



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND CIVIL DIVISION

CIVIL SUIT NO. 16 OF 2020

COAST HAULIERS LIMITED.....PLAINTIFF

VERSUS

IMPERIAL BANK LIMITED (in Receivership).....DEFENDANT

RULING

1. The plaintiff filed an application by way of Notice of Motion dated 21st February, 2021 under the provisions of Sections 1A and 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders-

(i) Spent;

(ii) That pending the hearing and determination of this suit, there be and is hereby issued an order of mandatory injunction to compel the defendant to discharge the securities over motor vehicle registration numbers ZD9829, ZD9830, ZE0083, ZE0086, KBC 252J, KBC 254J, KBC 266J, KBC 713L, KBE 780G and ZF 1838 and to release to the plaintiff all the original log books for the said motor vehicles within 14 days of this order;

(iii) That in default the defendant's compliance with prayer 2 above, the Deputy Registrar of this Honourable Court to execute the necessary documents to facilitate the discharge of the securities over motor vehicle registration numbers ZD9829, ZD9830, ZE0083, ZE0086, KBC 252J, KBC 254J, KBC 266J, KBC 713L, KBE 780G and ZF 1838; and

(iv) That the costs of this application be provided for.

2. The said application is supported by an affidavit sworn on 21st February, 2020 by Zabin Khosla, a director of the plaintiff company, who was duly authorized to swear the affidavit on behalf of the said plaintiff.

3. To oppose the application, the defendant on 9th November, 2020 filed a Notice of Preliminary Objection dated 6th November, 2020 based on the following grounds-

(i) That at the time of the institution of this suit, the defendant was already placed (sic) under receivership;

(ii) As per the requirements of Section 56(2) of the Kenya Deposit Insurance Act (Act No. 10 of 2012), leave of the court to institute injunctive or civil proceedings against an institution under receivership is a condition precedent and mandatory;

(iii) That the plaintiff, contrary to the above provisions has instituted proceedings against the defendant without leave of the court; and

(iv) As such, the application dated 21st February, 2020 and indeed the entire suit is fatally defective and ought to be struck out with costs.

4. The Preliminary Objection was canvassed by way of written submissions. The defendant's Counsel filed his written submissions on 19th January, 2021. He relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** (1969) EA 696, where the court gave a definition of what constitutes a Preliminary Objection.

