



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL SUIT NO. 11 OF 2019**

**FAST TRACK**

**SULEIMAN ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**DUBAI BANK KENYA LIMITED**

**(IN LIQUIDATION).....DEFENDANT/RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Koyokko Advocate for the Applicant**

**Mr. Muchiri Advocate for the Respondent**

**RULING**

The plaintiff/applicant instituted proceedings against the defendant/respondent vide a plaint dated 03.10.2018 filed together with a notice of motion application under certificate, seeking to restrain the defendant from appointing receivers over the plaintiff in exercise of its powers in a charge dated 18.10.1999 granted by the plaintiff to **East African Development Bank (EADB)** over the plaintiff's property **LR. No 21983 and 21918**. The plaintiff had issued said charge to **EADB** to guarantee credit facilities extended by the said Bank to **Kemu-Salt Packers Productions Limited**. The plaintiff then filed the current Notice of Motion application dated 27.03.2020 seeking the following orders *inter alia*:

**1. Spent**

**2. That the Plaintiff be granted leave to amend its plaint in terms of the draft amended Plaint annexed hereto.**

**3. That this Honorable court be pleased to stay the hearing of the counter claim by the Defendant against the plaintiff in respect of Bank Account Number 810xxxxx in view of Nairobi Milimani Commercial Courts on Dubai Bank Kenya Limited in liquidation in view of Nairobi Milimani Commercial Courts HCCC No. 467 of 2015 Kenya Deposit Insurance Corporation Vs Hassan Ahmed Abdul Hafedh Zubedi & Suleiman Enterprises Limited & 4 Others which is pending hearing.**

**Costs of the Application be provided for.**

The application is premised on the grounds (1) – (6) on the face of the application and further supported by the supporting affidavit of one **Mohamed Ali**, a general manager of the applicant dated 27.03.2020. The respondent filed a Replying Affidavit dated 10.08.2020 by a Resolution Officer, one **John Masega Ombasa**.

**Background**

In summary the applicant, a limited liability company is the Proprietor of **LR. No. 21918 Malindi, LR. No. 21983 Malindi, LR. No. 11/6163 Mombasa, LR. No. 11/6164 Mombasa and LR. No. 11/1773 Mombasa**. The plaintiff had an arrangement with Kemu-Salt Packers Production Limited where it had allowed the company to harvest salt on its land **LR. No. 21983 and LR. No. 21918**. Vide a charge dated 18.10.1999 the plaintiff charged its property **LR. No. 21983 and 21918** to East Africa Development Bank to secure a loan granted to Kemu-Salt Packers Production Limited. The borrowing was also secured by a debenture issued by the said company in favor of the bank over all its under takings dated 01.09.1999. Upon default by Kemu-Salt Packers Production Limited, the defendant appointed receivers over the assets of the company. Upon receivership the defendant then entered the aforementioned parcels of land and began harvesting salt, it went further and granted a license to another company Kemu-Salt Limited to harvest salt from the plaintiff's land. Kemu-Salt Packers Production Limited

has challenged the appointment of the receivers on another suit pending before this Court. The plaintiff consequently filed the instant suit seeking interalia; an order of injunction restraining the defendant from appointing a receiver over its assets, advertising, selling, disposing of, transferring or interfering with its assets, a declaration that the transfer of charge over the plaintiff's property was a nullity and a declaration that the guarantee and charges over the plaintiff's property are fully discharged and free of any encumbrances to the defendant. Upon service the defendant filed a defence and counter claim. The plaintiff then filed this instant application seeking leave to amend its plaint and praying for an order to stay the hearing of the counter-claim by the defendant.

This court requested that parties file submissions on the Notice of Motion application.

### **Applicant's Written Submissions**

The applicant through its advocate **Koyokko**, in his submissions dated 13.10.2020 and filed on an even date, submitted that there were only two issues of determination in their view; first, whether the plaintiff should be granted leave to amend its plaint and secondly whether the counter-claim introduced by the respondent is res sub-judice and should be stayed pending the hearing of **Nairobi Milimani HCCC No. 467 of 2015**.

On the first issue the counsel submitted that Order 8 rule 3 and 5 of the Civil Procedure Rules allowed parties a wide latitude to amend their pleadings at any stage of the suit for purposes of determining the real question in the controversy between the parties which amendments can be effected by the court on its own motion or by the parties. He also submitted that the amendments sought are bona fide and necessary to determine the real issues and further that the respondent itself concedes that it does not oppose the prayer for leave to amend.

