enforced individually.
15. On 16th June, 2022, the parties were directed to canvass the applications by way of written submissions and as the record reflects all the parties filed their respective submissions whereby the Plaintiff's ae dated 18th July, 2022 while the Defendants' submissions are dated 30th January 2023. I have thoroughly read through and considered the said submissions alongside the authorities relied on by the respective parties. Since they reflect the summary given above, I do not wish to reproduce the same here.

Analysis and Determination

16. Having considered the two applications, the respective affidavits sworn in support and rebuttal thereof, and the submissions filed by the parties herein, I am persuaded that the following issues crystalize for determination:-
 - a. Whether the suit herein is *sub-judice* and an abuse of the court process;
 - b. Whether leave should be granted under Order 1 Rule 8 for the Plaintiff to proceed with this suit in representative capacity as sought; and if so,
 - c. Whether the Plaintiff should advertise the suit in at least two daily newspapers to give notice to the persons on whose behalf the suit has been instituted.
17. On the first issue of whether the suit is *sub-judice*, Section 6 of the [Civil Procedure Act](#) provides for the doctrine of *sub-judice* as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



18. The Supreme Court of Kenya in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others* (2020)eKLR put the issue in perspective where it held thus: -

“The purpose of *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.

19. Taking cue from the above decision, the doctrine of *sub-judice* disallows hearing of a claim whose subject matter is directly and substantially in issue in a previously instituted and pending claim between the same parties before same or another court with jurisdiction to determine it. The 1st and 2nd Defendant submitted that the case herein stem from the 1st Defendant’s decision to appoint the 3rd Defendant as a Manager and liquidator respectively of the fourth Defendant bank and thus the material facts are similar as those pleaded in HCCC No.E708 OF 2021 initiated by Directors of the 4th Defendant Bank to challenge the Bank’s placement into liquidation. It is added that the reliefs sought in both suits are identical, hence they pose the risk of the two courts duplicating work and arriving at conflicting decisions which would amount to imprudent use and waste of judicial work.
20. In opposing the said application, the Plaintiff has stated that the two suits are different with respect to the parties involved and the relief sought. That the first suit was initiated by the Directors of the 4th Defendant, who are not acting for the depositors while the 1st and 2nd Defendants owe different obligations to other depositors and the Plaintiff, who have claims against the parties herein and their interests will not be protected in the first suit as no-one is suing on his behalf in that suit. The Plaintiff is against the prayer to have the suit stayed pending hearing and determination of the first suit as this would result into shutting him and other depositors, though with different claims and capacity, from accessing court to lay their grievances to be heard as of right and their disputes to be resolved.
21. In considering the issue of *sub-judice*, I find that it is not in dispute that there is another suit, being HCCC No.E708 of 2021, Sajay Ramniklal shas & Others v Central Bank of Kenya & Others. However, none of the parties have availed or produced any pleadings in the said suit for comparison with the instant suit
22. The former case was filed by the Directors of the 4th Respondent Bank as against, amongst other parties, the 1st and 3rd Respondents herein. In addition, the Plaintiff herein filed the present suit in his capacity as a depositor of the 4th

Respondent bank.

23. While it is true that it would generally be imprudent to have both suits run concurrently, as this may result in duplication of work, and may and end up giving rise to conflicting decision by different courts, the question to ask is whether the Plaintiff’s right to be heard and have the dispute resolved by a court of law would be infringed if the instant suit is struck out or stayed pending the hearing and determination of the first case.



24. In my humble view, a depositor of a bank enjoys separate and distinct rights from those of the Directors of the bank, hence the two cannot be deemed to be proxies of each other so as to litigate under the same title. In the previous suit, the Directors of the bank are not suing on behalf of the Depositors. It is from the submissions by the parties in either case that the suits arise from similar transactions, which is the appointment of the 2nd Defendant as a Manager of the 4th Defendant and the appointment of the 3rd Defendant as a liquidator of the 4th Defendant. However, although the suits may arise from the same transactions, the same have been pleaded differently, whereby some common questions of law and facts are bound to arise in both matters at the hearing, and some may not be raised in the first suit if the instant one is stayed or struck out. This is because, it has not been shown that the claim or rights to sue by the 4th Respondent's depositors would either way be determined and addressed in the suit filed by the 4th Respondent's Directors so as to render the claim res-judicata.
25. It is also worth-noting that the Plaintiff and 2nd Defendant in this suit are not parties in the first suit while some parties such as the National Police Service, the Directorate of Criminal Investigations and the Honourable Attorney General are not parties of this suit.
26. In view of the above-observation, Section 6 of the [Civil Procedure Act](#), is imperative in so far as the instant suit is concerned as an abuse of the court process.
27. However, there seems to be some common questions of law and or fact arising from both suits and the right to reliefs sought in both of suits arise out of the same series of transactions. In view of this, so as to afford all the parties an opportunity to be heard, and in line with the overriding objective as provided for under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Article 150(2)(h) of the [Constitution](#), to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes, it behoves the court to invite the parties to consider a possible consolidation of the two suits.
28. In the alternative, the 1st and 2nd Defendants have sought the court to direct the suit herein be stayed pending the hearing and determination of HCCC No.E708 OF 2021. Time and again, this court has pronounced itself that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his/her/its litigation expeditiously. It impinges on the right of access to justice, the right to be heard without delay and overall, the right to fair trial. It should be granted sparingly unless it is shown that the proceedings sought to be stayed are so hopeless as to be allowed to proceed.
29. Such is not the case in the present proceedings as the 1st and 2nd Defendants have not shown that the present suit is so hopeless as to amount to wastage of judicial time. What the Defendants assert is that the suit poses a risk of court(s) arriving at conflicting decisions on the same issues. In my view, this can be cured in event the two suits are consolidated.
30. The other issue for determination is whether the Plaintiff should be granted leave to proceed with the suit as representative capacity under Order 1 Rule 8 of the [Civil Procedure Rules](#). According to the Plaintiff, the other depositors with the 4th Defendant may have a similar interest and or claim as he has. He therefore seeks to proceed with the claim on their behalf and any relief sought, to be considered in their favour too as he believe that the decision by the 1st Defendant to appoint the 5th Defendant to liquidate the 4th Defendant Bank is an attempt to evade responsibility from harm, loss, and danger the Defendants have occasioned on the Plaintiff and other Depositors and Creditors of the 4th Defendants. Also that all the material provisions the 1st Defendant has relied on in appointing the Manager and Liquidator are intended to protect a definite class of people, being the Depositors and Creditors of the 4th Defendant. That as at 23rd June, 2006 - 7th May, 2021, the Depositors form a definite, identifiable and distinct class of people, who may be deprived of their property arbitrarily, illegally and in bad faith



