



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 206 OF 2019**

**UNION DE BANQUES ARABES ET FRANCAISES –U.B.A. F..... PLAINTIFF**

**-VERSUS-**

**CHASE BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**KENYA DEPOSIT INSURANCE CORPORATION.....2<sup>ND</sup> DEFENDANT**

**As the receiver manager of Chase Bank of Kenya Ltd)**

**SBM BANK KENYA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Background.**

1. The plaintiff herein, Union Be Banques Arabes Et Francaises (UBAF) sued the defendants through the plaint dated 26<sup>th</sup> August 2019 wherein it sought judgment against all the defendants jointly and severally for: -

- a. A declaration that the defendants are liable to account to the plaintiff for the sum of USD 4,999,888.30 together with interest as the court thinks fit.**
- b. All necessary accounts and inquiries to enable the plaintiff to trace and recover the sum of USD 4,999,888.30.**
- c. An order for delivery up or transfer to the plaintiff the sum of USD 4,999,888.30 together with interest.**
- d. An order of permanent injunction to restrain the defendants from removing, transferring, disposing or otherwise dealing with the sum of USD 4,999,888.30 held in trust for the plaintiff.**
- e. An order compelling the defendants to pay to the plaintiff the sum of USD 73,331.70 being interest accrued in relation to the 1<sup>st</sup> extension from 10<sup>th</sup> August 2017 to 8<sup>th</sup> December 2016 and the sum of USD 4,999,888.30 held in trust for the plaintiff together with interest thereon at commercial rates of 6.7% per annum from 8<sup>th</sup> December 2016 until payment in full.**
- f. Costs of the suit on a full indemnity basis and interest thereon at 14% p.a from the date of judgment until payment in full.**

2. The 3<sup>rd</sup> defendant filed its Memorandum of Appearance and Statement of Defence on 11<sup>th</sup> September 2019 and 7<sup>th</sup> October respectively.

3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants on the other hand, filed their defence on 30<sup>th</sup> September 2019 and an application dated 11<sup>th</sup> November 2019 seeking, *inter alia*, orders that the plaintiff furnishes security for costs and stay of any further proceedings until the plaintiff furnishes security for costs.

4. Through the application dated 15<sup>th</sup> January 2020, the plaintiff sought orders that;

**1. Spent**

**2. The defendants do file their witness statements and documents within 7 days failing which an order do issue striking out the defence for non-compliance.**

**3. The hearing of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's Notice of Motion application dated 11<sup>th</sup> November 2019 be stayed pending compliance by the defendants with case management requirements.**

**4. Costs of the application be provided for.**

5. The application is supported by the affidavit of the plaintiff's advocate, **Mr. Allen Waiyaki Gichuhi** and is premised on the main ground that the defendants have refused to comply with the Case Management directions issued on 28<sup>th</sup> November 2019 despite reminders from the plaintiff. It is the plaintiff's case that it is unable to respond to the defendant's application dated 11<sup>th</sup> November 2019 without the benefit of perusing the defendant's bundle of documents.

6. On 30<sup>th</sup> January 2020 the matter came up before me for directions when the parties were unable to agree on how to proceed with the two pending applications. **Miss Leah Muhia** advocate for the plaintiff argued that the plaintiff's application dated 15<sup>th</sup> January 2020 should be heard first as the plaintiff was unable to respond to the defendant's application dated 11<sup>th</sup> November 2019 in view of the defendant's non-compliance with the direction of 28<sup>th</sup> November 2019.

7. **Mr. Chege** for the 3<sup>rd</sup> defendant sought for time to comply with the practice directions while **Mr. Issa** for the 1<sup>st</sup> and 2<sup>nd</sup> defendant's urged the court to handle the application dated 11<sup>th</sup> November 2019 first as it had been filed first in time.

8. After considering the submissions of counsel on how the two pending application ought to proceed, this court directed that the application dated 11<sup>th</sup> November 2019 be heard first after which parties were directed to file their respective responses and written submissions to the said application. The matter was then listed for hearing on 6<sup>th</sup> May 2020.

**Application dated 11<sup>th</sup> March 2020.**

9. This court's directions of 30<sup>th</sup> January 2020 precipitated the filing of the application dated 11<sup>th</sup> March 2020 which is subject of this ruling.