On the issue of the stay it was the applicant's submission that the respondent in his amended defence dated 22.11.2018 introduced a new cause of action pleaded in paragraphs 27-31 of their counter claim, which new cause of action introduced by way of the counter claim that the plaintiff seeks to have stayed by this court for it is sub-judice and contrary to section 6 of the Civil Procedure Act. He submitted that the claims in the counter-claim are directly and substantially in issue between the plaintiff and the defendant in **Nairobi Milimani HCCC No. 467 of 2015, Kenya Deposit Insurance Corporation as the liquidator of Dubai Bank Kenya Limited in liquidation- Hassan Ahmed Abdul Hafedi Zubedi and 5 Others**. Counsel submitted that the defendant herein is the plaintiff in that suit while the plaintiff herein is the 3<sup>rd</sup> defendant. It is counsel's submission that the claims as pleaded in **Nairobi Milimani HCCC 467 of 2015** are in all intent purposes offensive to the Provisions of Section 6 of the Civil Procedure Act and should be stayed. Counsel submitted that the respondents counter claim is directly and substantially the same in the previously instituted suit at Commercial Court at Nairobi.

For these submissions Counsel relied on the cases of **Heritage Insurance Company limited v Patrick Kasina Kisilu (2015) eKLR** and **Malindi HCCC No. 28 of 2016 Kemusalt Packers Production Limited v Dubai Bank Kenya Limited & 2 Others** to buttress his arguments and legal perspectives.

### **The Respondent's Written Submissions**

The respondent through its advocate **Mr. Muchiri** filed submissions dated 02.11.2020, submitted that the plaintiff commenced suit in 2018 before the Mombasa High Court wherein it was formerly **HCCC 79 of 2018** seeking to challenge the proposal to appoint a receiver over its properties situated in Malindi, which suit was transferred to Malindi High Court in January 2019. He submitted that the plaintiff failed to file and exchange witness statements and bundles of documents in order to allow the case to proceed to hearing in clear breach of Order 3 Rule 2 of the Civil Procedure Rules.

He submitted that the plaintiff's prayer to have the defendant's counter-claim stayed or struck out is contrary to the applicant's allegations as there was valuable consideration given by the Dubai Bank (In Liquidation) for the assignment of the debenture and Charges by the East African development Bank thus making both the Deed of Assignment of the Debenture and Transfer of Charges valid.

Counsel further submitted that the applicants suit is bad in law and should be struck out in the first instance as the plaintiff had not sought leave of the Court before instituting said suit as required by Section 56 (2) of the Kenya Deposit Insurance Corporation Act, and the application seeking stay of the counter-claim lacks merit and should be struck out as the defendant's counter-claim does not offend the rule against Sub-judice.

For these submissions Counsel relied on the cases of; **Kuza Farm and Allied Limited v Dubai Bank Kenya Limited (In Liquidation) [2017] eKLR, Republic v Registrar of Societies Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others (2017) eKLR, ASL Credit Limited v Abdi Basid Sheikh Ali & Another [2019] eKLR, William Odhiambo Ramogi & 2 Others V Attorney General & 6 Others (2018) eKLR, Kenya Ports Authority v , William Odhiambo Ramogi & 8 Others (2019) eKLR** and **T.S.S Grain Millers Ltd (Under Administration) v NIC Bank Kenya PLC [2018] eKLR**.

### **Issues for Determination**

I have considered the Notice of Motion, affidavits and submissions by Counsel. I also distill only two issues for determination.

- 1. Whether the plaintiff/applicant should be granted leave to amend its plaint in terms of the draft amended plaint annexed to the notice of motion application.***
- 2. Whether the defendant/respondent's counter claim is sub-judice and should be stayed pending the hearing of Nairobi Milimani HCCC No. 467 of 2015.***

### **Legal Analysis and Determination**

The existence of two suits is not disputed hence I shall begin with **the issue of Res- Sub-judice:**

**A useful starting point is Section 6 of the Civil Procedure Act which provides that any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. The operative words in this provision are “expressly” or “impliedly barred.” In a situation where two suits arising out of the same issues between the same parties are brought before the Courts, there is bound to be wastage of resources and frivolous litigation. In order to correct this redundancy, there exists the doctrine of sub-judice which is captured in Section 6 of the Civil Procedure Act.**

