



REPUBLIC OF KENYA



KENYA LAW
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Hexa Development Group Limited v Chase Bank (Kenya) Limited (in Liquidation (Commercial Case E444 of 2020) [2022] KEHC 13301 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 13301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E444 OF 2020**

WA OKWANY, J

JULY 28, 2022

BETWEEN

HEXA DEVELOPMENT GROUP LIMITED PLAINTIFF

AND

CHASE BANK (KENYA) LIMITED (IN LIQUIDATION) DEFENDANT

RULING

1. The applicant herein, Hexa Development Group Limited, filed the application dated May 25, 2021 seeking the following orders:-
 1. That this court do grant leave to the plaintiff/ applicant to continue this suit against the defendant which was placed in liquidation on April 16, 2021 by the Central Bank of Kenya.
 2. That this court do grant the plaintiff the leave to amend its amended plaint to reflect that the defendant has been placed in liquidation as set out in the enclosed draft further amended plaint.
 3. That costs of this application be provided for.
2. The application is anchored on section 56(2) of the *Kenya Deposit Insurance Act*, section IA and 1B of the *Civil Procedure Act*, order 8 rule 5 and order 51 of the *Civil Procedure Rules* and article 40 of the *Constitution of Kenya*
3. The application is supported by the affidavit of the applicant's director Mr Anthony W Mwaniki and is based on the following grounds:-
 1. That on November 3, 2020 the plaintiff herein instituted a suit against the defendant which was in receivership at the time.



2. That on April 16, 2021 *vide* special issue gazette notice number 3651 of 2021 the Central Bank of Kenya appointed the Kenya Deposit Insurance Corporation as the liquidator of the defendant.
 3. That the plaintiff has a meritorious claim which was instituted against the defendant before it was placed in liquidation on April 16, 2021 and the plaintiff wishes to have its claim heard and determined on merit.
 4. That given the placing of the defendant in liquidation on April 16, 2021 the provisions of section 56(2) of the [Kenya Deposit Insurance Act](#) require that plaintiff do obtain sanction and/or leave of the High Court to continue such an action/ suit and/or civil proceedings.
 5. That the giving of the plaintiff the right to continue its suit against the defendant will be a preservation of the plaintiffs right to property as enshrined in the [Constitution of Kenya, 2010](#).
 6. That following the grant of the leave to the plaintiff to continue its suit against the defendant (In liquidation) it will be necessary for the plaintiff to amend its plaint to reflect that the defendant is now (in liquidation).
 7. That no prejudice will be occasioned to the defendant should the reliefs sought by the plaintiff be granted.
 8. That it is in the interests of justice that the reliefs sought by the plaintiff be granted.
4. The respondent opposed the application through the replying affidavit of the liquidation agent Mr Geoffrey Nyakundi who contends that the intended further amended plaint only amends the respondent's current status and, if allowed, the respondent's statement of defence will still suffice as a response to the further amended plaint.
 5. He further states that the respondent cannot undertake any banking activity as its banking license was revoked by the Central Bank on April 16, 2021 after which the Kenya Deposit Insurance Corporation transferred 75% of its assets to SBM bank. He contends that the set off sought in the amended plaint will result in an unfair advantage over other creditors even in respect of the applicant's prorated deposits. It is the respondent's case that other unsecured creditors will be prejudiced by the continued litigation.
 6. I have considered the pleadings and the rival submissions made by the parties herein. The main issue for determination is whether the applicant has made out a case for granting the orders sought. The applicant seeks leave to continue the suit against the defendant which is currently under liquidation.
 7. The application is anchored on section 56(2) of the [Kenya Deposit Insurance Act](#) (No 10 of 2012) which provides as follows:-

“No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the court.”
 8. The applicant's case was that it instituted the suit against the defendant before it was placed on liquidation when the applicant had Kshs 23,000,000 in its accounts. It is the applicant's case that article 40 and 48 of the [Constitution](#), protects its right to property and access to justice.
 9. The respondent, on the other hand argued that the leave under the said section 56(2) is intended to protect the assets of the company in liquidation. It was submitted that the applicant had not demonstrated that the suit herein has merit.



