



**Doshi & another v Central Bank of Kenya (CBK) & another (Commercial Case 36 of 2016) [2022] KEHC 17070 (KLR) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 17070 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE 36 OF 2016  
MN MWANGI, J  
NOVEMBER 25, 2022**

**BETWEEN**

**ASHOK L. DOSHI ..... 1<sup>ST</sup> PLAINTIFF**

**AMIT A. DOSHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CENTRAL BANK OF KENYA (CBK) ..... 1<sup>ST</sup> DEFENDANT**

**IMPERIAL BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before this Court is a Notice of Motion dated 20<sup>th</sup> December, 2021, brought under the provisions of Sections 54 and 56 of the *Kenya Deposit Insurance Act*, 2012, Sections 1A and 3A of the *Civil Procedure Act* and Order 40 Rule 1 of the Civil Procedure Rules, 2010. The plaintiffs seek the following orders-
  - i. Spent;
  - ii. Spent;
  - iii. Spent;
  - iv. That the Honourable Court be pleased to grant leave for the orders sought herein;
  - v. That the defendants herein be and are hereby ordered to deposit USD 7,277,314.91 in a joint interest earning account in the names of the Advocates on record within 30 days of this order as security for any decree that may ultimately be passed by the Court;
  - vi. In the alternative to order (iv) above (sic), the defendants be and are hereby ordered to jointly and severally give a binding undertaking to pay any sums adjudged due and payable to the plaintiffs after full adjudication and determination of this suit; and



- vii. That the costs of this application be borne by the defendants jointly and severally.
2. The application is supported by an affidavit sworn on 20<sup>th</sup> December, 2021, by Ashok L. Doshi, the 1<sup>st</sup> plaintiff herein. In opposition thereto, the 1<sup>st</sup> defendant filed a replying affidavit and a further affidavit both sworn by Kennedy Kaunda Abuga, the General Counsel for the 1<sup>st</sup> defendant on 29<sup>th</sup> December, 2021 and 23<sup>rd</sup> May, 2022, respectively. The 1<sup>st</sup> defendant also filed grounds of opposition to the said application and a Notice of Preliminary Objection both dated 29<sup>th</sup> December, 2021.
  3. The 2<sup>nd</sup> defendant filed a replying affidavit and a supplementary affidavit both sworn by Andrew Rutto, the 2<sup>nd</sup> defendant's Liquidation Agent on 4<sup>th</sup> January, 2022 and 20<sup>th</sup> May, 2022 respectively. The 2<sup>nd</sup> defendant also filed a Notice of Preliminary Objection dated 4<sup>th</sup> January, 2022.
  4. This Court gave directions for the Notices of Preliminary Objection to be heard first. A ruling was delivered on 6<sup>th</sup> May, 2022, where this Court dismissed the Notices of Preliminary Objection by the 1<sup>st</sup> defendant dated 27<sup>th</sup> December, 2021 and the one by the 2<sup>nd</sup> defendant dated 4<sup>th</sup> January, 2022.
  5. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Oluga & Company Advocates on 21<sup>st</sup> January, 2022, 28<sup>th</sup> June, 2022 and 12<sup>th</sup> July, 2022. The 1<sup>st</sup> defendant's submissions on the other hand were filed on 18<sup>th</sup> January, 2022 and 28<sup>th</sup> June, 2022 by the law firm of Amolo & Gacoka Advocates, while the 2<sup>nd</sup> defendant's submissions were filed on 17<sup>th</sup> January, 2022 and 4<sup>th</sup> July, 2022 by the law firm of Issa and Company Advocates.
  6. Mr. Oluga, learned Counsel for the plaintiff submitted that they are seeking to ensure that the consent recorded on 15<sup>th</sup> July, 2016 is not defeated. He further submitted that the said consent was not disputed and that the 2<sup>nd</sup> defendant gave an undertaking to this Court that once this matter is determined, it shall pay the plaintiffs any sums adjudged due and payable to them. He contended that in as much as the said consent was recorded between the plaintiffs and the 2<sup>nd</sup> defendant, the same was done in the presence of the 1<sup>st</sup> defendant's Advocate who did not raise any objection at the time. Mr. Oluga stated that at the time of recording the said consent, the 2<sup>nd</sup> defendant had been placed under receivership by the 1<sup>st</sup> defendant, thus the 2<sup>nd</sup> defendant was by operation of the law under the control of the 1<sup>st</sup> defendant.
  7. Mr. Oluga submitted that on 8<sup>th</sup> December, 2021, the 1<sup>st</sup> defendant placed the 2<sup>nd</sup> defendant in liquidation, a process that ultimately leads to the winding up of the 2<sup>nd</sup> defendant, which means that the undertaking given to this Court by the 2<sup>nd</sup> defendant cannot be enforced when the 2<sup>nd</sup> defendant is in liquidation since it was given when the 2<sup>nd</sup> defendant was in receivership. He stated that the plaintiffs are seeking revival of the said order since they may ultimately succeed in the suit herein, but there is a possibility that by then, the 2<sup>nd</sup> defendant shall have been wound up thus leaving nothing for execution, and it will be impossible to enforce the undertaking given to this Court by the 2<sup>nd</sup> defendant.
  8. The plaintiffs' Counsel submitted that in as much as the appointment of the Liquidator was irregular, the plaintiffs were not challenging the liquidation. He stated that the order made to stay liquidation was a temporary measure and that liquidation cannot be used to challenge the application herein since it was done irregularly, which makes it an illegal process. He submitted that the plaintiffs sought leave of the Court to file the present application in prayer No. 4 of the said application. He stated that the 1<sup>st</sup> defendant can be made a party to the undertaking so that it can be safe, secure and enforceable.
  9. Mr. Chege, learned Counsel for the 1<sup>st</sup> defendant relied on the provisions of Section 45(5)(a) of the *Kenya Deposit Insurance Act* and submitted that the 2<sup>nd</sup> defendant was not under the control and mandate of the Receiver. He further cited Section 51 of the *Kenya Deposit Insurance Act* and submitted that the 2<sup>nd</sup> defendant was not under the control of the 1<sup>st</sup> defendant. He stated that the basis of the



