



REPUBLIC OF KENYA



KENYA LAW
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Badar Pharmacy Limited v Imperial Bank Limited (In Liquidation) (Civil Suit 73 of 2022) [2023] KEHC 24305 (KLR) (24 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 73 OF 2022
DKN MAGARE, J
OCTOBER 24, 2023**

BETWEEN

BADAR PHARMACY LIMITED PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN LIQUIDATION) DEFENDANT

RULING

1. By a plaint dated 28/9/22 the plaintiff sought he following several prayers related to an account at the defendant's bank. The suit was filed against Imperial Bank Limited on 7/10/2022. The dispute related to a letter dated 10/3/2026.
2. There is an allegation of breach of contract by the bank. The Plaintiff stated that at the time of filing suit leave was not required as the appointment of the Liquidator was stayed by the Court of Appeal arising from Mombasa HCCC 36 of 2016. Ashok Doshi & another =vs= Central Bank of Kenya & Another.
3. The defendant filed defence on 23/11/2022 under protest. Their main defence was that there is no sanction under section 56(2) of the *Kenya Deposit Insurance Act* to commence proceedings.
4. The defendant, made an application dated 24/1/2023 which was filed on 25/1/2022 seeking the following
 - a. The plaint dated 28/9/2023 together with accompany pleadings be struck out.
 - b. The suit be dismissed with costs.
 - c. Costs of the application be borne by the plaintiff Respondent.
5. This is based on the ground that the decision to liquidate the defendant was made and KDIC was appointed a liquidator on 8/12/2021 vide gazette notice No. 13395. The decision in HCCC 36/2016



was stayed on 22/12/2021. This was subsequently stayed in Mombasa Misc. CA Application No. 094 Of 2022

6. The application was to the effect that this suit was filed without leave of the court under Section 56(2) of the *Kenya Deposit Insurance Act*. The same was supported by the affidavit of Andrew Rutto dated 24/1/2023.
7. He reiterated the contents of the application save to add that the Central Bank of Kenya revoked the banking license on 8/12/2021.

Plaintiff's Submissions

8. The Plaintiffs opposed the application through the Replying Affidavit sworn by Aly Deederali Jamal, the Plaintiff's director on March 17, 2023 and filed on the same date. 4. It is our submission that the Defendant's application is not merited because of the following reasons:
 - a. Leave of court was not required to institute this suit.
 - b. The appointment of the Kenya Insurance Depositors Corporation (KDIC) as the liquidator of the Defendant was done outside the timelines 2 prescribed by the law and was therefore illegal and cannot be used to challenge this suit.
 - c. Section 55 (2) of the *Kenya Deposit Insurance Act* expressly permits a party aggrieved with the exercise of the liquidation powers to apply to the High Court thereby granting jurisdiction to this court
 - d. The defendant's application is fatally defective because it is supported by an affidavit of a person who is not authorized to swear the affidavit on behalf of the defendant.
 - e. The defendant has not satisfied the grounds for striking out the pleadings.
9. He states that the said section relates to a different aspect, that is,
 - a. Stay of proceedings (1) ...
 - b. No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.
10. They submitted that under section 56 (2) of the *Kenya Deposit Insurance Act* does not indicate that sanction of court is required when the institution is in liquidation, we wish to compare section 56 (2) of the Act with section 46 (1) (a) of the Act. Section 46 (1) (a) provides as follows:

“ 46. Actions against the Corporation (1) Where the Corporation or the appointed person, as the case may be, has assumed control of an institution under section 44(2)(b)—

 - a. no injunction may be brought or any other action or civil proceeding commenced against the Corporation or the appointed person in respect of the assumption of control.”
11. Strangely, he submitted that the court decisions by Justice PJ Otieno and Justice Tuiyott cited by the defendant which seem to suggest that section 56 (2) of the Act applies to liquidation were made per incurium because the said section does not mention liquidation. He urged the Honourable Court not to be bound by per incurium court decisions by Justice PJ Otieno and Justice Tuiyott but to give the proper interpretation to section 56 (2) of the Act which as plainly crafted does not specify that it applies when the institution is in liquidation.



