



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL CASE NO E142 OF 2020

STICHTING MEDICAL CREDIT FUND.....PLAINTIFF

VERSUS

SBM BANK KENYA LIMITED.....DEFENDANT

PRELIMINARY OBJECTION

RULING

PLAINTIFF'S CASE

1. The Plaintiff filed a Plaint dated 20th April 2020. The Statement of Claim is that the Plaintiff by an agreement dated 25th September 2013 entered into a Fund Management Agreement with Chase Bank limited and in accordance with the terms and conditions of the agreement and its addendum, the Plaintiff provided to Chase bank Kenya limited **Kshs.35,086,851** as the co-funding amount.
2. That on or about 7th April 2016 Chase Bank Kenya limited was placed under receivership by the Central Bank of Kenya to be managed by the Kenya Deposit Insurance Corporation. Upon default by Chase Bank Kenya limited and its placement under receivership all amounts due to the Plaintiff became payable as per clause 17.2 of the Fund Management Agreement.
3. Further, on 6th July 2018 vide **Gazette Notice No.6833** the Governor of the Central Bank of Kenya gave notice of the transfer of certain assets and liabilities of Chase bank Kenya limited to the Defendant. Which acquisition, transfer and assumption was to take effect on 17th August 2018. The Plaintiff's claim against the Defendant is for the payment of all amounts due and payable under the Fund Management Agreement dated 25th September 2013 for **Kshs.46,177,556**.

DEFENCE

4. The Defendant admits that it only acquired certain assets and liabilities of chase bank Kenya limited and that it should be noted that Chase Bank Kenya limited still remains operational despite being placed under receivership.
5. The Defendant states that it did not acquire, take over and/or assume the alleged contracts between the plaintiff and Chase Bank Kenya limited and therefore not liable for the Plaintiffs claim herein.

PRELIMINARY OBJECTION

6. The Defendant raised a Preliminary Objection as follows; -
 - a. The Plaintiff is an entity unknown in law within the Republic of Kenya and incapable of instituting a civil claim in the manner this suit is presented.
 - b. The Plaintiff's claim offends the provisions of **Section 2 of the Banking Act** with regards to carrying out banking business and/or financial business.
 - c. The Plaintiff is not licensed to carry out the activities alleged in its plaint under **Section 5 of the Banking Act**.
 - d. This instant application and suit are in violation of the overriding objective under **Section 1B of the Civil Procedure Act** which

requires that there be an efficient use of the available judicial and administrative resources.

e. The entire suit as filed is grossly incompetent, defective, frivolous, vexatious and a blatant abuse of the court process. The same ought to be struck out with costs to the Defendant.

DETERMINATION

7. The issues that emerge for determination are;

- a. Whether the plaintiff is an entity unknown in law within the Republic of Kenya and incapable of instituting a civil claim in the manner this suit is presented.
- b. Whether the plaintiff is licensed to carry out the activities alleged in its plaint under **Section 5 of the Banking Act**.
- c. Whether this instant application and suit are in violation of the overriding objective under Section 1B of the Civil Procedure Act which requires that there be an efficient use of the available judicial and administrative resources.

Whether the Plaintiff is an entity unknown in law within the Republic of Kenya and incapable of instituting a civil claim in the manner this suit is presented.

8. The Fund Management Agreement MFC Program between the Plaintiff and Chase Bank (Kenya) Limited describes the Plaintiff as a;-

Foundation incorporated under the law of the Netherlands, registered with the Trade Register of the Dutch Chamber of Commerce. It is a not for profit foundation which aims to enhance the provision of affordable healthcare to low income Africans.

9. In light of the above, the Plaintiff is not a financial institution carrying on financial business as described under **Section 2 of the Banking Act**.

“Financial institution” means a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act.”

10. **Paragraph e** of the Fund Management Agreement states as follows; -

“MFC is willing to provide funding to CHASE in order to enable CHASE to provide affordable loans to selected Healthcare Providers under the program.”

11. My understanding of the above clause is that Chase Bank was tasked with the responsibility of carrying out the financial business. In accordance with the terms and conditions of the agreement and its addendum, the Plaintiff provided to Chase bank Kenya limited a loan as the co-funding amount.

12. The Plaintiff is not a financial institution under **Section 5 of the Banking Act** and does not therefore require to be licenced in order to carry out its activities. It is clear that the Plaintiff is a non-profit foundation that entered into a Funding Agreement with Chase Bank while loans were to be provided by Chase Bank to the participants under the program.

13. The issues raised can only be determined upon adducing evidence and are therefore not pure points of law where facts are contested.

14. It is therefore, the finding of this court that the Preliminary Objection dated lacks merit and it is hereby dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2021 (VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS ECHESSA FOR THE PLAINTIFF

MS ABUYA FOR THE DEFENDANT

COURT ASSISTANT - TUPET