**Section 6 of the Civil Procedure Act** provides as hereunder:

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

I will attempt to analyze some salient features of the rule of sub-judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub-judice is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that claim so long as the first suit is pending determination. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage. The mere addition or subtraction of a party or parties does not alter the pith and substance of the suit. The Black’s Law Dictionary defines *lis pendens*, as a Latin expression which simply refers to a “pending suit or action.” In essence, there are three key conditions which need to be fulfilled to bring into operation the doctrine of *res sub-judice*: (a). *The matter in issue in the subsequent suit is directly and substantially in issue in the previous instituted suit.* (b). *The parties in the both suit are the same.* (c). *Both must be pending in Courts in Kenya established under the authority of the Constitution.* (d). *The Court in which the first suit is instituted is a Court with competent jurisdiction to grant the relief claim in the subsequent instituted suit.* (e). *The parties must be litigating under the same title in both suits.*

The Supreme Court of Kenya in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)** had occasion to pronounce itself on the subject of *sub-judice*. It aptly stated:

*[67] The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.*

*[68] In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of the Constitution. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of the Constitution. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.*

*[69] In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of the Constitution as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.*

*[70] In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of the Constitution. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of the Constitution.*

*[71] In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.*

*[72] We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of the Constitution, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that Court has already been moved.*

*[73] Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article*

163(6) of the Constitution. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).

In *Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR the court held that:

*“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”*

The rationale for this principle was restated in *Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General* in which the Court held that:

*“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”*

In *Barclays Bank Of Kenya Ltd vs. Elizabeth Agidza & 2 Others* [2012] eKLR the Court held that:

*“...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties...”*

In *Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga* [2013] eKLR; the Court opined that:

*“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”*

However, in *Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR

*“...In this case whereas it may be true that the issues in both suits may not be directly and substantially in issue, it is however clear that no matter how one looks at the dispute, the resolution thereof will ultimately depend on the determination of the question of the leadership of the Africa Independent Pentecostal Church of Africa. Even if this Court was to find that the cancellation of the subject agreement and the reconciliation by the Registrar was improper, the issue as to the leadership of the Church would still remain at large pending the determination of the other suit, assuming this suit would be determined earlier. On the other hand, if that other suit were to be determined before these proceedings, the setting aside of the decision of the Registrar subsequent to the determination of the leadership of the Church would only cause confusion and chaos in a matter which is already riddled with a plethora of litigation...”*

From the above cited cases, it is clear what the doctrine of sub-judice entails; same parties involved in same/similar subject-matter in various suits in different Courts. In the instant case it is clear that there is a suit that is pending determination under **Nairobi Milimani Courts HCCC No. 467 of 2015** with the same subject matter and different parties but the parties herein are also the parties in that other suit. The subject matter is also similar especially in light of the points raised in the defendant's counter-claim.

**The principle of res sub-judice has been consistently applied as reflected in John Christopher Kamau v Co-operative Bank of Kenya** [2014] eKLR which upheld the case of **Mburu Kinyua v Gachiri Tuti** [1998] KLR 69 where the court found that an issue which ought to have been made a ground of attack or defence in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Of course, nevertheless the nature of the principle demands full disclosure from the advocates to make fullest disclosure of all material facts within their knowledge not to deprive the Court of any advantage may have already obtained by them from their respective clients. It may be a breach of duty of their professional calling as advocates of the High Court that conduct is penal in nature and the materials of any case before the Court cannot be overlooked. This is what the Court of Appeal had in mind in **Yat Tung Investment Company Ltd V Dao Heng Bank Ltd & Another, Privy Council Appeal No. 14 of 1973** citing **Henderson v Henderson** [1843] 3 Hare 100 per **Wigam V.J.** and as adopted by the Court of Appeal in **Uhuru Highway Development Ltd v CBK & 2 Others** [1996] eKLR, the Court of Appeal issued a stern warning to advocates who insist on filing and arguing similar applications to those dismissed otherwise they would be called upon to show cause why they should not be made to personally bear costs. Where the test of res sub-judice is met, the explanatory notes to the Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined.