- application herein is the consent but the 1<sup>st</sup> defendant did not give any undertaking, thus the said consent is not binding on it. He stated that the said consent does not talk about the figure being sought by the plaintiffs herein hence there is no legal basis for paying the said sums.
10. He further submitted that the 2<sup>nd</sup> defendant was put into liquidation on 8<sup>th</sup> December, 2021 and pursuant to the provisions of Section 56(2) of the [Kenya Deposit Insurance Act](#), the plaintiffs ought to have sought leave to continue with this suit, which was not done. To this end, Mr. Chege relied on the case of Ashok L. Doshi & another v Central Bank of Kenya & another [2016] eKLR and Thomas & Piron Grands Lacs Limited v Lighthouse property Company Limited; Chase bank Kenya Limited (In Receivership) & another (Interested parties) [2019] eKLR, where Courts outlined situations in which sanction of the Court must be sought under the [Kenya Deposit Insurance Act](#).
  11. While relying on the provisions of Section 50(2) of the [Kenya Deposit Insurance Act](#), Mr. Chege submitted that the 2<sup>nd</sup> defendant had declared a moratorium on the payment to its depositors and other creditors by the institution and that the declaration of the moratorium shall among other matters be applied equally and without discrimination to all classes of creditors, thus the plaintiffs herein are not exempted by the law. He contended that if this Court orders for the amount sought to be deposited in Court, it would lead to favouritism of the plaintiffs as against the other depositors.
  12. Mr. Chege stated that if in the event that the consent took away the powers conferred upon the 1<sup>st</sup> defendant by Section 54(1), (2), & (3) of the [Kenya Deposit Insurance Act](#), it could not have been intended to take away the powers of the 1<sup>st</sup> defendant to appoint a Liquidator. In submitting that the Court has no powers to make orders outside the purview of the [Kenya Deposit Insurance Act](#), he referred to the case of Kenya Deposit Insurance Corporation v Richardson and Davidson Ltd [2017] eKLR. He submitted that the institution herein was liquidated on 8<sup>th</sup> December, 2021, thus it cannot be interfered with by the Court. Mr. Chege stated that the Court of Appeal held that parliament would have expressly made such provisions if it intended so.
  13. Mr. Mansur, learned Counsel for the 2<sup>nd</sup> defendant submitted that no issue has been raised in the present application in regard to the manner in which the 2<sup>nd</sup> defendant was liquidation. He submitted that in the Chamber Summons application dated 20<sup>th</sup> December, 2021, there was no mention that leave was sought as the 2<sup>nd</sup> defendant was in liquidation. He contended that no leave was sought to continue with this suit after the 2<sup>nd</sup> defendant was placed under liquidation. He relied on the case of Bisai & another v KCB & others [2002] 2 EA 346 and submitted that the provisions of Section 56(2) of the [Kenya Deposit Insurance Act](#) which provide for sanction of the Court to be sought for companies in liquidation, before institution of suits or continuance of suits are akin to those of Section 228 of the repealed [Companies Act](#), Cap 486.
  14. He cited cases that were decided under Section 35 of the [Banking Act](#) (now repealed) and Section 228 of the [Companies Act](#), Cap 486 (now repealed), such as Kirtish Premchand Shah vs Trust Bank Limited [2007] eKLR. The 2<sup>nd</sup> defendant's Counsel submitted that the rationale for sanction of the Court is to ensure that during the period of liquidation, there is no preferential treatment of creditors. He also cited the case of Ruth Wanjiku Kagiri v Reliance Bank Limited [2012] eKLR and submitted that in view of the glaring omission by the plaintiffs to seek sanction of the Court, the application herein is defective.
  15. On the issue of the consent, Mr. Mansur submitted that Section 56(3) of the Kenya Deposits [Insurance Act](#) gives complete protection against execution, and attachment after liquidation. He also submitted that if the money being sought is attached, it will offend the provisions of Section 56(3) of the [Kenya Deposit Insurance Act](#), which aims to insulate and protect the interests of the 1<sup>st</sup> defendant. He cited the case of Kwanza Estates Limited v Dubai Bank of Kenya Limited & another [2013] eKLR, where the



