



G.Radia & 6 others v Imperial Bank Limited (Under Receivership) & 3 others (Civil Case 838 of 2021) [2023] KEHC 21839 (KLR) (Commercial and Tax) (25 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 838 OF 2021
A MSHILA, J
AUGUST 25, 2023**

BETWEEN

**DR.ROHIT G.RADIA 1ST PLAINTIFF
DR.KIRAN B.RADIA 2ND PLAINTIFF
SUNAY R.RADIA 3RD PLAINTIFF
AGGARWAL MADHUBALA 4TH PLAINTIFF
PRAMILA C.R.AGGARWAL 5TH PLAINTIFF
AMIRJEET K.RADIA 6TH PLAINTIFF
AMIT K.G.K.RADIA 7TH PLAINTIFF**

AND

**IMPERIAL BANK LIMITED (UNDER RECEIVERSHIP) 1ST RESPONDENT
DR.PATRICK NJOROGE GOVERNOR, CENTRAL BANK OF
KENYA 2ND RESPONDENT
CENTRAL BANK OF KENYA 3RD RESPONDENT
KENYA DEPOSIT INSURANCE CORPORATION 4TH RESPONDENT**

RULING

1. Before the Court is the Plaintiffs' Notice of Motion application brought under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 40 Rule 1, 51 of the Civil Procedure Rules, Sections 43, 50 and 51 of the *Kenya Deposit Insurance Act*, Section 9 of the *Banking Act* and Article 159 of the *Constitution* of Kenya 2010, dated September 29, 2021, seeking the following orders: -



- a. Pending the Hearing and Final Determination of the suit herein, the Court to Order the 1st and 4th Defendant/ Respondents to render a detailed account to the Court of all monies paid out by/ and or withdrawn from the 1st Defendant/ Respondent by the 4th Defendant/ Respondent, from April 13th 2017, till the date of the Application herein within Fourteen (14) days of the Court having ordered so. Pending the Hearing and Final Determination of the suit herein the Court to Order the 2nd and 3rd Defendant/ Respondent to supply, furnish and or deliver to the Court the following documents within fourteen (14) days of the Order being granted: -

SUBPARA i.

Any and all Reports and or Supporting Documentation confirming and or justifying the decision to place the 1st Defendant/ Respondent under Receivership in line with Section 43 of the [Kenya Deposit Insurance Act](#); and

SUBPARA ii.

the Notice of the passing of the resolution confirming any amalgamation or arrangement, or any arrangement for the transfer of assets and liabilities, together with a copy of such resolution and the terms and conditions of the relevant agreement or arrangement, duly certified by the Chairperson of the meeting at which such resolution was passed and by the Secretary of the institution in line with Section 9 (5) of the [Banking Act](#).
 - c. In the event of non-compliance with Orders 6. and 7. here above, the Court to order, that pending the hearing and determination of the Suit and, or until such compliance by the respective Defendant/ Respondents, with Orders 6 and 7 here above, there be a halt on any dealings with, the money held by the 1st Defendant/Respondent by the 4th Defendant/ Respondent acting as the receiver.
 - d. In the alternative (and without prejudice) to prayer 8. above, and, or in the event of non-compliance with Orders 6. and 7 hereabove, the Court to order the Defendant/ Respondents, whether jointly or severally (at the discretion of the Court) to Deposit in Court (or in a joint interest earning account in their joint names and that of the Plaintiff's Advocates, Murage Juma & Company, Advocates) the sums of Kenyan Shillings 531,746, 130.86 and 18,075.50 United States Dollars.
 - e. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit sworn on even date by the 1st Plaintiff/ Applicant Dr. Rohit G. Radia.

Applicants' Case

3. It was the Applicants' case that Hon. Onyiego J.'s Order stayed the 1st Defendant's (being Central Bank of Kenya) decision to appoint the KDIC as liquidator of Imperial Bank Limited. The said Order is still in force and has not been set aside, reviewed and or stayed.
4. In the Supreme Court decision in *Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Other* (2014) eKLR it was held thus: -

“...The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.”



