



**Okesa v Deposit Protection Fund Board & another (Civil Suit
1452 of 1999) [2023] KEHC 18205 (KLR) (Civ) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18205 (KLR)

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

CIVIL

CIVIL SUIT 1452 OF 1999

CW MEOLI, J

MAY 25, 2023

BETWEEN

JOACKIM MWANDALE OKESA PLAINTIFF

AND

DEPOSIT PROTECTION FUND BOARD 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. Joackim Mwandale Okesa (hereafter the Plaintiff) sued The Deposit Protection Fund Board (hereafter the 1st Defendant) and the Honourable Attorney General (hereafter the 2nd Defendant) vide the amended plaint filed on 15th March, 2005 for general, special, punitive and exemplary damages arising out of a claim in the nature of malicious prosecution.
2. Subsequently, the 1st Defendant brought the Chamber Summons (hereafter the Summons) dated 26th March, 2021 seeking to be struck out as a party from the suit. The motion is expressed to be brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* (CPA) and Order 1, Rules 10, 14 and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR).
3. The grounds on the face of the Summons are amplified in the supporting affidavit sworn by Dr. Peter Kitonyo, an employee of the 1st Defendant, who averred that the 1st Defendant was appointed as the liquidator of Thabiti Finance Company Limited (hereafter the Company) through the Gazette Notice dated 23rd December, 1994 and that the subject matter of the dispute herein arose out of the ensuing liquidation process, more specifically an alleged disparity between the signature of the debt recovery schedule and the signatures appended by the Plaintiff as extracted from the files of the Company. That the 1st Defendant cannot be sued in its own name but can only sue and be sued in the name of the institution it is controlling, namely the Company. The deponent further averred that the police officers



- who effected the arrest of the Plaintiff and which led to his prosecution were acting on behalf of the Company and not the 1st Defendant.
4. The Plaintiff opposed the Summons by swearing a replying affidavit on 26th July, 2021. Therein, he deposed that at the time the 1st Defendant was appointed as a liquidator of the Company, it had powers to sue and be sued in its own name and hence the 1st Defendant is a proper party in the suit. The Plaintiff also deposed that it is the 1st Defendant and not the Company that instructed police officers to effect the arrest of the Plaintiff. The deponent therefore urged the court to dismiss the Summons.
 5. The 2nd Defendant similarly opposed the Summons by filing the Grounds of Opposition dated 7th August, 2021 containing the following grounds:
 - i. That the Plaintiff's/Respondent's instant suit is predicated from the original complaint made by the 1st Defendant/Applicant that led to the plaintiff's arrest and subsequent culminating events that led to this suit.
 - ii. That joinder of the first defendant in the suit is necessary to enable the court make a fair determination and enable it to completely adjudicate over the issues before it.
 - iii. That there is no misjoinder and the court ought to determine the suit as presented.
 - iv. That the application is therefore frivolous, vexatious and an abuse of the court process.
 6. The 2nd Defendant soon thereafter filed the notice of preliminary objection dated 5th September, 2022 seeking the summary dismissal of the suit against it for being statutorily time barred by dint of Section 3(1) of the *Public Authorities Limitation Act* (hereafter the Act), having been filed after the lapse of 12 months from the date of the cause of action which accrued upon the acquittal of the Plaintiff on 14th May, 1998.
 7. It was agreed by the parties that the Summons and the preliminary objection be heard together by way of written submissions. To support the order sought in the Summons, counsel for the 1st Defendant submitted that it only lodged a complaint with the police but that it did not prefer criminal charges against the Plaintiff, relying on *National Oil Corporation v John Mwangi Kaguenyu & 2 others* [2019] eKLR. Counsel further submitted that by suing the 1st Defendant to the exclusion of the police officers who effected his arrest, the Plaintiff's suit against it is unfounded, since the police officers are employees of the Government and not of the 1st Defendant.
 8. It was also contended further that if the court deems the joinder of the 1st Defendant in the suit to be proper, then it ought to be sued in its capacity as the liquidator of the Company, citing the case of *Welcome Properties Ltd v Jackson Kamau Kenya & Others* (2001) eKLR and *Terry Njagi Muia v Chase Bank (Kenya) Limited & 2 others* [2019] eKLR. Counsel therefore urged that the Summons be allowed.
 9. On the part of the Plaintiff, it was argued by counsel that pursuant to the Gazette Notice dated 23rd December, 1994 and Section 36 of the (Repealed) *Banking Act*, the 1st Defendant upon its appointment as the liquidator of the Company had powers to sue and be sued in its own name, or alternatively, in the name of the institution undergoing liquidation. That pursuant to Section 76(8) of the New *Banking Act*, any legal proceedings pending by or against the 1st Defendant vested upon its successor (Kenya Deposit Insurance Corporation) to either sue or be sued in its name. Counsel therefore submitted that the 1st Defendant is a proper party to the suit and hence the Summons ought to be dismissed with costs.



