



**SBM Bank (Kenya) Limited v Singh (Civil Case E503 of 2020)
[2022] KEHC 12172 (KLR) (Commercial and Tax) (22 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E503 OF 2020
DAS MAJANJA, J
AUGUST 22, 2022**

BETWEEN

SBM BANK (KENYA) LIMITED PLAINTIFF

AND

JAMES GITAU SINGH DEFENDANT

RULING

1. This ruling is in respect to the Notice of Motion dated July 30, 2021 filed under order 2 rule 15 of the [Civil Procedure Rules](#). It is supported by the affidavit of Payal Paresh Davez, an advocate, representing the defendant. It seeks an order that the plaintiff's suit against the defendant be struck out with costs. The application is opposed through the replying affidavit of Kevin Kimani, the plaintiff's legal manager, sworn on April 27, 2022.
2. By way of background, the defendant entered into an agreement on November 31, 2015 with Chase Bank (Kenya) Limited (in liquidation) ("Chase Bank") which was taken over by the plaintiff, SBM Bank, ("the Bank") vide Gazette Notice no 6833 of July 6, 2018 ("the Gazette Notice"). The agreement was for provision of banking services of kes account number 001xxxxxxxx991 and Euro account number 001xxxxxxxx002 ("the accounts"). The accounts were overdrawn to a sum of EUR 530,692.91 and kes 367,688 as at September 17, 2020 and continue to accrue interest. The defendant failed to pay the said sums despite numerous negotiations with the plaintiff which led to the filing of the Plaint dated November 23, 2020.
3. The defendant filed a Notice of Motion dated February 15, 2021 seeking production of the documents referred to in the Plaint necessary to prepare his Defence. The defendant states that the Plaint dated November 23, 2020 indicated that '...vide Gazette Notice no 6833 of July 6, 2018 the plaintiff took over the business of Chase Bank (Kenya) Limited and all rights and obligations including rights and obligations with respect to the defendant's accounts were validly transferred to the plaintiff herein.'



The defendant went ahead to highlight the contents of the Gazette Notice and sought production of the following documents:

- i. The agreement for the transfer of certain assets and the assumption of certain liabilities dated April 17, 2018 between Chase Bank (Kenya) Limited (in liquidation) and SBM Bank (Kenya) Limited, mentioned in the Kenya Gazette, under Gazette Notice no 6833.
 - ii. The Kenya Deposit Insurance Corporation Limited Board of Directors resolution passed April, 2018 and May, 2018;
 - iii. The instrument of transfer of assets and liabilities between Chase Bank (Kenya) Limited (in liquidation) and SBM Bank (Kenya) Limited;
 - iv. The Central Bank Supervision Reports of Chase Bank (Kenya) Limited from the year 2011 to 2015;
 - v. The Statutory Audited Reports of Chase Bank (Kenya) Limited (in liquidation) from year 2011-2015.
4. This application was unopposed and on June 16, 2021, this court allowed it and directed the plaintiff to produce the documents within 21 days. The plaintiff failed to produce them prompting the defendant to file the present application seeking to strike out the plaintiff's suit. The defendant avers that the refusal to produce and supply the documents is an indication that the plaintiff has no reasonable cause of action against it and therefore the suit should be struck out.
 5. In opposition to the application, the plaintiff states that on April 7, 2016, Chase Bank was placed under receivership by the Central Bank of Kenya which appointed the Kenya Deposit Insurance Corporation ("KDIC") as the receiver. It states that under the Gazette Notice, KDIC approved the transfer of certain assets and certain liabilities of Chase Bank to SBM Bank (Kenya) Limited which included the defendant's accounts.
 6. The plaintiff avers that it instructed its advocates to inquire into the status of the defendant's accounts from KDIC through the letter dated August 17, 2021. KDIC responded and confirmed that the obligations, assets and/or liabilities of the defendant's account rest with SBM Bank (Kenya) Limited. The plaintiff states that it has complied with the court's orders issued on June 16, 2021 and November 24, 2021 and has produced all the documents within its power and possession as directed by the court on July 29, 2021. It contends that the matter is yet to proceed to pre-trial conference as contemplated in order 11 of the *Civil Procedure Rules* and as such the application lacks merit.
 7. The application was disposed of by written submissions. From the arguments and authorities cited, the issue for determination is whether the court should strike out the claim on the ground of non-compliance with orders of discovery.
 8. The defendant submits that the plaintiff disobeyed the court orders on production of documents which are vital to establish the plaintiff's *locus standi* to recover the debt from as it has not provided any documents to show transfer of the defendant's accounts from Chase Bank. In his view, the issue of privilege does not arise as claimed by the plaintiff and as was held by the court in the ruling dated November 17, 2021, the defendant is only interested in the information showing that his accounts were specifically transferred from Chase Bank and not all the other assets and liabilities.
 9. The plaintiff states that it has complied with the court order since it has availed documents which were within its power and possession and it cannot be compelled to produce documents that are not in its possession. It cites *Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd* NRB Misc. 607 of 2014 [2016] eKLR to urge that the court can only order discovery of documents that are relevant and



necessary. It submits that the defendant has not pleaded that the plaintiff lacks *locus standi* hence the application lacks any basis. On the aspect of *locus standi*, the plaintiff contends that it has established the relationship between the defendant and Chase Bank which the defendant does not deny. It adds that since the principal issue raised by the defendant is whether there is a different entity apart from SBM Bank Kenya that took over the assets and liabilities of Chase Bank, burden of proof shifts to the Defendant to demonstrate that his accounts and/or debt lies with a different entity that took over Chase Bank and not SBM Bank Kenya.

