



REPUBLIC OF KENYA



Rinascimento Global Limited & 13 others v Deloitte & Touche Kenya (Commercial Case E950 of 2021) [2022] KEHC 16879 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16879 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E950 OF 2021
DAS MAJANJA, J
DECEMBER 21, 2022

BETWEEN

RINASCIMENTO GLOBAL LIMITED 1ST PLAINTIFF
ONE RINA LIMITED 2ND PLAINTIFF
LOUIS SHILAKO AS TRUSTEES 3RD PLAINTIFF
CARLO VAN WAGENINGEN 4TH PLAINTIFF
NAMAJA INVESTMENTS LIMITED 5TH PLAINTIFF
SIMON WOODS 6TH PLAINTIFF
LANDSBURY LIMITED 7TH PLAINTIFF
REALCAP INVESTMENT LIMITED 8TH PLAINTIFF
FRANGIE INVESTMENT LIMITED 9TH PLAINTIFF
DAWOOD SHAH 10TH PLAINTIFF
FRANK MWONGERA 11TH PLAINTIFF
ANTHONY GROSS 12TH PLAINTIFF
ROWENA GROSS 13TH PLAINTIFF
CHASE BANK KENYAA LIMITED (IN LIQUIDATION 14TH PLAINTIFF

AND

DELOITTE & TOUCHE KENYA DEFENDANT



RULING

1. The 1st to 13th Plaintiffs ('the Plaintiffs') are shareholders in the 14th Plaintiff ('Chase Bank') which is now in liquidation. The Defendant was Chase Bank's independent auditor between December 31, 1994 and December 31, 2015. By a Plaint dated December 7, 2021, the Plaintiffs filed suit accusing the Defendant of being professionally negligent in carrying out its professional responsibilities and thereby occasioning them extensive loss and damage.
2. The Liquidator of Chase Bank, the Kenya Deposit Insurance Corporation ('the Liquidator') has approached the court by way of the Notice of Motion dated April 6, 2022 made under Order 7 rule 10(2) and Order 51 rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the [Civil Procedure Act](#) (Chapter 21 Laws of Kenya) seeking to strike out Chase Bank from this suit. This application is supported by the affidavit of David Irungu, the Liquidator's General Manager – Resolutions, sworn on April 6, 2022. It is opposed by the Plaintiffs through the replying affidavit of Zafrullah Khan, a director of the 1st Plaintiff sworn on May 25, 2022.
3. The Defendant has also filed a Notice of Motion dated April 7, 2022 made under Order 2 Rule 15 of the [Civil Procedure Rules](#) and sections 55 and 56 of the [Kenya Deposit Insurance Act](#), 2012 ('the KDIA') seeking to strike out the Plaintiff. The application is supported by the grounds on its face. It is opposed by the Plaintiffs through the Grounds of Opposition dated June 14, 2022. The parties have also filed written submissions in support of their respective positions to the applications.

The application by the Liquidator

4. In its application, the Liquidator prays that the suit be struck out. Its case is that the order issued by the court dated December 6, 2021 in HCOMM Misc E870 of 2021 granting leave to the Plaintiffs to join Chase Bank as the 14th Plaintiff to this suit is a nullity because it was obtained through misrepresentation and misapplication of section 56 of the KDIA and as it is only the Liquidator who is empowered under section 55(1)(o) thereof to sue on behalf of a bank under liquidation. It further contends that the shareholders of the Chase Bank, do not have any cause of action as the alleged breaches arise from a contractual relationship between the Defendant and the Chase Bank.
5. According to the Liquidator, once a bank such as Chase Bank is placed under liquidation, only the Liquidator can commence proceedings on its behalf. That section 56 of the KDIA only provides for leave to commence proceedings against a bank in liquidation and not for leave to join it as a plaintiff in a suit as has been done in this case. It adds that only the Liquidator can commence a suit arising from breach of a contractual relationship between a bank in liquidation and a third party. In this case, the Liquidator restates that the Plaintiffs do not have a cause of action against the Defendant as contended because the duty of care claimed to have been breached was only owed to Chase Bank as set out in the contract between the Bank and the Defendant.
6. The Plaintiffs oppose the application. They state that upon being appointed as the receivers, the Liquidator was obligated to facilitate the resuscitation of Chase Bank and to penetrate the management of Chase Bank, assess its viability and determine whether it could be salvaged or whether it is beyond redemption. That in undertaking the aforementioned duties, the Liquidator ought to have as much as possible managed and run Chase Bank as a going concern until such appointment is revoked. However, the Plaintiffs allege that in this case, the Liquidator, with the approval and assistance of the Central Bank of Kenya, milked Chase Bank dry before hurriedly jumping ship.