- Court held that committal proceedings that had taken place before liquidation could not be enforced. In addition, Mr. Mansur cited Section 33(6) of the *Kenya Deposit Insurance Act* which provides for depositors to be paid in 30 days. He stated that the orders requiring money to be deposited in an interest earning account will affect the deposits to be made to other depositors.
16. It was submitted by Counsel that this Court does not have the jurisdiction to grant the orders sought in the application herein, since the decision to place the 2<sup>nd</sup> defendant in liquidation lies with the 1<sup>st</sup> defendant. He relied on the Court of Appeal decision in *Kenya Deposit Insurance Corporation v Richardson & David Limited & another* (supra), to the effect that under Section 5(1) of *Kenya Deposit Insurance Act*, the liquidation could not be enforced. In addition, Mr. Mansur cited Section 33(6) of the *Kenya Deposit Insurance Act* to the effect that the power to receive, liquidate and wind up an institution is vested in the Kenya Deposit Insurance Corporation (KDIC) only. Mr. Mansur contended that it will be in the interest of the plaintiffs and all other depositors for the interim orders to be lifted or varied so that the 2<sup>nd</sup> defendant can continue receiving money from borrowers and pay out sums due to depositors.
  17. In a rejoinder, Mr. Oluga submitted that the 1<sup>st</sup> defendant is the one which has the express mandate of inspecting and controlling banking institutions. He also submitted that under Section 7 of the *Kenya Deposit Insurance Act*, the Governor Central Bank is a board member of Kenya Deposit Insurance Corporation hence the submissions by Mr. Chege that the 1<sup>st</sup> defendant has no control over the Receiver and Liquidator cannot stand.
  18. Mr. Oluga submitted that the 2<sup>nd</sup> defendant was placed under Receivership on 13<sup>th</sup> October, 2015 and as at that date, Section 53(1) of the *Kenya Deposit Insurance Act* could not be enforced. In addition, Mr. Mansur cited Section 33(6) of the *Kenya Deposit Insurance Act* which provides that the appointment of the Corporation (KDIC) as Receiver shall be for such a period not exceeding twelve months and that the same may be extended by the appointing authority for a further period not exceeding six months, if such extension appeared to the appointing authority to be justified.
  19. He stated that Section 53(2) of the said Act provided that in the course of receivership, the KDIC may recommend to the Central Bank that an institution be liquidated and in such a case, the Central Bank shall appoint the KDIC as the Liquidator. He contended that Section 53 of the *Kenya Deposit Insurance Act* (KDI Act) allowed the appointment of the KDIC as the 2<sup>nd</sup> defendant's Receiver for only 12 months up to 13<sup>th</sup> October, 2016, and that any extension of appointment of the Receiver could only be extended for a further period of up to 6 months, that is up to 13<sup>th</sup> April, 2017 and the law as it was, did not allow for further extension. Mr. Oluga argued that the law as at 13<sup>th</sup> October, 2015 up to 13<sup>th</sup> April, 2017 provided for a maximum period of 18 months and prohibited the 2<sup>nd</sup> defendant's receivership beyond 13<sup>th</sup> April, 2017, but the 1<sup>st</sup> defendant purported to extend the receivership of the 2<sup>nd</sup> defendant beyond the stated period.
  20. He asserted that it was illegal to appoint KDIC as the 2<sup>nd</sup> defendant's liquidator on 8<sup>th</sup> December, 2021 as it was not done in the course of the 2<sup>nd</sup> defendant's receivership which had long passed on 13<sup>th</sup> April, 2017 and could not be legally extended, and if there was any extension, then it was done against the provisions of 53 of the KDI Act. He submitted that an act that is illegal, null and void could not be cited as the basis to challenge the application herein and the entire suit.
  21. On the issue of whether leave/sanction of the Court has been sought to continue with the present suit, Mr. Oluga contended that Section 56(2) of the KDI Act does not provide for "leave" but only talks of the word "sanction" which cannot be equated with leave of the Court as alleged by the defendants.



