



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 483 OF 2016**

DAVID NDIRITU GATHUNGU.....1<sup>ST</sup> PLAINTIFF/APPLICANT

DANIEL NDUNG’U KANYIGI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

CHASE BANK (KENYA) LIMITED (IN RECEIVERSHIP)...1<sup>ST</sup> DEFENDANT/RESPONDENT

TETALK COMMUNICATIONS LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT

ANTIQUA AUCTIONS AGENCIES.....3<sup>RD</sup> DEFENDANT/RESPONDENT

**RULING**

1. This Ruling relates to a Preliminary objection (herein “the Objection”), dated 30<sup>th</sup> November 2016, filed by the 1<sup>st</sup> Defendant (hereinafter “the Applicant”), against the Plaintiffs’ (herein “the Respondents”) suit, on the ground that, the suit and all proceedings taken against it are null ab initio. The objection is premised on the provisions of Section 43(1) and (2) and Section 53(1) of the Kenya Deposit Insurance Act 2012, and all other enabling provisions of the law.

2. The Respondents filed the subject suit on 28<sup>th</sup> November 2016, against the Applicant and two others seeking for an order of a temporary injunction to restrain the Applicants and the other Defendants, from selling their’ properties known as; LR No. Limuru/Ngecha/2198, LR No. Limuru/Ngecha/2143 and LR No. Kiambu/Lari/2233 (herein “the suit properties”).

3. The Applicant argues that at the time the suit was commenced the Applicant was under Receivership and therefore the Respondents were required as required under the law, to seek Court’s leave, before commencing the suit. That, in the given circumstances the suit is incurably defective, bad in law and ought to be struck out.

4. That the Applicant was placed under Receivership by the Governor of the Central Bank of Kenya, pursuant to Section 43(1) and (2) and Section 53(1) of the Kenya Deposit Insurance Act. The Receivership was subsequently, advertised accordingly in the Kenya Gazette and took effect on the 7<sup>th</sup> April 2016. Therefore as aforesaid at the time the suit was commenced on 28<sup>th</sup> November 2016, the Applicant was already under Receivership.

5. Therefore as per the requirements of Section 56(2), Kenya Deposit Insurance Act, states the leave of the Court should have been sought, as the leave is a condition precedent and mandatory.

6. However, the Respondents opposed the Preliminary objection and argued that the proceedings herein were triggered by an advertisement for sale by public auction, of the suit properties, whereupon the Respondents sought for and obtained a restraining order against the Applicant and other from advertising, auctioning, and transferring, alienating or otherwise dealing with the suit properties.

7. The Respondents argue that, at the time of instituting the proceedings, the Applicant was not in Receivership as alleged or at all. That it was acquired by the Kenya Commercial Bank Ltd and as a result, its branches are operational throughout the County. Consequently, the Receiver Manager has been stopped from running the affairs of the Applicant. That as a result of the Merger the Applicant was put in the same position as before and therefore there was no need to seek for leave.

8. The parties agreed to dispose of the Preliminary objection by filing submissions. The Applicant raised three issues for determination in their submissions dated 12<sup>th</sup> January 2017, namely:

- a) Whether the Respondents ought to have sought for leave of the Court before filing the suit and the Application for injunction;
- b) Whether the suit and the Application for injunction against the 1<sup>st</sup> Applicant is a nullity ab initio; and/or
- c) Whether this suit is incurably defective, bad in law and ought to be struck out.

9. The Respondents similarly filed their submissions dated 15<sup>th</sup> February 2017, and raised the following issues for determination;-

- (i) Whether leave was required before suing the 1<sup>st</sup> Applicant;
- (ii) Whether the suit and all the proceedings against the 1<sup>st</sup> Respondent are a nullity;

10. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants relied on the submissions filed by the Applicant and did not file any submissions.

11. I have considered the Preliminary objection and the submissions filed by the respective parties and I find that the key issues for consideration are;-

- (i) Whether at the time the suit was filed, the Applicant was under Receivership, had merged with and/or had been acquired by Kenya Commercial Bank Limited;
- (ii) Whether the Respondents were required to seek leave from the Court before commencing the action herein;
- (iii) Whether therefore the suit, the Application and/or consequential orders given herein are null and void ab initio and
- (iv) Whether the suit is fatally defective and should be struck out.

12. On the first issue, the Applicant submitted that, it was placed under Receivership on 7<sup>th</sup> April 2016, and the suit herein commenced on 28<sup>th</sup> November 2016. I find that, if that is the correct position, then the leave of the Court was required before commencement of the suit. However, the Respondents argue that, the Applicant is not under Receivership but is under a Merger and/or Acquisition arrangement between it and Kenya Commercial Bank of Kenya, Ltd.

13. The key question is whether the Applicant is under Receivership, Merger or Acquisition arrangement. To answer this question, reference must be made to the Kenya Gazette Notice Number, 2320. It states as follows:-

*“GAZETTE NOTICE NO. 2320*

*THE KENYA DEPOSIT INSURANCE ACT*

*(NO. 10 OF 2012)*

*IN THE MATTER OF CHASE BANK LIMITED*

*(IN RECEIVERSHIP)*

*APPOINTMENT OF RECEIVER*

*PURSUANT to section 43 (1), 43 (2) and section 53 (1) of the Kenya Deposit Insurance Act, 2012, the Central Bank of Kenya appoints the Kenya Deposit Insurance Corporation as the receiver for Chase Bank Limited, for a period of twelve months with effect from the 7th April, 2016.*