Speaking of this doctrine under Section 6 of the Civil Procedure Act with respect to the present suit I do not at all doubt that contrary to the objection raised by the respondent's counsel that HCCC No. 467 of 2015 at Commercial and Tax Division at Nairobi involves K.D.I.C as against Suleiman Enterprises Ltd. That the subject matter is on account of Suleiman Enterprises Ltd at Dubai Bank (now under liquidation). Thus the Kenya Deposit Insurance Company as the liquidator of Dubai Bank instruction of the suit thereof is aimed at seeking effective remedies against Enterprises Ltd as guarantor to Kemu-Salt Packers Production Company, Hassan Ahmed Abdul Zubedi, Africa Energy test, Kamp-General Engineering Co. and Maesho Properties Company.

As deduced from the pleadings, affidavits and various correspondents or annexures as between the applicants and the respondents. The cause of action is clear the scope and main objective of the litigation is in respect of Dubai (Bank) under receivership and the primary role played by Suleiman Enterprises Ltd as guarantors to Kemu-Salt Packers Production Kamp General Engineering Co. on the authority to be advanced money from the aforesaid Bank.

That the applicant is a registered owner of properties referenced as LR No. 21918 and LR 21983 situated at Malindi North is not in dispute. It is also not disputed that vide a charge dated 18.10.1999 the two properties are a subject of instruments with East African Development Bank to secure a loan to company known as Kemu-Salt Packers Productions Ltd.

The pleadings talk about an arrangement provided for in the deed of agreement as between the applicant and Kemu-Salt Packers Production Ltd for the later to harvest salt from the aforesaid parcels of land. That generally means that the claim founded against the respondent is a challenge on the purported applicant of receivers to take over management of Kemu-Salt Packers Production Ltd.

Therefore, the thrust of the trail of the claim in HCCC 467 of 2015 and Malindi ELC No. 90 of 2018 have a common denominator, pending before those competent jurisdictional Courts being the discharge of LR No. 21983 and 21918 and the removal of the receiver managers in the pending suit Civil Suit No. 11 of 2019. The applicant seeks declarations of injunctions against the respondent Bank (in liquidation) or its agents from appealing a receiver over the identified charged properties and in any event from interfering with the applicants suit properties.

In addition, a declaration that the purported transfer of charge over the aforementioned properties by East African Development Bank is null and void. In respect of that claim the respondent counter-claimed the sum of Kshs.253,898,081.27 plus interest at commercial rates of 29% with effect from 21.4.2016 and a declaration that the applicant remains liable to the respondent as a guarantor to Kemu-Salt Packers Production Ltd.

Whilst the applicant suit talks of discharging the charge and removal of the receiver managers in that respect read as its, that plea shows that the respondent is allegedly owed the amount in the counter-claim and therefore bound to redeem the charge.

Here I must consider circumstances peculiar to the facts of this case and the provisions of Section 6 of the Civil Procedure Act. I have no doubt in my mind that the express provisions under Section 6 of the Act does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy. It is not enough that one or more issues are in common. The subject matter must be covered in the previous suit and in vice versa whilst the respondent counsel Mr. Muchiri vehemently opposed the line of argument by the applicant counsel to the effect that their counter-claim is res subjudice, in my view the mere fact that HCCC 467 of 2015 is a suit between KIDC, Dubai Bank Ltd, Kemu-Salt Packers Production Ltd, Suleiman Enterprises Ltd, Kamp Engineering and Mosacho Enterprises as defendants and the second suit HCCC No. 11 of 2019 is between the applicant as a plaintiff and Dubai Bank as the defendant, and not the other parties in HCCC No. 467 of 2015 will not take the suit out of the operation of Section 6 of the Act; once the other key parameters are satisfied.

It is sufficient that the already identified parties already referred to are litigating on the two parcels of land in respect to the impugned executed charge. I am persuaded by the facts and circumstances of this litigation after all said and done, there is one factor in common between these parties, they are having a propensity of instituting multiplicity of suits at various Courts competent to try the claim within the framework of the money owed to Dubai-Bank (now under liquidation).

It is quite possible that such suits are filed to vex the Court with a possibility of occasioning conflicting decisions and a mistrial of the issues which may arise from the different forums. The question is one of estoppels, where the matter in issue in the two suits are similar. The Courts inherent power under Section 3A and Section 6 of the Act in consonant with Section 6 of the Civil Procedure Act ought to be invoked to stay any such subsequent trial of the instituted suit. This is the principle expounded in **Nyanza Garage v Attorney General Kampala HCCS No. 450 of 1993:**

*“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases Courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”*

Against such a background of analysis of jurisprudential dimensions, it is apparent to the Court that the defendant claim be considered vexatious for adjudication in HCCC NO. 11 OF 2019 given the earlier filings at the Milimani Commercial Courts. Although the applicant has vigorously claimed that this Court does not have the jurisdiction to entertain the counter-claim for reasons of being res subjudice I am also certain to a large extent, the issues in this suit are cross-cutting the cause of action. The relevance of it can be adducted from the pleadings in the pending suits.