He indicated that the 1<sup>st</sup> defendant, Central Bank of Kenya is not in liquidation and as such, Section 56(2) of the KDI Act does not apply to it.

22. The plaintiffs' Counsel indicated that the plaintiffs filed two applications; a Chamber Summons dated 20<sup>th</sup> December, 2021 and a Notice of Motion dated 20<sup>th</sup> December, 2021. He also indicated that the first prayer in the Chamber Summons sought an order for the Court to admit the Notice of Motion application for hearing during the Court recess. He stated that the 2<sup>nd</sup> prayer was for the Court to grant (sanction) the interim *ex parte* orders sought in prayers 2 and 3 of the Notice of Motion dated 20<sup>th</sup> December, 2021. He further stated that prayers in the Chamber Summons were not sought just because the Court was in recess but it was also filed as a way of seeking the Court's "sanction" for the interim orders sought in prayers 2 and 3 of the Notice of Motion. He indicated that the foregoing is the reason why prayer 2 of the Chamber Summons asked the Court to grant prayers 2 and 3 of the Notice of Motion. In addition, Mr. Oluga stated that there is no format or formula for seeking the Court's sanction.
23. Mr. Oluga submitted that Section 56(2) of the KDI Act does not specify the time when the sanction of the Court ought to be sought and that the said Section does not specify that sanction must precede the application and that it cannot be sought simultaneously or contemporaneously with a substantive prayer. He relied on the case of *Johnson Mbugua Mugo & 2 others v Dominic Kinuthia Mugo & another* [2004] eKLR, where Judge Kasango held that combining a prayer for sanction with other prayers in the same application is not fatal. The plaintiff's Counsel stated that a prayer for "leave" can be combined with the rest of the prayers and that was what the plaintiffs had done in prayer 4 of the Notice of Motion.
24. Mr. Oluga submitted that prayers 2 and 3 of the Notice of Motion requiring stay of the 1<sup>st</sup> defendant's decision to appoint KDIC as Liquidator of Imperial Bank Limited (In Receivership) did not require the Court's sanction under Section 56(2) of the KDI Act because the 1<sup>st</sup> defendant is not the institution in liquidation hence the said orders cannot be impugned due to want of the Courts' sanction. In addition, he stated Section 56(2) of the KDI Act, 2012 uses the word "may" and not "shall", which means that the said provisions are not mandatory but are permissive. He stated that failure to seek the Court's sanction is not fatal to the case herein or the plaintiffs' application. To buttress the said submissions, he relied on the case of *Kenya Wildlife Service v Joseph Musyoki Kalonzo* [2017] eKLR, where the Court of Appeal stated that the use of the word "may" is permissive and not mandatory and does not oust the jurisdiction of the Court.
25. Mr. Oluga submitted that although there is a moratorium, the 2<sup>nd</sup> defendant gave an undertaking by consent. He indicated that their prayer is for money to be deposited and if the Court ultimately finds that the plaintiff's should not be paid then the money will be returned to the 2<sup>nd</sup> defendant.

#### **ANALYSIS AND DETERMINATION.**

26. I have considered the application filed herein and the affidavits filed in support thereof. I have also considered the replying affidavit as well as the grounds of opposition by the defendants, and the written submissions as well as oral highlighting of the said submissions by the Counsel for the parties. The issues that arise for determination are-
  - i. Whether the application herein is incurably defective for want of sanction pursuant to the provisions of Section 56(2) of the *Kenya Deposit Insurance Act*; and
  - ii. If the defendants herein should be ordered to deposit USD 7,277,314.91 in a joint interest earning account in the names of the Advocates on record within 30 days of this order as security



for any decree that may ultimately be passed by the Court or if they should jointly and severally give a binding undertaking to pay any sums adjudged due and payable to the plaintiffs after full adjudication and determination of this suit.