5. Mr. Mohamed Ali, learned Counsel for the defendant submitted that it was not disputed that at the time of filing the present suit on 24th February, 2020, the defendant was already under receivership and that the heading of the plaint describes the defendant as being under “receivership”. He further submitted that in the said circumstances the provisions of Section 56(2) of the Kenya Deposit Insurance Act (Kenya Deposit Insurance Act), come into play. That under the said provisions which are couched in mandatory terms, no injunction or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the court. He contended that the suit herein could not be sustained for failure by the plaintiff to seek leave of the court to commence the same. It was asserted that the Preliminary Objection was merited since it was purely on a point of law.
6. Counsel for the defendant relied on the case of **David Ndiritu Gathungu and another v Chase Bank (Kenya) Limited (In Receivership) and 2 others** [2018] eKLR, where the court found a suit which had been filed without leave of the court against an applicant under receivership, to be incurably defective and incompetent and it was struck out with costs. He also cited the case of **Charity Wangui Ngumo v Chase Bank Limited (In Receivership) & Antique Action Agencies** [2018] eKLR, where the court held that leave of the court was mandatory and found the suit therein to be incompetent *ab intio*.
7. In urging this Court to allow the defendant’s Preliminary Objection, he also relied on the case of **Bourgainville Estate Limited v Kenya Deposit Insurance Corporation (KDIC) and 3 others** Malindi ELC 212/2016, where the Court cited the case of **Andrew G. Muchai v Chase Bank Ltd** [2016] eKLR in which the court held that for a company under receivership, a party suing it must seek the court’s leave before commencing a suit against it and institution of any proceedings require the sanction of the court.
8. Counsel for the defendant prayed for the Preliminary Objection to be allowed and for the suit against it to be declared incompetent and be struck out with costs.
9. The plaintiff’s learned Counsel, Mr. Oluga in urging his client’s case in opposing the Preliminary Objection relied on their submissions filed on 22nd February, 2021. He indicated that the defendant herein was precluded from and had no right to raise the said Preliminary Objection. He stated that an interlocutory judgment was entered in this case on 11th June, 2020 for the liquidated amount and the defendant had not set aside the said judgment.
10. It was further submitted that the defendant had not filed a statement of defence at all. He stated that a defendant who defaults by not filing a statement of defence is precluded from raising a Preliminary Objection.
11. He cited the case of **Stephen Onyango Achola and another v Edward Hongo Sule and another** [2004] eKLR, where the Court of Appeal held that the second respondent therein having failed to specifically plead the issue of limitation in its defence was not entitled to rely on the said issue and base its Preliminary Objection on it. The said Court also held that second respondent therein could also not rely on that defence during trial of the suit unless it amended its defence.
12. He also relied on the case of **Kutima Investments Limited v Muthoni Kihara and another** [2015] eKLR, which adopted the decision in **Stephen Onyango Achola and another v Edward Hongo Sule and another** (supra), on the same issue of the importance of specifically pleading the statute of limitation.
13. On the said issue of the need to specifically plead in a statement of defence the point of law that will be subsequently pursued in a Preliminary Objection, Mr. Oluga cited the case of **Unilever Tea Kenya limited v Andrew Cheruiyot Rotich and 3 others** [2020] eKLR.
14. The plaintiff’s Counsel contended that the issue of leave under the provisions of Section 56(2) of the Kenya Deposit Insurance Act ought to have been raised first in a statement of defence before being raised first in the Preliminary Objection.
15. He submitted that the provisions of Section 56(2) of the Kenya Deposit Insurance Act are applicable to companies under liquidation but are not applicable to the defendant which is under receivership. He pointed out that Part IV of the said Act is well structured and deals separately and distinctly with the subject of receivership at Sections 43-53, liquidation in Sections 54-59 and winding up in Section 60.
16. To support the foregoing submission, Mr. Oluga relied on the case of **Ashok L. Doshi and another v Central Bank of Kenya and another** [2016] eKLR, where the court found that a Preliminary Objection raised in the said case was conceived and prosecuted on the understanding that the said defendant had been placed under liquidation, and if that had been the case, it would have been an open and shut case to invoke the provisions of Section 56(2) of the Kenya Deposit Insurance Act.
17. In making reference to the provisions of Section 56 of the said Act, Counsel for the plaintiff indicated that the entire Section addresses liquidation and not receivership. He urged this court to apply the *ejusdem generis* rule to construe Section 56(2) of the Kenya Deposit Insurance Act which immediately follows Section 56(1) to apply to the issue of liquidation also. He submitted that it is not possible for Section 56(1) to deal with liquidation yet Section 2 which comes immediately thereafter would deal with receivership.
18. Mr. Oluga stated that Part IV indicates that a company that falls into troubled times starts with being placed under receivership before being placed in liquidation and being ultimately wound up. He stated that the distinction in the two stages of liquidation and receivership were addressed by the Court in the case of **Thomas & Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chase Bank Kenya Limited (In Receivership) and another (Interested parties)** [2019] eKLR. He submitted that the Court in the said case concluded that the provisions of Section 56 of the Kenya Deposit Insurance Act do not apply to institutions placed under receivership and found the Preliminary Objection which had been raised therein misplaced.
19. The plaintiff’s Counsel was of the view that even if it was to be assumed that Section 56(2) of the said Act was available as protection to the defendant herein which is under receivership and not liquidation, leave of the Court would still not be required as the said Section only prohibits proceedings brought against the institution’s assets. He relied on the case of **Northwest (K) Limited v Kenya Deposit Protection Insurance Corporation (official Receiver for Chasebank Limited) and Another** [2018] eKLR, to augment his submission.

20. The plaintiff's Counsel indicated that sanction of this court would be required if this suit was in respect of the defendant's assets. It was pointed out that the prayers sought in the plaint are for a mandatory injunction to compel the defendant to discharge securities and for recovery of interest illegally charged by the defendant on the plaintiff's accounts. It was stated that the plaintiff also sought compensation for the losses incurred by the plaintiff as a result of the defendant's failure to discharge the securities.

21. In regard to the authorities relied on by the defendant's Counsel, Mr. Oluga stated that they were made on the presumption that Section 56(2) of the Kenya Deposit Insurance Act applies to companies in receivership. He urged this court not to strike out the suit because that would be a very drastic and draconian act that should not be applied in this case. He relied on the Court of Appeal decision in **Kutima Investments Limited v Muthoni Kihara and another** [2015] eKLR, where the Court stated that striking out of a litigant's suit should not be lightly undertaken but the court should proceed with caution and circumspection, resorting to it only in the clearest of cases where there is plainly no cause of action and the pleading in question is so hopelessly bad and devoid of substance as to be incapable of cure or salvage even by amendment.

ANALYSIS AND DETERMINATION

The issue for determination is if the plaintiff's suit should be struck out for failure to comply with Section 56 (2) of the Kenya Deposit Insurance Act.

22. As Counsel for the defendant correctly indicated, the plaintiff in the plaint has stated that the defendant is under receivership. In paragraph 2 of the said plaint, the plaintiff describes the defendant as a banking institution duly registered as such under the Banking Act (Cap 488) Laws of Kenya and is currently in (sic) receivership. In his written submissions, the plaintiff's Counsel submitted that the defendant is under receivership and not liquidation, thus the provisions of Section 56(2) of the Kenya Deposit Insurance Act do not apply. The defendant's Counsel did not file supplementary submissions to respond to the said issue raised by the defendant.

23. The provisions of Section 56(2) of the Kenya Deposit Insurance Act state as follows-

“No injunction may be brought or any other proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the court.”