7. The Plaintiffs aver that the appointment of Kenya Commercial Bank of Kenya Limited as a receiver manager with a view of eventually taking over assets of the Bank was done in violation of the Central Bank Act, the Insolvency Act and the KDIA and the act of appointing a receiver manager for purposes of acquisition of assets of Chase Bank was a death sentence to it, an absurd act on the part of the Central Bank of Kenya and the Liquidator and contrary to the statutory and fiduciary duty they owe Chase Bank, the Plaintiffs and depositors at large.
8. The Plaintiffs admit that section 56(2) of the KDIA prohibits the commencement and/or continuation of any civil proceedings against an institution under liquidation or in respect of its assets without the sanction of this Court. That consequently, the Plaintiffs sought and were granted leave as a condition precedent for filing these proceedings involving Chase Bank. The Plaintiff states that the rationale for such a legal requirement is founded on the need that a neutral arbiter oversees the affairs of the company to ensure that some improper, ignoble, ingenuine or unjustified activities are not undertaken by or against Chase Bank to the disadvantage of its shareholders, creditors, other stakeholders and the Bank itself.
9. The Plaintiffs state that indeed, leave was granted by the court on December 3, 2021 to the Plaintiffs to join Chase Bank pursuant to section 56(2) of the KDIA. Nonetheless, the same was never challenged and to date no application has been put forward to set aside the said order.
10. The Plaintiffs reiterate that their suit challenges the manner in which the Defendant conducted the audit of Chase Bank for the year ending 2015 and that they are aggrieved by the manner in which the Defendant restated Chase Bank's accounts which was detrimental and prejudicial to Chase Bank, its shareholders and depositors and this forms the substratum of the suit. They contend that they have a valid claim which they need to pursue against the Defendant, which claim is by and large in respect of the Defendant's actions, which in turn directly affect Chase Bank's assets and such, it was extremely necessary that leave be granted by the court institute the suit and join Chase Bank.
11. The Plaintiffs urge that the Liquidator's application is not for misjoinder, but rather seeks to strike out pleadings. Nonetheless, the Plaintiffs submit that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. They further state that the presence of Chase Bank is necessary to enable the court effectually and completely adjudicate upon and settle the questions involved in the suit.
12. The Defendant supports the Liquidator's position that Chase Bank has been improperly joined as a plaintiff as it is only the Liquidator who has the right or power to bring proceedings in the name of and on behalf of Chase Bank under section 55 (1) (o) of the KDIA. The Defendant submits that the Court had no jurisdiction to grant the Plaintiffs leave to bring these proceedings under section 56 of the KDIA and that the order granting leave on December 3, 2021 in HCOMM Misc E870 of 2021 was made without jurisdiction.

The Defendant's application

13. The Defendant's case is that the Plaintiffs do not have any cause of action or locus standi to bring these proceedings against it on that ground that the only contract was between it and Chase Bank. That if any duty was owed by the Defendant to the Plaintiffs, as shareholders under the provisions of the Companies Act, 2015, it was to the shareholders of Chase Bank as a body and not to individual shareholders and where a loss is suffered by an actionable wrong alleged to have been done to both the company and the shareholders as alleged, the cause of action is vested in the company and not in the individual shareholders.