12. My understanding of per incurium arises from deciding a case contrary to binding precedent. There is no binding precedent that was cited to have been ignored.
13. They further submitted that Even assuming that section 56 (2) of the [Kenya Deposit Insurance Act](#) is applicable to liquidation, the section prohibits civil proceedings against “the institution” and not just any other entity. The question that this Honourable Court must then answer is, what is an “institution”? To know what “institution” is, one must resort to the definition given in the [Kenya Deposit Insurance Act](#) itself. Section 2 of the [Kenya Deposit Insurance Act](#) defines “institution” as follows: “institution” means a bank, financial institution or mortgage finance company as defined in the [Banking Act](#) (Cap. 488), or a microfinance bank as defined in the [Microfinance Act](#), 2006 (No. 19 of 2006), or any other deposit taking entity licensed by the Central Bank.
14. He proceeded to state that those three entities are defined by section 2 of the [Banking Act](#) as follows:
- “bank” means a company which carries on, or proposes to carry on, banking business in Kenya.”
- “financial institution” means a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act”
- “mortgage finance company” means a company (other than a financial institution) which accepts from the members of the public, money—
- (a) on deposit repayable on demand or at the expiry of a fixed period or after notice; or
- (b) on current account and payment on and acceptance of cheques, and is established for the purpose of employing such money in accordance with section 15.
15. It was their submission that even if the Defendant was still an “institution” insulated from suits without 10 sanction by section 56 (2) of the [Kenya Deposit Insurance Act](#) (which it was not), no sanction of the court was required because at the time this suit was filed, the appointment of the defendant’s liquidator had been stayed by the High Court vide an order made on December 22, 2022 in HCCC NO. 36 OF 2016.
16. They relied on the fact that Striking out suit is a draconian measure which should be exercised sparingly. A pleading can only be struck out if it so hopeless that it cannot be cured/remedied even by amendment. They placed reliance on the case of [Nathans Browne Jp v Murang’a County Government](#) [2022] eKLR where Kimondo, J. stated as follows:

“Striking out a pleading is a draconian measure to be employed sparingly. *Wambua v Wathome* [1968] E.A 40, *Coast Projects Ltd v M.R. Shah Construction* [2004] KLR 119. 9. Ideally, cases should be determined on tested evidence at a full hearing. The words of Fletcher Moulton L.J. in *Dyson v Attorney General* [1911] 1 KB 410 at 418 still ring true to my mind, it is evident that our judicial system would never permit a plaintiff to be ‘driven from the judgment seat’ in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad 10. The dictum of Madan J.A. (as he then was) in *D T Dobie & Company (Kenya) Limited v Muchina* [1982] KLR 1 at 9 is succinct No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and



is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. 11. The court must also pay heed to the overriding objective to do justice to the parties. See article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. See also *Harit Sheth v Shamas Charania*, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.”

17. The Respondent filed an affidavit dated 17/3/2023. They state that the appointment of the liquidation is stayed.
18. The respondent delivers with the powers of the High Court under section 86 of the Kenya Deposit Insurance Act.
19. They state that the appointment of the liquidator was done outside the time statutory prescribed. It is their view that the Defendant is looking for a short cut to avoid merit.

Applicant’s submissions

20. The applicant relied on the decision in Mombasa CA Application number 094 of 2022. I have not had sight of their submissions. They relied on their oral submissions in court on 2023.

Analysis

21. As I was dusting this application, I noted from the CTS that the applicant filed an application for leave, during the week, court number 5 was on duty and was granted leave. They did not disclose pendency of this application. Nevertheless, this is now water under the Nyali bridge. This caused the application to be overtaken by events.
22. When the order of 13/10/2023 was given, the court’s hands were effectively tied. Not that the order was irregularly given, but disclosure by plaintiffs is necessary. I note that the applicant relied on events in another suit. It is important for parties to act in their own interest as opposed to placing reliance on other litigants.
23. The status of the case has thus been oscillating between HCCC 26 of 216 and Mombasa Misc. CA Application No. 094 Of 2022. No wonder even the defendant filed this application after 26/5/2023.
24. It therefore becomes unnecessary to analyse the application in view of the intervening actions.
25. However, the application had merit before it was overtaken by events. In view of the intervening factors, I will dismiss the application. However, given that the defendant woke up the Plaintiff to regularize its case, the defendant shall have costs of the Application.

Determination

26. The upshot of the foregoing is that I find merit. However, it has been overtaken by events.
 - a. The application dated 24/1/2023 and is thus dismissed with costs of Ksh. 20,000 to the applicant.
 - b. The Applicant’s costs shall be paid within 30 days.
 - c. The court shall give directions on hearing and all pending applications after the ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 24TH DAY OF OCTOBER,2023.



KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Oluga for the Plaintiff

No appearance for the Defendant

Court clerk- Brian