27. In the affidavit filed by the plaintiffs, they deposed that a consent was recorded in this suit in which the 2<sup>nd</sup> defendant gave an undertaking to pay any sums adjudged due and payable to the plaintiffs after full adjudication and determination of this suit. They averred that the said consent has never been reviewed, varied and/or set aside to date. They stated that during the pendency of the said consent, on 8<sup>th</sup> December, 2021, the 1<sup>st</sup> defendant appointed Kenya Deposit Insurance Corporation (KDIC) as the Liquidator of the 2<sup>nd</sup> defendant, which appointment has the effect of defeating the consent recorded on 15<sup>th</sup> July, 2016 since the legal status of the 2<sup>nd</sup> defendant has changed from being under receivership to being in liquidation and as such, the consent is no longer binding on the 2<sup>nd</sup> defendant.
28. The plaintiffs averred that KDIC is likely to start paying out deposits and that the said payment will defeat their claim which was filed before the appointment of the Liquidator, since there will be nothing left to pay out to the plaintiffs should they succeed in their claim herein. They contended that although the defendants had made some periodic and intermittent payments to the plaintiffs, a substantial portion of their deposits still remains unpaid.
29. The 1<sup>st</sup> defendant opposed the application herein through grounds of opposition dated 29<sup>th</sup> December, 2021 on the basis that-
- i. The 1<sup>st</sup> defendant was not a party to the consent recorded in Court on 15<sup>th</sup> July, 2016;
  - ii. The consent filed in Court on 15<sup>th</sup> July, 2016 does not in any way vitiate the mandate of the 1<sup>st</sup> defendant to place the 2<sup>nd</sup> defendant under liquidation as provided by Section 54 of the [Kenya Deposit Insurance Act](#);
  - iii. That the application has been overtaken by events since the 2<sup>nd</sup> defendant was placed under liquidation on 8<sup>th</sup> December, 2021;
  - iv. Section 50(2)(b) provides a moratorium on payment of deposits to be applied equally and without discrimination of any depositor;
  - v. That the applicants are in no better position than the other depositors of Imperial Bank Limited (IR);
  - vi. The applicants cannot stop liquidation on the basis of their deposit to the exclusion of other depositors;
  - vii. The Receiver having recommended to the 1<sup>st</sup> defendant that the institution be liquidated under Section 54(1) the Central Bank of Kenya the 1<sup>st</sup> defendant herein is under a statutory obligation to appoint a liquidator;
  - viii. There is no legal nexus between the plaintiff's claim of USD. 7,277,314.91 and the 1<sup>st</sup> respondent; and
  - ix. Kenya Deposit Insurance Corporation v Richardson & David Limited & another [2017] eKLR (sic).
30. In the replying affidavit by the 1<sup>st</sup> defendant, it deposed that the exparte injunction orders granted on 22<sup>nd</sup> December, 2021 brought the 2<sup>nd</sup> defendant's operations to a complete halt since the receivership of the 2<sup>nd</sup> defendant cannot be restored. He averred that pursuant to the provisions of the [Banking Act](#), Cap 488, the 1<sup>st</sup> respondent is empowered to regulate and license financial institutions, intervene



in management where necessary and to liquidate institutions by appointing Kenya Deposit Insurance Corporation as the Liquidator as provided by Section 54 of the *Kenya Deposit Insurance Act*.