24. This court notes that Section 55 which precedes Section 56 of the said Act provides for the powers of the Corporation, that is the Kenya Deposit Insurance Corporation, as a liquidator. Section 55(1) of the Act sets out the powers of a liquidator as *inter alia*, carrying on the business of an institution so far as may be necessary for the beneficial appointing of professionals to assist in the performance of the duties, paying any classes of creditors in full, making any compromise or arrangement with creditors. The above provisions are covered under Part VI of the Kenya Insurance Deposit Act which has a heading on receivership, liquidation and winding up.

25. Section 43 of the Kenya Deposit Insurance Act addresses the issue of appointment of the Kenya Deposit Insurance Corporation as a receiver. Section 43(1) of the said 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. Sub-section 2 thereof states that the Central Bank shall appoint the corporation as the sole receiver of any institution if the Central Bank determines *inter alia* that the institution assets are less than the institution's obligations to its creditors, an unsafe or unsound condition to transact business exists or other cause that warrants the exercise of the relevant power in the interests of the institution, its depositors or other creditors.

26. Section 53(2) of the said Act provides as follows-

“In the course of the receivership, the Corporation may recommend to the Central Bank that the institution be liquidated in which case the Central Bank shall appoint the corporation as the liquidator.”

27. The submissions made by the plaintiff's Counsel ring true in that an institution that has fallen into troubled times financially and/or has flouted regulations among other things, goes through the process of being put under receivership first in a bid to revive it into an institution that can meet its financial obligations and to comply with the operations of a banking institution. If the said institution cannot be salvaged, the Central Bank appoints the Kenya Insurance Deposit Corporation as a liquidator for purposes of winding up the institution. Judge Tuiyott in **Thomas and Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chasebank Kenya Limited (In Receivership) and another (Interested parties)** (supra) succinctly stated thus-

“The concept of Receivership and liquidation as contemplated by the KDI Act are different. The circumstances under which Central Bank can place a Bank under receivership are set out in Section 43(2) of the KDI Act and include when assets of an institution are less than its obligations to its creditors or the institution has engaged in malpractices or activities contrary to provisions of any Kenyan law or other applicable law Perhaps I need to add that while proceedings against an institution under receivership can be commenced or continued without the necessity of court sanction, a decree holder will not be able to reach the assets of the institution if it is shielded by a moratorium under the provisions of Section 50(2). I have come to the conclusion that the provisions of Section 56 of the KDI Act do not apply to institutions placed under receivership and the preliminary objection is misplaced.”

28. This court holds a similar position as that held by the court in the above decision. A plain reading of the provisions applicable to a banking institution that is under receivership show that they are distinct from those applicable to an institution in liquidation and that leave of the court is not a prerequisite to the filing of a suit against a company under receivership.

29. In my understanding, the provisions of Sections 43 to 53 of the Kenya Deposit Insurance Act and Sections 54 to 61 of the said Act are not meant to be read conjunctively but should be read disjunctively as they apply to institutions under receivership and liquidation,

respectively. Liquidation under the said Act only kicks in when a banking institution that has been put under receivership cannot be turned around. One process therefore leads to the other, as the two processes cannot be undertaken simultaneously. To illustrate the clear distinction, the provisions of Section 56(1) of the Kenya Deposit Insurance Protection Act state that no action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.

30. This court therefore holds that the defendant's Counsel misapprehended the application of the provisions of Section 56(2) of the said Kenya Deposit Insurance Act on the plaintiff which is under receivership and not liquidation. The decisions relied on by the defendant's Counsel are in the said circumstances not applicable in the present instance as this court holds a different perspective as to the applicability of the provisions of 56(2) of the Kenya Deposit Insurance Act to an institution which is under receivership.

31. 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 as far as its assets are concerned.

32. It is also noted as was pointed out by the plaintiff's Counsel that the defendant never filed a statement of defence to challenge the failure by the plaintiff to seek the sanction of the court before filing the suit herein, which it would then have taken up on a preliminary point of law.

33. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696 Law J.A and Newbold P (both with whom Duffus VP agreed held thus at pages 700 and 701, respectively – Law JA:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the court, or a plea of limitation or submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (emphasis added).

34. In the above case, Newbold P held as follows-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of Judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

35. It is apparent that in this case the defendant got it all wrong when it raised a Preliminary Objection before it had even filed its statement of defence and by relying on the wrong provisions of the law.

36. In **Stephen Onyango Achola and Another v Edward Hongo Sule and Another** [2004] eKLR, the Court of Appeal when making a determination on failure to specifically plead to an issue subsequently raised as a Preliminary Objection held as follows-

“ the second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition.”

37. Inasmuch as the defendant was convinced that there was need for the court to sanction the filing of the suit herein, it is apparent from the analysis made in this ruling that it started off on the wrong footing. Further, as was submitted by the plaintiff's Counsel, the defendant should have sought to set aside the interlocutory judgment on record first, before filing the present application.

38. It is my finding that the Preliminary Objection dated 6th November, 2021 is unmeritorious and incompetent. It is hereby dismissed with costs to the plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA on this 28th day of May, 2021. Ruling delivered through Microsoft Teams Online Platform due to the outbreak of the Covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Ojwang holding brief for Mr. Oluga for the plaintiff

Mr. Mohamed Ali for the defendant

Ms Bancy Karimi - Court Assistant.