10. In the said application, the applicant/plaintiff seeks orders that: -

**1. Spent**

**2. The order given by court on 30<sup>th</sup> January 2020 be set aside forthwith and/or be stayed pending the hearing and determination of this application.**

**3. The plaintiff's Notice of Motion application dated 15<sup>th</sup> January 2020 be heard in priority to the 1<sup>st</sup> and 2<sup>nd</sup> defendant's Notice of Motion application dated 11<sup>th</sup> November 2019.**

**4. Costs of the application be in the cause.**

11. The application is supported by the affidavit of the plaintiff's advocate **Mr. Allen Waiyaki Gichuhi** and is premised on the grounds inter alia that: -

**a. The plaintiff stands prejudiced as it is unable to respond to the plaintiff's application substantively without the benefit of perusing the defendants' documents.**

**b. The 1<sup>st</sup> and 2<sup>nd</sup> defendants already admitted holding over Kshs 400 million belonging to the plaintiff, the only contention is whether they hold the money as a deposit or a trust fund, without them filing statements of accounts, the plaintiff cannot be said to be heard on merit.**

**c. Order 7 Rule 5 provides in mandatory terms that a statement of defence shall be accompanied by copies of documents to be relied on at the trial.**

**d. Rule 15 of the Practice Directions Relating to Case Management in the Commercial and Admiralty Division provides that all applications should as far as possible be raised and dealt with at the Case Management Conference.**

**e. The order issued by court is in breach of the overriding objective and contrary the to the spirit of the Civil Procedure Rules and the Practice Directions Relating to Case Management in the Commercial and Admiralty Division which make it mandatory for parties to comply with Case Management before the application is heard.**

**f. The order fetters the plaintiff's constitutional rights to a fair hearing as the plaintiff is being denied the chance to peruse the defendants' bundle of documents to enable it file a substantive response.**

**g. It is in the interest of justice that the defendants be compelled to comply with the Civil Procedure Rules and the Practice Directions for Case Management.**

12. The 3<sup>rd</sup> defendant opposed the application through the Grounds of Opposition dated 29<sup>th</sup> May 2020 wherein it listed the following grounds: -

1. **This Honourable court properly exercised its discretion in making the order of 30<sup>th</sup> January, 2020.**
2. **No grounds exist to justify setting aside this Honourable Court's Order of 30<sup>th</sup> January, 2020.**
3. **This is not an Appellate Court.**
4. **It is in the established doctrine of equity that the first in time takes precedent and because the 1<sup>st</sup> and 2<sup>nd</sup> defendant's application dated 11<sup>th</sup> November, 2019 was filed earlier than the plaintiff's application dated 15<sup>th</sup> January, 2020, the same ought to be heard first.**
5. **The present application is diversionary in nature, intended to assist the plaintiff and prolong the immediate payment of security for costs in court.**
6. **The applicant is trying to steal a march from the respondents.**

13. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the plaintiff has made out a case for setting aside/stay the orders of 30<sup>th</sup> January 2020 and whether the application dated 15<sup>th</sup> January 2020 should be heard in priority to the application dated 11<sup>th</sup> November 2019.

14. As a starting point, it is worth noting that no substantive orders were issued against any party on 30<sup>th</sup> January 2020 as all that this court did was to issue directions on which application should proceed first between the defendant's application dated 11<sup>th</sup> November 2019 and the plaintiff's application of 15<sup>th</sup> January 2020. In issuing the impugned directions, this court rendered itself as follows: -

**"I note that the 1<sup>st</sup> and 2<sup>nd</sup> defendant's application was filed on 12<sup>th</sup> November 2019 while the plaintiff's application was filed on 15<sup>th</sup> January 2020. My take is that in the interest of justice, and considering the hardline positions taken by the parties regarding which application should be heard first, it shall only be fair and just that the application that was initiated first in time be heard first.**

**Consequently, I direct that the parties file and serve their respective responses and submissions to the application filed on 12<sup>th</sup> November 2019 before the next hearing date."**

15. Having regard to the above directions/ order, I find that it is not within the purview of this court to revisit the issue of which application should be heard first as to do so will be tantamount to sitting on appeal on the impugned order. I further find that having determined the issue of which application should be heard first, the said issue is now *resjudicata* as the plaintiff had the option to appeal against this court's directions if it was not satisfied with it.

16. Similarly find that the prayer by the plaintiff for the setting aside/stay of the impugned orders is not merited as the mere fact that the plaintiff is not happy with the court's directions does not warrant the setting aside of the same.

17. In sum, I am not persuaded that the application dated 11<sup>th</sup> March 2020 is merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 20th day of August 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Liproop for 1<sup>st</sup> and 2<sup>nd</sup> defendant

Miss Leah Muhia for plaintiff

Court Assistant: Sylvia