5. The Applicants argued that the placement of the 1st Defendant in Liquidation was stayed by the High Court and as such the 1st Defendant cannot be said to be in Liquidation if the said institution has no Liquidator. Therefore, Hon. Onyiego J.'s Orders were issued to allow for the Applicant's in the Suit to proceed with their Case without being affected by Section 56 of the [Kenya Deposit Insurance Act](#) which provision does not apply to the suit as against the 2nd and 3rd Defendants.
6. It was thus the Applicant's submission that the decision to appoint the 4th Defendant as liquidator having been stayed therefore means that the KDIC is not the liquidator of the 1st Defendant and cannot therefore seek the protections of Section 56 (1) of the [Kenya Deposit Insurance Act](#) (KDIA).
7. Further, if the Court were to apply Section 56 of the KDIA even with Hon. Onyiego's Orders in force, there is no Statutory Provision preventing the Court from allowing the suit to continue as against the 2nd and 3rd Defendant.
8. The Applicants stated that it is the Plaintiffs' position that all the Defendants have breached the KDIA Act with the Defendants grossly acting in breach of the express provisions of Sections 43, 50, 51 and 53 of the [Kenya Deposit Insurance Act](#) (KDIA) they cannot now expect to be shielded by the very same statute they are in breach of.
9. Section 53 of the [KDIA](#) Act states that an institution can only be placed under liquidation during the course of receivership and that the maximum term of receivership is 30 Months in this case the term of receivership was only extended by the 2nd and 3rd Defendants for six months meaning that the 1st Defendant's receivership terminated by operation of law in April of 2017 and the said 2nd and 3rd Defendant's alleged placement of the 1st Defendant under liquidation was in breach of Section 53 of the KDIA and as such is a nullity.
10. The Applicants relied on the decision of the Court of Appeal in *Kenya Deposit Insurance Corporation v Richardson & David Limited & another* [2017] eKLR where the court categorically stated that the High Court has no jurisdiction to extend the term of receivership or review the express provisions of the KDIA.
11. Further, the Applicants asked the court to find that the term of receivership of the 1st Defendant having ended in April 2017 meant that the placement of the 1st Defendant in Liquidation more than 4 years later means that the 4th Defendant is not and cannot be appointed as liquidator legally as the same would be in breach of Section 53 of the KDIA.
12. It also therefore follows that the Corporation was not legally a receiver of the 1st Defendant when the suit was instituted and can therefore not enjoy any alleged protection from the KDIA Act of which they were and remain in breach of.

Respondents' case

13. The Respondents submitted that the Plaintiffs cannot continue with this suit or their application dated September 29, 2021, without the Court's approval/sanction. Such leave has not been obtained by the Plaintiffs as is required by law as provided under Section 56(2) of the [Kenya Deposit Insurance Act](#). The Plaintiffs are required by law to apply for Court's leave/sanction before continuing with the suit against the 1st Defendant in liquidation.
14. It was the 2nd and 3rd Defendants' submission that leave should be sought by the Plaintiffs before continuance of this suit against the 1st Defendant. In [Thomas & Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chasebank Kenya Limited \(In Receivership\) & another \(Interest](#)



- Parties*) [2019] eKLR Hon. Justice Francis Tuiyot applied with approval Justice P.J. Otieno's decision on when leave is required.
15. The requirement for leave after a Bank is liquidated was equally addressed by the Court in *Kwanza Estates Limited -vs- Dubai Bank Kenya* [2015] eKLR, wherein the Learned Judge observed that the plaintiff was aware that the defendant it sued had been placed under liquidation hence the need for leave of the court to allow the matter proceed as against the liquidation agent. It had demonstrated its appreciation of the position by filing the application already alluded to. In that application it was clear that the Plaintiff took cognizance of the fact that once a liquidation agent is appointed the leave of the court for the matter to proceed is mandatory.
 16. It was the Respondents' submission that upon placing of the 1st Defendant under liquidation on December 8, 2021, the Court has no jurisdiction/powers to revive the receivership. Indeed, this position was extensively dealt with by the Court of Appeal in *Kenya Deposit Insurance Corporation v Richardson & David Limited & another* [2017] eKLR.
 17. The 3rd Defendant did not contravene any law in making the decision to liquidate the 1st Defendant and there is no evidence that the 3rd Defendant did not exercise its statutory discretion correctly, to warrant staying its decision to liquidate the 1st Defendant.
 18. It was the Respondents' position that the Plaintiffs should move the Court appropriately by way of a formal application for leave, if they wish to continue with these proceedings against the 1st Defendant.
 19. The Court should not allow the Plaintiffs to bypass the provisions of Section 56(2) of the *Kenya Deposit Insurance Act*, 2012 on the requirement for Court's leave, like they are attempting to do. For doing so amounts to reviving the receivership of the 1st Defendant, which jurisdiction/power the Court does not have.