14. The Defendant states that any loss or damage which the Plaintiffs may have suffered as a result of any alleged breach of such statutory duty is reflective of the loss or damage which Chase Bank may have suffered and that to allow the Plaintiffs as shareholders to sue in respect of the same alleged actionable wrongs as Chase Bank is suing on would be to allow double recovery. The Defendant avers that any such statutory duty owed by it to the shareholders in Chase Bank was to enable the shareholders as a body to exercise and protect their collective interest in the management of Chase Bank and does not give rise to any claim for economic loss alleged to have been suffered by the Plaintiffs. That the alleged loss of the Plaintiffs measured by the diminution in value of their shareholding or investment as alleged merely reflects the alleged loss suffered by Chase Bank in respect of which Chase Bank has its own cause of action.
15. The Defendant further avers that the claims put forward by the Plaintiffs are time barred as all matters pleaded in the Plaint relate to the audit of Chase Bank's accounts for the period ending December 31, 2015 and to various alleged acts of the Defendant on or before April 6, 2016 or alternatively the appointment of the receiver on April 7, 2016. That any claim based on damages alleged to have been suffered by the Plaintiffs for alleged breach of the statutory duty imposed on the Defendant is a claim in tort and time barred under section 4(2) of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) and any claim by Chase Bank would be time barred under the provisions of the contract between Chase Bank and the Defendant as set out in clause 12 of their Engagement Letter dated November 18, 2015.
16. The Defendant also states that the combination of claims by the 1st and 14th Plaintiffs is an abuse of the process of the court as the Plaintiffs' deponent admits in its statement of evidence that he is a director of the 1st Plaintiff and was at all material times the Chairman of Chase Bank and that Chase Bank has sued the deponent and the 1st Plaintiff herein together with other persons and entities in HCCC No 159 of 2017.
17. The Plaintiffs oppose the Defendant's application. They reiterate that they have the locus standi to sue the Defendant by virtue of being shareholders of Chase Bank as a duty of care is owed to them. They maintain that they were granted leave by the Court to join Chase Bank pursuant to section 56(2) of the KDIA in HC COMM Misc Application No E870 of 2021 and that the Plaintiffs disclose a reasonable cause of action as against the Defendant with adequate reprieve under the law. The Plaintiffs state that the Defendant does not make any justifiable argument why the suit is unsustainable on account of the facts on this case and that the application is therefore lacks and merit and ought to be dismissed.

Analysis and Determination

18. From the two applications, the parties' responses and submissions, the two issues that emerge are whether Chase Bank should be struck out from the suit and whether the suit against the Defendant should be struck out.
19. Chase Bank's application is grounded on the fact that it ought not to have been made party to this suit as the 14th plaintiff by the order of December 3, 2021 that granted leave to the Plaintiffs to join it as a party pursuant to section 56(2) of the KDIA. Essentially, Chase Bank seeks to review, set aside and/or vary the court's order of December 3, 2021.
20. It is not in dispute that on December 3, 2021 in HC COMM Misc No E870 of 2021 the court granted leave, 'to the 1-13th Plaintiffs/Applicants to enjoin the 14th Plaintiff herein Chase Bank Kenya (in receivership) pursuant to section 56(2) of the the *Kenya Deposit Insurance Act* as per the Plaint annexed.' It is this order that the Liquidator and Defendant seek to challenge. Since the order was made ex-parte, it may be challenged by a party in subsequent proceedings who is affected by it as it is merely



provisional and not final and conclusive (see *Mary Wambui Kabugu v Kenya Bus Services Limited NRB CA Civil Appeal No 195 of 1995 [1997] eKLR*).

21. The impugned order was made under section 56(2) of the KDIA which provides 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.