**In the upshot and in the interest of justice and given the peculiar nature of the current claim, I sustain the objection put forth by the applicant counsel to stay the hearing and determination of the respondents counter-claim otherwise it can fit within the rubric of an abuse of the Court process.**

On the issue of amending the plaint, **Order 8 Rule 1 (1)** of the **Civil Procedure Rules** provides;

*“A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed,”*

Order 8 Rule 2 (a) & (b) of the **Civil Procedure Rules** provides;

*“Where an amended plaint is served on a defendant—*

*(a) if he has already filed a defence, the defendant may amend his defence; and*

*(b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.”*

The position in Law is that in exercising discretion to effect any amendment to pleadings, the application must meet two cardinal test:

*(a) That the amendment is necessary for the determination of the real question in controversy,*

*(b) That for the amendment to be allowed, it should not occasion an injustice to the other side.*

Be that as it may be consideration of such matters an amendment can be effected to the pleadings by the Court to sufficiently cater for the following scenarios:

*(a) Grant of consequential relief.*

*(b) To avoid multiplicity of proceedings*

*(c) Taking notice of subsequent events*

*(d) Where the amendment is a formal in nature.*

*(e) To clarify the pleadings.*

*(f) Where the parties in the plaint are wrongly described.*

*(g) Where some properties are omitted from the plaint by inadvertence.*

*(h) Where there is a mistake in the statement of cause of action.*

*(i) Bonafide omission in making the necessary averments in the plaint.*

In the case of *Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991* the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is 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 and amendment notwithstanding the expiry of current period of limitation.*

Under the rules on amendment, the Court should do whatever is necessary to interpret and construe the provisions in conformity with the particular facts and subject matter in issue. If the remedy on amendment is likely to occasion prejudice or an injustice to the defendant or plaintiff it would be inappropriate to grant the application. In the comparative precedent the **Supreme Court of India in Revajeetu Builders & Developers v Narayanaswamy & Sons (2009) 10 SCC 84** formulated the following principles while allowing or rejecting the application for amendment:

*(i) Whether the amendment sought is imperative for proper and effective adjudication of the case?*

*(ii) Whether the application for amendment is bona fide or malafide?*

*(iii) The amendment should not cause such prejudice to the otherside which cannot be compensated adequately in terms of money;*

*(iv) Refusing amendment would in fact lead to injustice or lead to multiple litigation;*

*(v) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And*

***(vi) As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.***

Having said that the above mentioned parameters are not exhaustive as far as the grant of leave to amend pleadings is concerned that means that the court has a very wide berth in granting leave to amend. It is clear from the above principles laid down in the cases I endeavored to import into this case, that an amendment of pleadings in general should be allowed before the final Judgment.

It is imperative that the procedure laid down in the relevant statute and the precedent setting principles be properly observed in the exercise of discretion in matters of amendment to pleadings. This primary Rule is subject to various other statutory limitation which are not merely procedural but mandatory in nature and so affect jurisdiction to grant any such relief.

In the instant case, the legality and validity of the instituted proceedings are permissible altogether with the obvious requirement provided for under **Section 56 (2) of the Kenya Deposit Insurance Corporation 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 with against the institution in respect of its asset without the sanction of the Court.”***

It is also the legal position in Section 46 of the said Act that the following sanctions are expressly stated as follows:

***“(a) No injunction may be brought or any other action or civil proceeding commenced against the Corporation or the appointed person in respect of the assumption of control.***

***(b) no creditor has any right of set off against the institution which for greater certainty, does not include the consolidation of accounts maintained in the normal course for the purpose of providing clearing and settlement services or other services referred to in Section 48, and***

***(c) no person may terminate or amend any agreement with the institution or claim an accelerated payment under any such agreement with the institution by reason only of:-***

***(i) the insolvency of the institution.***

***(ii) a default before the assumption of control under Section 44 (2) (b) by the Corporation or the appointed person, as the case may be, takes effect, by the institution in the performance of its obligations under the agreement; or***

***(iii) Assumption of control under Section 44 (2).***

***(b) by the Corporation or the appointed person as the case may be as from the date of the assumption of control of the institution.***

***(2) .....***

My reading of Section 46 and 52 of the Act is a model to a complete ouster clause and interpreted in such a way to preserve the institution supervisory jurisdiction. It is to enable it to assert that authority which parliament intended in enacting the provisions.