Issues for determination

20. The court has considered the parties arguments in their submissions and has framed only one issue for determination:
 - a. Whether Plaintiffs need leave of the court to proceed with the suit; and;
 - b. The effect of Hon Justice Onyiego's Order on these proceedings;

Analysis

21. The main issue for contention before the court is that the Plaintiffs never sought leave of the Court prior to the filing of the suit and the application dated September 29, 2021 as required under Section 56(2) of the *Kenya Deposit Insurance Act*, 2012 and that the suit is hence fatally defective.
22. It is not in dispute in the matter before the court that no leave was sought prior to the commencement of this suit. On the issue of leave, Section 56 of the *Kenya Deposit Insurance Act*, 2012 provides as follows:

Stay of proceedings –

- (1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.



- (2) No injunction may be brought or any other action or civil proceedings may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.
23. It was the Respondents' argument that the Plaintiffs cannot continue with this suit or their application dated September 29, 2021, without the Court's approval/sanction. Such leave has not been obtained by the Plaintiffs as is required by law as provided under the above-mentioned Section 56(2) of the [Kenya Deposit Insurance Act](#). The Plaintiffs are required by law to apply for Court's leave/sanction before continuing with the suit against the 1st Defendant in liquidation.
24. In contrast it was the Applicants' case that Hon. Onyiego J.'s Order stayed the 1st Defendant's (being Central Bank of Kenya) decision to appoint the KDIC as liquidator of Imperial Bank Limited. That said Order was still in force and had not been set aside, reviewed and or stayed.
25. It is the Court's understanding that by the court's Ruling in [Doshi & another v Central Bank of Kenya \(CBK\) & another](#) (Commercial Case 36 of 2016) [2022] KEHC 17070 (KLR) (25 November 2022) by Njoki Mwangi J. the 1st Defendant was put under receivership. The court stated as follows;

“It is not disputed as submitted by the defendants that there was a moratorium on the payment by the institution to its depositors and other creditors and the declaration of the moratorium among other matters shall be applied equally and without discrimination to all classes of creditors thus the plaintiffs herein are not exempted by law. It is worth noting that the suit herein is yet to be heard and determined on its merits therefore, this Court cannot grant an order for deposit of USD 7,277,314.91 in a joint interest earning account in the names of the Advocates on record as it would amount to usurping the powers of the Liquidator, pre-empting the outcome of the main suit which is yet to be heard and determined on merits and giving preferential treatment to the plaintiffs contrary to the provisions of Section 50(2) of the KDI Act.

57. This Court cannot on the other hand ignore the fact that there is a binding consent that has not been set aside. I therefore agree with Mr. Oluga for the plaintiffs that this Court should give an order with the aim of protecting the plaintiffs interest in the event they ultimately succeed in their claim herein, as the same will serve the intended purpose of the consent on record.
58. The upshot is that the application herein is merited and it is allowed in the following terms.
- i. That leave is hereby granted to the plaintiffs to have this application, any subsequent applications and main suit heard when the 2nd defendant is in liquidation;
 - ii. That within 30 days of this ruling, the defendants shall jointly and severally give a binding undertaking to pay any sums adjudged due and payable to the plaintiffs



after full adjudication and determination of the main suit; and

- iii. That the ex parte orders granted on 22.12.2021 staying the 1st defendant's decision to appoint Kenya Deposit Insurance Corporation as Liquidator of the 2nd defendant shall stand discharged upon execution of the order made in paragraph (ii) above;
- iv. That the costs of this application shall abide the outcome of the main suit.

It is so ordered”

26. The above Ruling was issued on November 25, 2022 after Onyiego J.'s order of December 2, 2021 and the position now is that the said Order is no longer in force as it has been set aside by the Court of Appeal, hence the Plaintiffs' argument that the 1st Defendant cannot be said to be in Liquidation if the said institution has no liquidator, fails.
27. In light of the above, this court is satisfied that leave ought to have been sought by the Plaintiffs before continuance of this suit against the 1st Defendant.

Findings and determination

28. For the foregoing reasons this court makes the following findings and determinations.
 - i. This court finds the suit as it stands is incompetent, defective and misconceived and it is hereby struck out
 - ii. Each party to bear their own costs

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

HON. A. MSHILA
JUDGE