The plain meaning of the aforesaid provisions is that the sanction of the court is required in order to commence or continue a suit against a bank in liquidation. This is what the court stated in *Coast Hauliers Limited v Imperial Bank (In receivership) ML HC COMM No 16 of 2020 [2021] eKLR*:'

'My understanding of the provisions of section 56(2) of the said Act is that the sanction of the court is required when a litigant institutes a suit or wishes to continue with a suit against an institution which has been placed under liquidation, in so far as its assets are concerned.'

22. This suit is by the Plaintiffs against the Defendant and not one where the Plaintiffs' seek relief from Chase Bank against its assets. In effect, it is a case where the Plaintiffs' seek to appropriate Chase Bank in order to pursue the Defendant which action does not fall within the purview of the section 56(2) of the KDIA. The sanction envisaged is for the Plaintiffs to proceed with the suit against the assets of Chase Bank. The Defendant, against whom the suit is lodged, can hardly be termed as an asset of Chase Bank.

23. Further, the Liquidator and the Defendant are correct to point out that under section 55(1)(o) of the KDIA, only the Liquidator has power to, 'sue in the name of an institution in liquidation, without the sanction of the Court.' The Plaintiffs' cannot therefore appropriate Chase Bank's name to pursue the Defendant. In addition, the provisions of Order 1 rule 10(3) of the Civil Procedure Rules are germane to this matter and provide as follows:

'10(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing.'

24. In *Joseph Nganga Ndungu and 10 Others v Original Wapendwa Afya Bidii Housing Co-operative Society Limited NRB ELC No 1562 of 2014 [2018] eKLR*, Okong'o J, explained this position as follows:

'The rationale for requiring consent to be obtained before a person is added to a suit as a plaintiff is that one cannot be forced to be a plaintiff in a suit save where one is added to a suit by the court on its own motion. See the case of *Lombard Banking Kenya Limited v Shah Bhaichand Bagwami* [1960] EA 969. A person can only be a plaintiff in a suit if he has some right to a relief against a defendant in respect of which the burden of proof is on him. It is futile to join a person to a suit as a plaintiff without his consent because he may not have a claim against the defendant in the suit. There is also the cost consequence factor in the event the suit is dismissed with costs. It is only fair that the consent of a person sought to be joined as a plaintiff in a suit be obtained before being exposed to such expense.'

25. In conclusion, I find and hold that despite having been granted leave to join Chase Bank as the 14th Plaintiff, such leave cannot be granted under section 56(2) of the KDIA in the circumstances of this case. Further, the Liquidator having power to institute suit in Chase Bank's name, cannot be forced to prosecute a suit by mere joinder to the suit. Since it has not consented to the cause of action, it cannot be joined to the suit as a Plaintiff. Consequently, Chase Bank is struck out from these proceedings.



