



Deposit Protection Fund Board as Liquidator of Prudential Building Society (In Liquidation) v Kahumbura & 10 others (Miscellaneous Civil Application 685 of 2012) [2022] KEHC 14382 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14382 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION 685 OF 2012
A MABEYA, J
OCTOBER 21, 2022
IN THE MATTER OF PRUDENTIAL BUILDING SOCIETY (IL)
AND
IN THE MATTER OF THE BUILDING SOCIETIES ACT CAP 489
AND
THE COMPANIES ACT, CAP, 486 LAWS OF KENYA

BETWEEN

DEPOSIT PROTECTION FUND BOARD AS LIQUIDATOR OF PRUDENTIAL BUILDING SOCIETY (IN LIQUIDATION APPLICANT

AND

JAMES M KAHUMBURA 1ST RESPONDENT
WILSON KIPKOTI 2ND RESPONDENT
LUCY N KAHUMBURA 3RD RESPONDENT
PRUDENTIAL DEVELOPERS LTD 4TH RESPONDENT
HAZEL PROMOTION LIMITED 5TH RESPONDENT
LE VOGUE HAIR & BEAUTY SALON LTD 6TH RESPONDENT
BRISKY PROPERTIES LIMITED 7TH RESPONDENT
INTERSTATE COMMERCIAL AGENCIES 8TH RESPONDENT
PACIFIC HOLDINGS LTD 9TH RESPONDENT



**PELICAN ENGINEERING & CONSTRUCTION COMPANY 10TH
RESPONDENT**

STANDARD ASSURANCE (K) LIMITED 11TH RESPONDENT

RULING

1. Before court is the applicant's notice of motion dated April 19, 2021 brought pursuant to order 8 rule 3 and 4 of and order 51 rule 1 the *Civil Procedure Rules 2010*.
2. The applicant sought leave to substitute Kenya Deposit Insurance Corporation as the applicant in the notice of motion application dated November 13, 2012 as per the amended notice of motion annexed thereto.
3. The basis of the application was that at the commencement of this suit, the Kenya Deposit Protection Fund Board was the liquidator of Prudential Building Society; that the said Deposit Protection Fund Board was established by the *Banking Act*.
4. That the Kenya Deposit Protection Fund Board ceased to exist in law upon the enactment of the *Kenya Deposit Insurance Act 2012* which transferred all of the Funds powers and obligations to the Kenya Insurance Deposit Corporation.
5. Therefore, the applicant argued that the Kenya Insurance Deposit Corporation is the liquidator of Prudential Building Society (In liquidation) and is vested with powers to be the proper applicant in this suit. The application was not accompanied by any supporting affidavit.
6. In opposition and on record are 4 grounds of opposition by the respondents herein.
7. The 2nd and 11th respondent lodged a preliminary objection dated April 19, 2021 in ardent opposition to the application. A supporting affidavit sworn on April 20, 2021 by the 2nd respondent's advocate was filed in support of the objection.
8. In the objection, it was contended that this suit is fatally defective, non-existent in law and ought to be struck out on the grounds that the Kenya Deposit Protection Fund Board ceased to exist in law on July 1, 2014; that in the premises, this action effectively abated 12 months from July 1, 2014 upon coming into effect of *Kenya Deposit Insurance Act*; that there is no transitional provision for the resuscitation of the action herein.
9. Further, that the action against the 2nd respondent is res judicata and statutorily time barred.
10. The court will firstly consider whether the objection has merit. The court has considered the submissions filed in relation to it.
11. The first issue for consideration is whether the present suit abated upon the expiry of 12 months from the time the *Kenya Deposit Insurance Act 2012* (the Act) came into operation.
12. The respondents argued that the *Kenya Deposit Insurance Fund, 2012* came into effect on July 1, 2014 effectively replacing the applicant with Kenya Insurance Deposit Corporation and that to be able to continue with this suit, it ought to have applied to act on behalf of the applicant. Reliance was placed upon order 24 rule 3(2) of the *Civil Procedure Rules* for that proposition.
13. Order 24 rule 3(2) of the *Civil Procedure Rules* deals with the abatement of a deceased plaintiff's suit wherein his personal representative does not apply to replace him in the suit within 1 year.



14. It is clear that the aforementioned provision does not apply in this case.
15. Section 76(8) of the *Kenya Deposit Insurance Fund 2012* provides: -
“All legal proceedings pending by or against, the Deposit Protection Fund Board, in respect of the repealed Act, shall be deemed to continue or be continued by or against the Corporation.”
16. The court cannot turn a blind eye to the fact that the applicant ceased to exist on July 1, 2014 when the Act came into effect. The present application that seeks to substitute the defunct board was made on April 19, 2021. About 7 years lapsed before the applicant brought the substitution application.
17. In *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR, the Court of Appeal stated: -
“In dealing with laches, Halsbury’s Laws of England, 4th ed Vol 16(2) at page 910 has this to say;
“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation, equity aids the vigilant, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).
Lord Selbourne LC delivering the opinion of the Privy Council in *The Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 said at page 240:
“Now the doctrine of laches in courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”
18. As a court of equity, I cannot aid the applicant’s inordinate delay. The applicant was well aware that this suit exists and that an application for substitution ought to be made in good time after the commencement of the Act in July 1, 2014.
19. The applicant did nothing but sit on its claim for more than 7 years and is guilty of laches. Equity aids the vigilant not the indolent.



20. Although the present suit did not stand automatically abated upon the expiry of 12 months from the time the Act came into operation, I find that the applicant is guilty of laches due to the undue delay in asserting its legal right or privilege.
21. Having made the foregoing finding, I uphold the objection and strike out the application with costs awarded to the respondents who filed respective oppositions to the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

A. MABEYA, FCIArb

JUDGE