31. It averred that the 1<sup>st</sup> respondent upon receipt of a recommendation of the KDIC to place an institution under liquidation is bound by the mandatory statutory obligation to appoint KDIC as the Liquidator under Section 52(3) and 54(1) of the KDI Act. The 1<sup>st</sup> defendant further averred that the 1<sup>st</sup> respondent's act in appointing KDIC as a liquidator cannot be suspended or reversed into receivership under Section 43(2) of the KDI Act. It was stated by the 1<sup>st</sup> defendant that it caused the 2<sup>nd</sup> defendant to be placed in liquidation on 8<sup>th</sup> December, 2021 and that upon appointment of a Liquidator, over the 2<sup>nd</sup> defendant, Section 56 of KDI Act strictly applies.
32. In its further affidavit, the 1<sup>st</sup> defendant deposed that nowhere in the consent order dated 15<sup>th</sup> July, 2016 did the 1<sup>st</sup> defendant undertake to pay any sums adjudged in the matter, thus the said order cannot form the basis of the orders sought herein. The 1<sup>st</sup> defendant averred that on 13<sup>th</sup> October, 2015, the 1<sup>st</sup> respondent appointed KDIC as the Receiver of the 2<sup>nd</sup> defendant through Kenya Gazette No. 7715 Vol. CXVII-No.111 since it determined that there existed unsafe or unsound conditions in the 2<sup>nd</sup> defendant to transact business and that warranted the appointment of a Receiver.
33. It was stated by the 1<sup>st</sup> defendant that the receivership of the 2<sup>nd</sup> defendant was extended for a further six months up to 13<sup>th</sup> April, 2017 and that there existed judicial proceedings in HCCC J.R Miscellaneous Civil Application No. 43 of 2016 - Republic v Central Bank of Kenya, Kenya Deposit Insurance Corporation and others, where the receivership period was extended in Court. The 1<sup>st</sup> defendant deposed that on 24<sup>th</sup> March, 2017, the Court in the aforementioned case extended the order freezing the running of time of the receivership for a further 90 days. He deposed that on 19<sup>th</sup> June, 2017, 31<sup>st</sup> July, 2017, and 31<sup>st</sup> July, 2018, the Court froze the running of time of the receivership for a further 90 days, 12 months and 70 days, respectively.
34. The 1<sup>st</sup> defendant averred that on 26<sup>th</sup> September, 2018 in a different suit which is still pending namely; HCCC No. 303 of 2018 - Kenya Tea Development Authority v Central Bank of Kenya, Kenya Deposit Insurance Corporation and Imperial Bank Limited (In Receivership), the time of running of the receivership was frozen by the Court through a Court order issued on 26<sup>th</sup> September, 2018 which order was still in force until the date the 2<sup>nd</sup> respondent was placed in liquidation on 8<sup>th</sup> December, 2021.
35. The 1<sup>st</sup> defendant further averred that on 7<sup>th</sup> December, 2021 it received a recommendation from KDIC for the 2<sup>nd</sup> defendant to be placed in liquidation and on 8<sup>th</sup> December, 2021, the 1<sup>st</sup> defendant revoked the 2<sup>nd</sup> defendant's banking license through Gazette Notice No. 13394 and appointed KDIC as the 2<sup>nd</sup> defendant's Liquidator vide Gazette Notice No. 13395, pursuant to the provisions of Section 54 of the KDI Act.
36. In the affidavit filed by the 2<sup>nd</sup> defendant, it deposed that the plaintiffs failed to seek sanction and leave of this Court before filing the application herein despite being aware of the current legal status of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant averred that the plaintiffs' contention that the consent recorded on 20<sup>th</sup> July, 2016 was a bar to the appointment of KDIC as a Liquidator was without merit since any consent/undertaking that would have the effect of subverting the express provisions of statute and giving preferential treatment to any class of depositors would be contra-statute, unenforceable, null and void as the KDI Act provides an elaborate statutory mechanism for the payment of depositors and other creditors.



37. The 2<sup>nd</sup> defendant deposed that the consent recorded in Court would not affect the statutory mandate of the Central Bank of Kenya or the KDIC to recommend the liquidation of the 2<sup>nd</sup> defendant. It also deposed that pursuant to the provisions of Section 50(9) of the KDI Act, the plaintiffs like all other depositors will have the right to lodge and prove their claim with the Liquidator
38. In the supplementary affidavit filed by the 2<sup>nd</sup> defendant, it deposed that vide Gazette Notice No. 7717 published on 13<sup>th</sup> October, 2015, KDIC declared a moratorium which provided that no deposits on any type of accounts operated by the 2<sup>nd</sup> respondent would be paid nor any claims by the other class of creditors be met during the pendency of the moratorium. It was stated by the 2<sup>nd</sup> defendant that once its banking licence was revoked by Gazette Notice No. 13994, it ceased to be a bank for all intents and purposes and its receivership was terminated by operation of the law.
39. The 2<sup>nd</sup> defendant further stated that with the gazettelement, its liquidation commenced with immediate effect. It averred that Section 56(1) of the *Kenya Deposit Insurance Act* does not contemplate that a cause of action that subsisted against the directors, management or the institution prior to liquidation would be maintained against the Liquidator. In addition, it averred that the law does not contemplate an injunction being granted against the 1<sup>st</sup> defendant as the banking regulator in its decision to place a financial institution in liquidation, without the sanction of the Court.
40. The 2<sup>nd</sup> defendant contended that no consent was recorded by the parties herein neither was there an undertaking to the effect that KDIC would not recommend placing the 2<sup>nd</sup> defendant in liquidation. It indicated that just like all other depositors, the plaintiffs would need to lodge their claim with the Liquidator and wait for their claim to be processed in accordance with the provisions of the KDI Act if any judgment is entered in their favour. The 2<sup>nd</sup> defendant cited Section 50(2)(a) of the KDI Act and averred that the plaintiffs elected to file the suit herein when the 2<sup>nd</sup> defendant was under receivership, which decision was misguided as a moratorium had been declared with the same applying equally and without discrimination to the liabilities of the 2<sup>nd</sup> defendant.

Whether the application herein is incurably defective for want of sanction pursuant to the provisions of section 56(2) of the *Kenya Deposit Insurance Act*.

41. Inasmuch as the plaintiffs submitted that the appointment of the Liquidator was irregular, they did not challenge the liquidation. The defendants submitted that since the 2<sup>nd</sup> defendant had been placed in liquidation, the plaintiffs ought to have sought sanction of Court before filing the application herein and/or proceeding with any suit that was pending against it. The plaintiffs submitted that in the present application, prayer 4 seeks leave of the Court to file the application herein. Since it is not disputed that the 2<sup>nd</sup> defendant was placed in liquidation on 8<sup>th</sup> December, 2021 through Gazette Notice No. 13995, the provisions of Section 56(2) of the KDI Act are applicable herein. The said Section states as follows-

“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.”