26. Turning to the Defendant's application, it seeks to strike out the Plaintiffs on the ground that the Plaintiffs do not have any cause of action or locus standi to bring these proceedings against it, that the Bank is improperly joined as a plaintiff, that the Plaintiff's suit is time barred and that the claims by the 1st and 14th Plaintiffs are an abuse of the court process. I have already dealt with the issue of joinder of the 14th Plaintiff to this suit. I will deal with the other aspects of the application.
27. It cannot be gainsaid that the power of the court to strike out a suit is drastic and must only be resorted to in the clearest of cases and where the suit cannot be saved by amendment (*DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another NRB CA Civil Appeal No 37 of 1978 [1980] eKLR*). Where there are facts to be ascertained or the defence raises triable issue then the court will not exercise that power and instead allow the matter to be ventilated at a full hearing.
28. The Defendant's position is that it only had a contract with Chase Bank and that any cause of action is vested in Chase Bank and not the individual shareholders and that any loss or damage which the Plaintiffs may have suffered by any alleged breach of such statutory duty is reflective of the loss or damage which Chase Bank may have suffered. In a nutshell, the Defendant is saying that the 1st -13th Plaintiffs, as shareholders, have no cause of action against it.
29. In their Plaintiffs, the Plaintiffs aver that the Defendant owed a duty to Chase Bank and its shareholders both in contract and also in tort to exercise a standard of skill and care appropriate to the Defendant's professional status. As such, the Plaintiffs aver that the Defendant is liable both in contract and in tort for all losses suffered by the Plaintiffs by reason of that breach of duty.
30. As regards the claim based on contract, I hold that the Defendant is correct to submit that its relationship is only between it and Chase Bank, as its auditor. This is basically a contractual relationship to which the shareholders are not privy. The Plaintiffs cannot implead a contract to which they are not party to hence any cause of action grounded on the contract is a non-starter for lack of privity (see *Aineah Likuyani Njirah v Aga Khan Health Services [2013] eKLR*). Further, while the Plaintiffs pleads breach of contract, the terms of the alleged contract, whether express or implied, between them and the Defendant are not pleaded.
31. As to whether the Defendant owes a duty of care to the body of shareholders as a whole, is a triable issue that should be determined during the trial. I accept, and there is ample authority cited by the Plaintiffs' counsel, that an auditor's statutory duty to prepare accounts is owed to the body of shareholders as a whole (see *Caparo Industries PLC v Dickman and Others [1990] 1 ALL ER 568*). The court will also be able to determine whether there was as a proximate relationship between Chase Bank, its shareholders and the Defendant in order to establish tortious liability (see *Segwick Kenya Insurance Brokers v Price Water House Coopers Kenya HCCC No 720 of 2006 [2007] eKLR*).
32. But the finding that there is a cause of action based on the auditor's statutory duty, is not the end of the matter as the Defendant contends that such a claim is, in any event, time barred. The Defendant contends that the Plaintiffs' claims are alleged to have taken place between December 31, 2015 and April 6, 2016 and that the same allege breach of the statutory duty imposed on the Defendant, which is a claim in tort and thus time barred under section 4(2) of The *Limitation of Actions Act* which provides that 'An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued'. Based on the cause of action as pleaded in the Plaintiffs, I agree with the Defendant that the Plaintiffs plead a breach of duty of care for actions or omissions that happened in 2015 and 2016. The Plaintiffs admit the same in its submissions by stating that the cause of action arose when the Defendant allegedly restated the 14th Plaintiff's financial statements on April 4, 2016.



33. A breach of statutory duty of care is a claim in tort essentially, so is the claim in negligence (see *Robin Cabill & 9 Others v TS Nandhra & 3 Others Civil Appeal No 57 of 2002 (UR)*). The Plaintiffs' cause of action based on breach of duty of care having arisen in 2016, ought to have been filed latest by 2019 hence it is barred by section 4(2) of the [Limitation of Actions Act](#).

Conclusion and Disposition

34. In summary, I hold the 14th Plaintiff cannot be joined to this suit without its consent as a plaintiff. Further, the cannot does not have the power under section 56(2) of the KDIA to grant leave for a party to join a financial institution under liquidation as a plaintiff to a suit as was done in this case.
35. As regards the claim against the Defendant, I hold that in so far as the Plaintiffs' claim against the Defendant is grounded on contract, there is no privity of contract between the Plaintiffs and the Defendant. That the claim based on tort or breach of statutory duty is barred by the statute of limitations as I have demonstrated.
36. It must be clear that the Plaintiffs' suit cannot survive the draconian orders of the court allowing the applications by the 14th Plaintiff and the Defendant striking out the suit. I therefore allow the 14th Plaintiff's application dated April 6, 2022 and order the 14th Plaintiff be struck out from the suit and the Defendant's application dated April 7, 2022 striking out the suit.
37. The Plaintiffs shall bear the costs of the 14th Plaintiff's application and the Defendant's application and suit.

DATED and DELIVERED at NAIROBI this 21st day of DECEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ahmednasir, SC with him Ms Rono instructed by Ahmednasir, Abdullahi Advocates LLP for the 1st – 13th Plaintiffs

Ms Lubano instructed by Oraro and Company Advocates for the 14th Plaintiff

Ms Kirimi instructed by Hamilton Harrison and Mathews for the Defendant.