10. In its replying deposition and in particular the declaration of Kevin Kimani sworn on February 22, 2022, the bank continues to urge that the documents sought are privileged information. It has produced a letter dated September 20, 2021 from the liquidation agent of Chase Bank confirming that the defendant held an account at the said bank. It also produced the defendant's statement of accounts.
11. The ultimate purpose of discovery is to ensure that the parties have a level playing field by ensuring full disclosure of documents by either party at the earliest opportunity. I agree with the sentiments of the court in *Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd (Supra)* that discovery will only be ordered for documents that are necessary and relevant. Finally, the court will only strike out a pleading for non-compliance with orders of discovery as a last resort as was held by the court in *Eastern Radio Service v Tiny Tots* [1967] EALR 392 where Newbold P, stated, "It is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the court. Nor is it, I think, in dispute that willful means intentional as opposed to accidental."
12. The documents the defendant seeks relate to the question whether the plaintiff has locus standi to prosecute the suit. The plaintiff submits that it has produced all the documents in its power and possession hence the burden shifts to the defendant to prove the case that it lacks *locus standi*. At this stage I wish to point out that discovery does not deal with the sufficiency or the weight to be ascribed to the documents produced. The latter issue is the subject of the application, that is, whether the court should strike out the suit for failing to disclose a reasonable cause of action made under order 2 rule 15 of the Civil Procedure Rules.
13. When the issue of discovery first came up, I stated as follows regarding the issue of privilege and confidentiality in the ruling of November 17, 2021 made pending the determination of the application:

Having heard the arguments between the parties, I am not satisfied that plaintiff has made sufficient disclosure in relation to the defendant. The issue of privilege and confidentiality does not affect the specific party before the court where the matter in issue relates to the capacity of the plaintiff to collect the debt. Neither the court nor the defendant is interested in the other parties who the plaintiff asserts are entitled to protection by non-disclosure.

In the circumstances, I direct that the plaintiff to make disclosure in relation to the defendant only within 21 days from the date hereof. The application dated July 30, 2021 is therefore adjourned to January 29, 2022.
14. The disclosure ordered in the ruling related only to the issue concerning the Defendant hence not all the documents requested, and set out in para. 3 above, are relevant, necessary and or relate to the defendant and the court still has to be satisfied that the documents requested are relevant and necessary to the issue of *locus standi*. The plaintiff's position is that the defendant's debt is one of the liabilities that was transferred while the defendant insists on proof of this transfer by demanding specific documents.



15. Amalgamation and transfer of assets and liabilities of financial institutions is governed by section 9 of the [Banking Act](#) (chapter 488 of the Laws of Kenya). Section 9(5) thereof imposes on the Central bank the obligation to publish the notice of such amalgamation and transfer of assets and liabilities. In this respect, it published Gazette Notice no 6855 confirming, *inter alia*, that certain liabilities of Chase Bank had been transferred to the plaintiff. The Gazette Notice is, in my view, the evidence of such transfer. In any case, the production of such a gazette notice is *prima facie* evidence of the due making and tenor of such notice as provided under section 69 of the [Interpretation and General Provisions Act](#) (chapter 2 of the Laws of Kenya) and section 85 of the [Evidence Act](#) (chapter 80 of the Laws of Kenya). In my view there is *prima facie* evidence of transfer of the defendant's debt due to Chase Bank to the plaintiff.
16. Apart from Gazette Notice no 6833 which is relevant and which is a matter of judicial notice, the following documents are not relevant or necessary for determination of the suit;
 - i. The instrument of transfer of assets and liabilities between Chase Bank (Kenya) Limited (in liquidation) and SBM Bank (Kenya) Limited;
 - ii. The Central Bank Supervision Reports of Chase Bank (Kenya) Limited from the year 2011 to 2015;
 - iii. The Statutory Audited Reports of Chase Bank (Kenya) Limited (in liquidation) from year 2011-2015.
17. As to whether the court should strike out this suit for failing to disclose a reasonable cause of action, the general principle guiding the court is that the court should exercise great circumspection in striking out a suit. That it should only do so in the clearest of cases where the case cannot be salvaged by amendment (*D.T. Dobie & Company (K) Ltd v Muchina* [1982] KLR 1).
18. In this case I find that the plaintiff has made sufficient disclosure for the reasons I have explained. Further, the issue of *locus standi* will be a matter that will be dealt with as part of the issues for resolution as the defendant does not dispute its relationship with Chase Bank.
19. I dismiss the application dated July 30, 2021 with costs to the plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2022.

D S MAJANJA

JUDGE

Court of assistant: Mr M Onyango

Ms Odongo instructed by Robson Harris and Company Advocates for the plaintiff

Ms Dave with her Mr Onyango instructed by LJA Associates LLP Advocates for the defendant.