42. It is not in dispute that Section 56(2) of the KDI Act does not specify the time when the sanction of the Court ought to be sought and it also does not specify that sanction must precede the application, and that it cannot be sought simultaneously or contemporaneously with a substantive prayer. In addition, the KDI Act does not specify the manner or form in which an application that seeks sanction of the Court shall take. That being the case, I am persuaded by the authority cited by the plaintiffs' Counsel



in *Johnson Mbugua Mugo & 2 others v Dominic Kinuthia Mugo & another* (supra), where Judge Kasango stated thus-

“I do not agree with submissions of the interested party that the application dated 25<sup>th</sup> October 2004 has contravened Section 241. The said application amongst its prayer is a prayer seeking the sanction for the appointment of counsel. I think it is unfortunate that counsel did not first seek the sanction and once sanction was granted then file the application for other prayer. I am of view that even combining of all those prayers is not prejudicial and is not fatal to the application but it may be prudent to first deal with prayer No. 2 and once that prayer is granted the Liquidator can proceed with the other prayers.”

43. In the Notice of Motion dated 20<sup>th</sup> December, 2021, the plaintiffs prayed for the Court to grant leave for the orders sought in the said application. In this Court’s view, the said prayer is synonymous with the plaintiffs seeking the Court’s sanction for the hearing of the application herein as the 2<sup>nd</sup> defendant had been put in liquidation. In this Court’s view, the use of the word “sanction” or “leave” is a matter of semantics as the meaning of the two words is more or less similar, as in both instances, approval or permission of the Court is necessary in order for a party to do a certain action.

44. It is trite that Courts are called upon to do substantive justice for the parties by giving effect to the overriding objective of Sections 1A and 1B of the *Civil Procedure Act* in the interpretation of its provisions and Rules which include; the just determination of the proceedings; efficient disposal of disputes; efficient use of available judicial and administrative resources, and the timely disposal of the proceedings at a cost affordable to the respective parties. In addressing the issue of the overriding objective of the *Civil Procedure Act*, the Court of Appeal in *Stephen Boro Gititha v Family Finance Building Society & 3 others* CA 363/2009 held as hereunder-

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”

45. As Judge Kasango held in the case of *Johnson Mbugua Mugo & 2 others v Dominic Kinuthia Mugo & another* (supra), it would have been more prudent to seek the sanction or leave of the Court first before filing the substantive application herein. It is however my finding that the combination of the prayer seeking leave of the Court with the other prayers in the present application is one of procedural technicality and it affects the form rather than the substance of the application herein, and is curable under the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010. I therefore hold that the plaintiffs complied with the provisions of Section 56(2) of the KDI Act, hence the application herein is not fatally defective.

If the defendants should be ordered to deposit USD 7,277,314.91 in a joint interest earning account in the names of the Advocates on record within 30 days of this order as security for any decree that may ultimately be passed by the Court or to jointly and severally give a binding undertaking give a binding undertaking to pay any sums adjudged due and payable to the plaintiffs after full adjudication and determination of this suit.

46. It must be borne in mind that the plaintiffs are not seeking to revive the receivership of the 2<sup>nd</sup> defendant. They submitted that the application herein seeks to revive the consent entered into on 15<sup>th</sup>



July, 2016 where the 2<sup>nd</sup> defendant gave an undertaking that after full adjudication and determination of this suit, the said defendant shall subject to the right of appeal, pay any sums adjudged due and payable to the plaintiff.