unless they are given an opportunity to ventilate their claims. As a distinct class, these depositors are said to have a common interest on the issue of management and liquidation of the 4th Defendant.

31. The 1st and 2nd Defendant on the other hand submitted that each depositor enjoys individual contractual right which cannot be asserted without their consent hence the application has failed to meet the test of representative suit as provided for under Order 1 Rule 8 (1) of the Civil Procedure Rules provides as follows: -

“(1) Order 1 Rule 8: One person may sue or defend on behalf of all in same interest

1. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
2. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
3. Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit.

32. As for the 3rd and 4th Defendants, it is their holding that allowing the prayers sought would be tantamount to usurping the powers of the Corporation as the liquidation of the Bank. Also, that the wrongs committed by the 3rd Defendant have not been pleaded and that the 3rd Defendant as a liquidator only acts as an agent of the 4th Defendant and cannot be said to have assumed or incurred any obligations or liability of the Bank for its own account.

33. And in the case of Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank [1992] eKLR, the court held as follows:-

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules...”

34. Equally, in the case of Yiapas Ole Seese & 4 others v Sakita Ole Narok & 2 Others (2008)eKLR, the Court of Appeal stated as follows:-

“The whole purpose of provisions of Order 1 Rule 8 is to ensure that all persons with unlitigated similar cause of action are desirous of having their cause determined are included in this suit for their own convenience and to obviate a multiplicity of suits. Hence the need to notify them of the Institution of the suit so that in case any of them wishes to take part he is given the opportunity to so so.....Until notices under Order 1 Rule 8 of the Civil Procedure Rules, are served, one may not know whether or not they will accept being treated



as Plaintiffs. Services of the notice as we stated earlier. It to give them an opportunity to make an election whether or not to become parties."

35. Further in the case of *Sonko and Others v Haluna & Another* (1971) EA 443, it was held thus: -

"It is apparent from the above (Order 1 Rule 8) that one or several persons can file suit while representing others. In my view, sub-rule 2, would apply where those being represented are not specifically named, or have not specifically given their authority for the filing of the suit. In other words, the suit would be for the benefit of many others who may not specifically be known to the applicants, or not specifically named, yet they stand to benefit from the final decision of the suit".

36. It then follows that one can file a suit while representing numerous other persons who have the same interest or grievance in any proceedings, provided that the final decision is bound to benefit the whole class of persons or persons similarly placed that can be identified in relation to a common interest, controversy or grievance in a proceeding, who may not be specifically be known to the Plaintiff. However taking into account that the suit seeks to enforce depositors' rights to be reinstated of their deposits, it is inevitable that at some point the determination of the suit will bear some financial obligations and it is imperative that the depositor willing to be joined as plaintiffs give a written consent/authority to extend. This is, notwithstanding that the depositors may form a distinct class as depositors of the 4th Defendant Bank as at 23rd June, 2003 when the 1st and 2nd Defendants issued Gazette Notices 4935 and 4936. For that reason, I am reluctant to grant leave for this suit to continue as representative suit as sought despite the large number of depositors.

37. However, any depositor willing to be joined as plaintiff in the suit is at liberty to apply to the court to be made a party and the Plaintiff granted the liberty to advertise the suit so as to notify willing depositors to be enjoined in the suit.

38. In view of the foregoing discussion:-

- a. The Plaintiff's application dated 4th May, 2022 be and is hereby allowed in part in terms of prayer No.(d), to wit that the Plaintiff be granted leave to publish a Notice of this suit in at least two Daily Newspapers with the advert circulation in Kenya to all persons on whose behalf or whose benefit the suit is filed to be made party to the suit within 7 days hereof.
- b. The 1st and 2nd Defendants' application dated 20th May, 2022 be and is hereby dismissed with no orders as to costs.
- c. If need be, the suit to be mentioned together with HCCC No.E708 of 2021, Sanjay Ramniklal Shah & Others v Central Bank of Kenya & Others for purposes of a possible consolidation, hearing and disposal.
- d. Each party to bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:



M/S Chepng'eno counsel for Plaintiff

M/S Kadima counsel for Defendants

Court Assistant - Sakina