The procedure for making a claim under any financial institution essentially under receivership involves two stages: First the Bank is placed under the supervisory jurisdiction of K.I.D.C. Some aspects of the insolvency and liquidation precedent will therefore be considered as one of these steps for the parties to consider whether a litigation against a financial institution placed under receivership and within the surveillance of the Kenya Deposit Insurance Act can suitably be sued without joinder of the institution as an interested party.

Compliance or noncompliance with the provisions is a matter which a Court will take into account when giving directions for case management of proceedings or when making orders to regulate the procedural tenets of the suit.

In deciding whether not to grant leave to amend pleadings, considerable measure of thought on this subject has gone into the nature of the claim, and the pleadings generally of both parties. It is apparent from the pleadings that the principal actors in these matters under litigation remain to be Kenya Deposit Insurance Corporation as a liquidator of Dubai Bank Ltd, Hassan Zubedi, Suleiman Enterprises Ltd, Kemu-Salt Packers Production Company. I pause the question has the applicant a reasonable objective excuse for suing Dubai Bank Ltd (as a single entity) for any declarations in terms of the charge without the detriment to Kenya Deposit Insurance Corporation.

In my view, I do not think so. As such the applicant is under an obligation by virtue of Section 46 as read with Section 56 (2) to serve their claim on any interested party of which they are aware, unless the Court directs otherwise. The actual outcome in this case is particularly important to K.D.I.C. in which the supervisory jurisdiction is emphasized to protect the depositors with Dubai Bank Ltd. The breach of the Bank's fiduciary duty as at the center of the KDIC mandate enough to entitle it a stake and an interest in **HCCC No. 11 of 2019**.

The threshold at which the Court would find the decision to sue Dubai Bank Ltd, under liquidation as a stand alone defendant that effectively excludes any other principal actor lies at the heart of the suit pending before this Court. The fact that the defendant Bank is under receivership is a matter whether the plaintiff can institute suit against it in their own name.

The conclusion has to be that it is necessary to seek leave founded under Section 56 (2) of the K.D.I.C Act. It was not necessary for the

plaintiff to lock out the K.D.I.C in respect of proceedings alleging financial facilities which have a causal intersection with Kemu-Salt Packers Ltd, Dubai Bank Ltd and East Africa Development Bank. There is therefore procedural impropriety as a ground to challenge the plaintiff suit against the defendant.

In the case of **Flagship Carriers Ltd v Imperial Bank Ltd & 2 others Nairobi (Milimani) HCCC No. 1643 of 1999** the Court held:

***“once the assets have been removed from the control of the directors, they have no access thereto and may only enter the company’s premises with the permission of the receiver. They may take no action in relation to the business of the company, which could be construed by third parties as indicating control or ownership of that business.... The appointment of the receivers relates solely to the assets and business of the company and in no way interferes with the statutory duties of directors who must continue to fulfil statutory duties such as maintaining the statutory books of the company and therefore they must retain possession of the company’s statutory books together with the company seal which are not considered the assets of the company.”***

It goes without saying that where business experiences financial problems such as the consistent inability to meet due obligations, to creditors, it is usually placed under receivership. For purpose of this litigation, it must be acknowledged that the defendant bank may have had difficulty for a variety of reasons which precipitated receivership. However, the state of affair show the applicant has instituted a claim against the defendant without any joinder with the official receiver. It should be emphasized again all these factors should be examined in light of the application for amendment which may result for a particular cause of action envisaged by the applicant.

In the upshot, the notice of motion dated 27.3.2020 partially succeeds and the following orders shall abide:

- 1. That leave is hereby granted to the applicant to amend their plaint as the defendant’s counter-claim is res subjudice.***
- 2. That The rest of the issue shall be raised and addressed during the hearing of this suit.***
- 3. That Costs of this application be in the course.***

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF MARCH 2021.**

.....

**R. NYAKUNDI**

**JUDGE**

***NB: This Ruling has been dispatched to the advocates through their respective emails.***

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