10. To support the preliminary objection, the 2nd Defendant through its counsel contended that following his acquittal on 14th May, 1998 the Plaintiff ought to have lodged the claim for malicious prosecution against it within 12 months therefrom, pursuant to Section 3(1) of the Act. That by virtue of the fact that the original plaint is dated 18th June, 1999, it stands as being time barred and on this basis, the court was urged to dismiss the Plaintiff's suit against the 2nd Defendant.
11. On his part and in answer to the above submissions regarding the preliminary objection, the Plaintiff urged the court to consider the provisions of Article 159(2) (d) of the Constitution to the effect that justice ought to be administered without undue regard to procedural technicalities. He further cited Wachira Webeire v Attorney-General [2010] eKLR to buttress his argument here. Consequently, the Plaintiff urged the court to dismiss the preliminary objection. The 1st Defendant did not respond to the preliminary objection.
12. The Court has considered the rival affidavit material; the preliminary objection; the Grounds of Opposition and submissions made in respect of the Summons and the preliminary objection. The court will first deal with the preliminary objection.
13. In the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court analyzed the definition of a preliminary objection in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
14. The above definition was further advanced by the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
15. It is apparent from the record that the Plaintiff herein was charged with the offence of forgery contrary to Section 351 of the Penal Code in Milimani Criminal Case No. 262 of 1997 and was eventually acquitted under the provisions of Section 210 of the Criminal Procedure Code on 14th May, 1998. The court notes that the instant suit is founded on the tort of malicious prosecution. Consequently, the cause of action would, as rightly pointed out by the 2nd Defendant, accrue as at the date of acquittal mentioned hereinabove.
16. The relevant provision is Section 3(1) of the Act which stipulates that:

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”
17. The Plaintiff admitted to bringing the suit outside of the stipulated timelines. There is also nothing to indicate that the Plaintiff sought and obtained leave of the court prior or subsequent to instituting the claim against the 2nd Defendant out of time as he ought to have done. For the foregoing reasons, I am satisfied that the instant suit against the 2nd Defendant is time barred. Resultantly, the preliminary objection is upheld.



18. Now to the Summons which sought for the striking out the 1st Defendant as a party to the suit, it is not in dispute that the 1st Defendant has at all material times been the liquidator of the Company, effective 23rd December, 1994 upon issuance of a Gazette Notice. It is also not in dispute that the subject matter of the dispute here arose in the Company and during the period of liquidation. Without delving into the merits of the suit at this premature stage, the pertinent question is whether the 1st Defendant is a proper party to the suit. The principles offering guidance to the court in determining whether to strike out and/or substitute the name of a party are encapsulated under Order 1, Rule 10 (2) of the Civil Procedure Rules as hereunder:
- a. “Whether or not the party to be substituted or struck out is a necessary party to the suit; and
 - b. Whether or not the presence of such party will assist the court in effectively adjudicating upon and settling all questions arising out of the suit.”
19. Upon consideration of the pleadings and circumstances pertaining to the role of the 1st Defendant as the liquidator of the Company, the court is convinced that the 1st Defendant is a necessary party to the suit and whose presence may prove helpful in determining the matter. To add on, the court has not come across anything in the law precluding the 1st Defendant from suing or being sued in its own name and capacity, notwithstanding its position as liquidator of the Company, pursuant to Section 36 (1) of the repealed Banking Act which stipulated that the Deposit Protection Fund Board is a legal entity with corporate powers and therefore capable of suing and being sued.
20. This subject was discussed by the Court of Appeal in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & another [2016] eKLR when it held that:
- “Before its repeal by Act No. 10 of 2012, sections 36 and 37 of the Banking Act made clear stipulations on establishment and legal status of Deposit Protection Fund Board (DPFB). Section 36(1), (2) & (3) (now repealed) made it clear that the DPFB was established as a body corporate with perpetual succession and a common seal, with power to acquire, own, possess and dispose of property, to contract and to sue and be sued in its own name.”
21. In view of all the foregoing circumstances, the court is not satisfied that it would be a proper exercise of its discretion to strike out the 1st Defendant from the suit. Consequently, the Chamber Summons is hereby dismissed. However, the Plaintiff’s suit against the 2nd Defendant is hereby struck out for being time barred. In the circumstances, parties shall each bear their own costs in respect of the Chamber Summons and the notice of preliminary objection.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Wangira

For the 1st Defendant: Mr. Kipchirchir

For the 2nd Defendant: Mr. Ngumbi

C/A: Carol