10. It was also the respondent's case that among the assets transferred to SBM bank was the applicant's overdraft loan facility and that the same was now an asset of SBM bank. The respondent contended that there was nothing to be tried against the respondent as the subject facility was no longer with the respondent.
11. It was not disputed that on April 16, 2021 the Central Bank of Kenya appointed the Kenya Deposit Insurance Corporation as the liquidator of the respondent and that 75% of the value of the assets were transferred to SBM bank.
12. In *Rashik Kumar Punja Shah & another vs Chase Bank Limited (In Liquidation) & another* [2021] eKLR it was held that:-
 21. The intent and purpose of section 56 (2) is to eliminate any applications which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to institute the proceedings if the court is satisfied that there is a case for further consideration. The requirement that the court sanctions the proceedings is designed to shield the liquidator from busy bodies with misguided or trivial complaints, and to remove the uncertainty as to whether a liquidator could safely proceed with his functions while court proceedings pend in court even though misconceived. The court is called upon to identify and filter out, at an early stage, claims which may be trivial or without merit.
 22. At this stage an applicant must show that: - (i) 'sufficient interest in the matter otherwise known as locus standi; (ii) that he/she is affected in some way by the decision being challenged; and, (iii) that he/she has an arguable case and that the case has a reasonable chance of success. The applicant has the burden of demonstrating that the application raises a serious issue. This is a low threshold. If the court is not persuaded as aforesaid, sanction will be denied and the matter proceeds no further. The facts relied upon must be clearly set out in the founding affidavit or draft pleadings or both. The court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases.
13. I have perused the pleading filed herein and I note that the plaintiff seeks a declaration it had a lawful compromise with regard to the financial facilities where it was to pay Kshs 43,100,000 to the defendant in full settlement of the liabilities and a mandatory injunction to discharge the guarantors.
14. My finding is that the plaintiff has demonstrated that it has a reasonable cause of action. I also note that the suit was initiated before the appointment of the liquidator which means that the liquidation process commenced after the plaintiff had moved the court for the orders sought in the plaint. In *Kwanza Estates vs Dubai Bank of Kenya Ltd & another* [2016] eKLR the court observed that: -
 26. I take it that section 56(2) carries toward the spirit of section 228 of the Companies Act. The only difference is that under Act No 10 of 2012, the intention is to give liquidation a focused and specialized hand under the sanction of the statutory Regulator. I find and hold that this court has the jurisdiction under section 56(2) to grant sanction that this matter having been filed prior to the appointment of the liquidator be continued with after such appointment.
15. Further in *Kuza Farms & Allied Ltd vs Dubai Bank Kenya Ltd (In liquidation)* [2017] it was held that:-
 12. In my considered opinion, the essence of seeking leave and/or sanction of the court to commence civil proceedings pursuant to section 56(2) of the Act, is *inter alia* to evaluate the merit of the alleged claim to be instituted. As rightfully submitted, the intention is to weed out frivolous cause of actions. The question that arises is: How can the court rule at



this stage, that the applicant intended cause of action is frivolous and/or lacks merit. The provisions of article 48 of the *Constitution* also comes into play, that the state shall ensure “access to justice for all persons”. The respondent have indeed raised very salient points in the replying affidavit by Boru, and in their submissions. However, I find that, the matters deponed to, and the submissions filed are very useful if the same were considered in the intended notice of motion application by the applicant. I have intentionally not delved there into in details so that if the intended suit/application are allowed, then i can use the materials at that time. The delicate balance herein is to weigh the consequences of denying the applicant an opportunity to be heard, and allowing the same. I am of the view that, if I allow the application, the respondent will have a second bit on the cherry, as they will still be heard on the intended pleading sought to be heard. If I deny the applicant the opportunity to be heard, then they will be prejudiced, as their “story” however “hopeless” it may be deemed to be will remain, untold and/or unheard.

16. Guided by the jurisprudence in the above cited cases, I find that the applicant has demonstrated that it has a valid claim against the defendant which favours the granting of the orders sought herein. I find that the applicant will be greatly prejudiced if the orders sought are not granted.
17. Section, 100 of the *Civil Procedure Act* (cap 21) laws of Kenya, provides that: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.
18. In *Ochieng and others vs First National Bank of Chicago* Civil Appeal Number 147 of 1 (unreported) as cited with approval in *St Patrick’s Hill School Ltd vs Bank of Africa Kenya Ltd* [2018] eKLR the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings as follows:-
 - a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b) the amendments should be timeously applied for;
 - c) power to amend can be exercised by the court at any stage of the proceedings;
 - d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
 - e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
19. The defendant was not opposed to the amendment of the pleading for reasons that it amends the previous version by reflecting the current status of the respondent. I have considered the proposed amendments and I find that the same do not introduce a new cause of action but only amends the status of the respondent.
20. In the upshot, I find that the application dated May 25, 2021 has merit I therefore allow it as prayed. Costs shall abide the outcome of the main suit.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Mwangi for Luseno for Plaintiff.

Mr. Akach for Respondent.

Court Assistant- Sylvia

