



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**PETITION NO. 2 OF 2018**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

*AND*

**THE KENYA DEPOSIT INSURANCE ACT**

*BETWEEN*

**DONALD SMITH EARLE.....PETITIONER**

*AND*

**CENTRAL BANK OF KENYA.....1<sup>ST</sup> RESPONDENT**

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

*AND*

**IMPERIAL BANK LIMITED.....INTERESTED PARTY**

**RULING**

1. This is a ruling on the Preliminary Objection dated 22<sup>nd</sup> August 2018, filed by **Kenya Deposit Insurance Corporation** (the 2<sup>nd</sup> Respondent and **Imperial Bank Limited**) (In Receivership) (the Interested Party). The objection is to the effect that the Petitioner, **Donald Smith Earle**, failed to obtain leave of the Court to file this Petition against both of those parties contrary to Section 56 (2) of the Kenya Deposit Insurance Act (herein after the Act)

**BACKGROUND**

2. It is common ground that the 1<sup>st</sup> Respondent, Central Bank of Kenya, as mandated under Section 43 (1) and (2) appointed the 2<sup>nd</sup> Respondent the Receiver Manager of the Interested Party. That appointment was after the 1<sup>st</sup> Respondent placed the Interested Party under receivership on 13<sup>th</sup> October 2015.

3. The Petitioner filed this action, by way of a Constitutional Petition. The Petitioner, by this Petition, stated that the 1<sup>st</sup> Respondent, at the material time when it granted the Interested Party with a banking license it should be deemed that the 1<sup>st</sup> Respondent had satisfied itself that the Interested Party had met all the statutory and regulatory requirements under the Banking Act. That because of that representation the Petitioner proceeded to enter into a bank customer relationship with the Interested Party. The Petitioner obtained from the Interested Party an overdraft facility of Kshs. 20 million on which the Petitioner had overdrawn Kshs. 13,518,774.94. The Petitioner also opened two fixed Deposit accounts with the Interested Party for total sum of Kshs. 40,055,918.35. The Petitioner pledged that amount in the fixed deposit account as security for financial facility of Kshs. 40 million extended to him by the Interested Party. The Petitioner obtained other financial facilities from the Interested Party which the Petitioner alleges the 2<sup>nd</sup> Respondent has merged together with a facility given to the Five Forty Aviation Ltd in which the Petitioner is a Shareholder and Director. The Petitioner further alleges that the 2<sup>nd</sup> Respondent has applied unconscionable interest rates on those facilities.

4. The Petitioner averred that whereas he is obliged to continue making loan repayments the 2<sup>nd</sup> Respondent is under no obligation to pay out, to the Petitioner, his deposits because of the moratoriums which is in place. The Petitioner further averred that he requested his fix

deposit accounts be used, by the 2<sup>nd</sup> Respondent, to offset the loans and debts the Petitioner owes the Interested Party. Further that, in violation of the Petitioner's constitutional rights, the 2<sup>nd</sup> Respondent has continued to demand, from the Petitioner, payment of loan account with interest and penalties, whilst still holding the Petitioner's fix deposit accounts with Kshs. 40,055,918.35.

5. The Petitioner seeks amongst others, the Court do declare that 2<sup>nd</sup> Respondent's failure to offset his loans from the fix deposit accounts, the application of interest whilst the 2<sup>nd</sup> Respondent has the Petitioner's fix deposit account is violation of the Petitioner's constitutional right; that the Court do issue order of mandamus ordering the 2<sup>nd</sup> Respondent to comply with Section 50 (2) (a) of the Act, to offset the Petitioner's loans; and order of restitution of the Petitioner's full deposits; order of mandamus compelling the 2<sup>nd</sup> Respondent to release the Petitioner's log book of his vehicle; and an order of certiorari quashing the 2<sup>nd</sup> Respondent's decision to apply interest that was due to the Petitioner in payment accrued interest.

#### **ANALYSIS AND DETERMINATION**

6. I have considered the parties submissions in respect to the Preliminary Objection under consideration. The 1<sup>st</sup> Respondent placed the Interested Party under receivership on 13<sup>th</sup> October 2015. In so doing as provided under Section 43 (2) of the Act the 1<sup>st</sup> Respondent appointed the 2<sup>nd</sup> Respondent as receiver of the Interested Party.

7. The sole issue the Court has to determine, in regard to the Preliminary Objection, is whether the Petitioner ought to have obtained leave of the Court before instituting this matter against the 2<sup>nd</sup> Respondent and the Interested Party. This will require a close examination of Section 56 (2) of the Act which provides:

***“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.”***

8. Institution, in the above subsection (2) of Section 56, is defined in the Act as the bank, financial institution or mortgage finance company. In this case institution is the Interested Party.

9. In my view the provisions of the above subsection are self-explanatory and do not need any in-depth interpretation. It is plain and obvious that Section 56 (2) of the Act forbids the institution of action or civil proceedings against an institution, such as the Interested Party, which is under receivership. I am wholly persuaded by the holding in the case **CHARITY WANGUI NGUMU –V- CHASE BANK LIMITED (IN RECEIVERSHIP & ANTIQUE ACTIONS AGENCIES (2018) eKLR** where the Court discussed the purpose of requiring parties to obtain leave before instituting proceedings against an institution in receivership and stated:

***“The essence of seeking leave to commence a suit, is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus, to create orderliness, decency and avoid a flood gate of actions, which may involve some of the matters placed under suspension.”***

10. The legislature, in enacting the Act, in its wisdom found that of necessity before action is instituted, or in the case of Section 56 (1) proceeded with, against an institution under receivership the Court ought to be given an opportunity to consider and give leave either for the institution of the action or the continuing of one already instituted. The Petitioner in my view, is instituting the action against the Interested Party, (the institution) missed an important and vital step which cannot be condoned. Section 56 (2) of the Act forbids it.

11. I am however of the view that no such leave was required in respect to the suit against the 2<sup>nd</sup> Respondent (Kenya Deposit Insurance Corporation). This is because under Section 4 of the Act the 2<sup>nd</sup> Respondent is capable of suing and being sued; see Section 4(2) (A) of Kenya Deposit Insurance Act.

12. It follows from the above discussion that the Preliminary Objection partly succeeds, in respect to the Interested Party, but fails in respect to the 2<sup>nd</sup> Respondent.

13. In the end the following are the orders of this Court:

**a) The Imperial Bank Limited (In Receivership) is hereby struck out of these proceedings for having been sued in contravention of Section 56 (2) of the Kenya Deposit Insurance Act. The Imperial Bank Limited (In Receivership) is awarded costs of this suit.**

**b) The Preliminary Objection dated 22<sup>nd</sup> August 2018 is dismissed with no orders as to costs in respect to the Kenya Deposit Insurance Corporation.**

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of MAY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PETITIONER

.....FOR THE 1<sup>ST</sup> RESPONDENT

.....FOR THE 2<sup>ND</sup> RESPONDENT

.....FOR THE INTERESTED PARTY