47. The 1<sup>st</sup> defendant submitted that the basis of the application herein is the consent in issue but it did not give any undertaking and as such, the said consent is not binding on it. It indicated that the 2<sup>nd</sup> defendant had also declared a moratorium on payment being made to its depositors and other creditors. The 1<sup>st</sup> defendant further submitted that the declaration of the moratorium shall among other matters be applied equally and without discrimination to all classes of creditors hence the plaintiffs herein are not exempted by law. The 1<sup>st</sup> defendant contended that if this Court orders for the amount being sought to be deposited in Court, it would lead to favouritism of the plaintiffs against the other depositors. The 2<sup>nd</sup> defendant on the other hand averred that just like all other depositors, the plaintiffs would need to lodge their claim with the Liquidator and wait for it to be processed in accordance with the provisions of the KDI Act, if any judgment is entered in their favour.
48. It is not contested that on 13<sup>th</sup> October, 2015 through Gazette Notice No. 7715, the 1<sup>st</sup> defendant placed the 2<sup>nd</sup> defendant under receivership and appointed the Kenya Deposit Insurance Corporation as its Receiver Manager in accordance with Section 43(1) and (2) of the KDI Act. The consent was entered into on 15<sup>th</sup> July, 2016. It is therefore evident that consent between the 2<sup>nd</sup> defendant and the plaintiffs was entered into during the pendency of the receivership.
49. Section 43(1) of the KDI Act provides that the Central Bank shall, in consultation with the Cabinet Secretary whenever the circumstances require, appoint the corporation to be the sole and exclusive Receiver of any institution. I am therefore of the considered view that pursuant to the provisions of Section 43 of the said Act, after the appointment of KDIC by the 1<sup>st</sup> defendant, KDIC gave frequent reports and recommendations to the 1<sup>st</sup> defendant herein, and therefore, upon placing a the 2<sup>nd</sup> defendant under receivership, the 1<sup>st</sup> defendant herein, took over the control of the 2<sup>nd</sup> defendant by operation of the law.
50. Section 45(1)(b) of the KDI Act states as follows-
- “ the Corporation or the appointed person, as the case may be, shall-
- i. remain in control of the assets, liabilities, businesses and affairs of the institution concerned; and
  - ii. carry on the businesses and manage the assets, liabilities and affairs of that institution in the name and on behalf of that institution including disposal of assets until such appointment is revoked by the Corporation.”
51. In light of the forgoing, it is discernible that at the time the 2<sup>nd</sup> defendant gave an undertaking through a consent entered into on 15<sup>th</sup> July, 2016, the Kenya Deposit Insurance Corporation which had been appointed as the 2<sup>nd</sup> defendant’s Official Receiver, was in control of the businesses and affairs of the 2<sup>nd</sup> defendant and carried on the business and management of the 2<sup>nd</sup> defendant’s assets, liabilities and affairs. Therefore, the 2<sup>nd</sup> defendant could only have entered into the said consent of 15<sup>th</sup> July, 2016, with the full knowledge and approval of KDIC and the 1<sup>st</sup> defendant. This Court finds that it is improper for the 1<sup>st</sup> defendant to claim that the said consent is not binding to it when it assumed control of the 2<sup>nd</sup> defendant through KDIC when it placed the 2<sup>nd</sup> defendant under receivership.
52. Authorities abound to the effect that a consent order can only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which



would enable a Court set it aside. In the present application, none of the parties herein has sought to have the consent set aside. What the defendants are contending is that the 1<sup>st</sup> defendant was not a party of the consent and that the same is not binding on it and the said consent cannot be used to bar the 1<sup>st</sup> defendant from placing the 2<sup>nd</sup> defendant in liquidation and appointing a Liquidator. In the case of Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR, the Court of Appeal when laying down the basis for setting aside a consent judgement or order stated as follows-

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgment at page 626 -"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out." See the decision of this Court in J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983, This Court in the case of Brooke Bond Liebig v. Mallya 1975 E.A. 266 held: - “A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.” (emphasis added).

53. In the present circumstances, I hold that the consent entered into on 15<sup>th</sup> July, 2016 between the plaintiffs and the 2<sup>nd</sup> defendant when it was under receivership had the ripple effect, of not only binding the 2<sup>nd</sup> defendant but the 1<sup>st</sup> defendant as well.

54. On whether this Court can grant the orders sought in the present application, Section 55(2) of the KDI Act provides as hereunder-

“Any party aggrieved by the exercise of any of the powers specified herein may apply to the High Court for orders as appropriate.”

55. Section 55 of the KDI Act provides for powers of the corporation as Liquidator which include but are not limited to payment of any classes of creditors in full. The defendants contended that just like all other depositors, the plaintiffs would need to lodge their claim with the Liquidator and wait for their claim to be processed in accordance with the provisions of the KDI Act if any judgment is entered in their favour. On their part, the plaintiffs averred that the application herein ought to be allowed since in the event that they ultimately succeed in the claim herein, the Liquidator might have finished paying all the depositors in full and there will be nothing left to execute.

56. 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 2<sup>nd</sup> 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 1<sup>st</sup> defendant's decision to appoint Kenya Deposit Insurance Deposit Corporation as Liquidator of the 2<sup>nd</sup> 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.

**DELIVERED, DATED and SIGNED at MALINDI on this 25th day of November, 2022. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Ogejoh h/b for the plaintiffs

Mr. Chege for the 1<sup>st</sup> respondent

Mr. Mbatai h/b for the Mr. Issa for the 2<sup>nd</sup> respondent

Mr. Francis Bandika – Court Assistant.