*Any claims and matters relating to Chase Bank Limited shall be directed to the receivers at CBK Pension House, 3rd Floor, Harambee Avenue; P. O.Box 45983-00100, Nairobi, Tel. 020-2863841; Email [kdiccommunications@depositinsurance.go.ke](mailto:kdiccommunications@depositinsurance.go.ke)*

*Dated the 7th April, 2016.*

*PATRICK NJOROGE,*

*Governor, Central Bank of Kenya”.*

14. In furtherance of the above Notice, a further Notice was published, vide the Kenya Gazette Notice No. 2321, which states as follows:-

*GAZETTE NOTICE NO. 2321*

*THE KENYA DEPOSIT INSURANCE ACT*

(NO. 10 OF 2012)

IN THE MATTER OF CHASE BANK LIMITED

(IN RECEIVERSHIP)

DECLARATION OF A MORATORIUM

*IN EXERCISE of the powers conferred by section 50 (2) of the Kenya Deposit Insurance Act, 2012, the Kenya Deposit Insurance Corporation, the receiver for Chase Bank Limited declares that with effect from the 7th April, 2016, and until such time as normal operations of Chase Bank Limited shall have resumed, a moratorium shall apply equally and without discrimination to the liabilities of Chase Bank Limited.*

Accordingly—

(a) *no deposits on any types of accounts operated by Chase Bank Limited (in receivership) shall be paid nor shall any claims by any other class of creditors be met;*

(b) *the maximum rate of interest which shall accrue on deposits and other debts payable by Chase Bank Limited (in receivership) during the period of the moratorium shall be limited to the minimum rate determined by the Central Bank of Kenya, provided that there shall be no obligation on Chase Bank to pay interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case; and*

(c) *the running of time for the purposes of the law of limitation in respect of a claim by any depositor or creditor of Chase Bank Limited is suspended for the duration that the moratorium shall remain in effect.*

Dated the 7th April, 2016.

MOHAMUD A. MOHAMUD,

Ag. Chief Executive Officer,

Kenya Deposit Insurance Corporation.

15. It is therefore clearly evident from the content of the Notices here before that, Kenya Deposit Insurance Corporation, was appointed as a Receiver Manager for the 1<sup>st</sup> Applicant with effect from 7<sup>th</sup> April 2016 for a period of Twelve (!2) Months. This period ends on 12<sup>th</sup> April, 2017. The suit was commenced on 28<sup>th</sup> November 2016, which is within the relevant period and Leave should therefore have been obtained.

16. Be that as it were, the Respondents submitted as follows;

*“the true position is that Kenya Deposit Insurance Corporation in consultation with Central Bank of Kenya, appointed an independent firm to conduct due diligence and valuation of the acquisition, depositors and other stakeholders which ushered the Merger-Acquisition arrangement between KCB and Chase Bank Kenya”*

17. Therefore according to the Respondents, the 1<sup>st</sup> Applicant is either merged and/or acquired by Kenya Commercial Bank of Kenya. If that is the correct position, then the questions that arise are; what does a Merger and/or Acquisition of a Company entail and whether there is a difference between the two terms. Is it possible for a Company to be merged with another and at the same time be acquired by that other company?

18. It is important to consider these three concepts; Receivership, Mergers and Acquisition, that have arisen from the submissions filed by the parties. This Court had an opportunity to consider the concept of; Receivership, in the HCCC 241 of 2016, where it was held as follows;-

*“Receivership in legal terms entails an order or directive where all the property and affairs of the institution are placed in the dominion and control of an independent person known as a Receiver. It is a preservation process put in place to protect the assets, liabilities and business affairs of an institution, with the aim of protecting the interests of its depositors, creditors and members of the public. In this case of a bank, to preserve the bank’s liquidity, assets, and to find the best way to return into normal business.”*

19. However, a merger on the other hand, occurs when two Companies join and one new Company is created. It is also called a consolidation. In this case, the previous companies cease to exist and a new enterprise is formed all together. Whereas, Acquisition involves a process by which one company acquires the assets of another, it is also known as a takeover. It can be done on a friendly or hostile manner depending on the circumstances of the case.

20. In my understanding therefore, a merger requires mutual consent of the parties, whereas the process of acquisition, whether friendly or hostile-taker, may occur without such consent. Furthermore, in the case of acquisition, the target company ceases to exist as it is swallowed by the purchaser. On the other hand, when there is a merger, there is fusion of the two Companies. Put it another way, a merger can happen

when two Companies decide to combine into one entity or when one company buys another. An acquisition always involves purchase of one company by another.

21. The question however remains: Did Kenya Commercial Bank of Kenya Ltd, acquire the Applicant's Company or did the Applicant's Company merge with Kenya Commercial Bank of Kenya Ltd? The question reverts us back to the first issue for consideration.

22. The Respondents relied on section 933 of the Companies Act to support the argument that, the Applicant is under Acquisition and not Receivership and that the functions of the Receiver Manager, were suspended when it was acquired by the Kenya Commercial Bank of Kenya Ltd.

23. Therefore, the argument that the Applicant is under Receivership is farfetched, unfounded and the same should be treated with the contempt it harbors. It was further argued that, the Applicant has not furnished evidence to prove that it is under Receivership. That during a News Conference and the Press Release, dated 20<sup>th</sup> April 2016, the Governor of the Central Bank of Kenya, announced that Kenya commercial bank acquired the 1<sup>st</sup> Applicant.

24. Therefore the Respondents argument is that, the 1<sup>st</sup> Applicant was placed under Receivership on 7<sup>th</sup> April 2016 vide Gazette Notice 2320, of the same date and on 20<sup>th</sup> April 2016, it entered into an Acquisition arrangement with Kenya Commercial Bank Ltd. The suit was filed on 28<sup>th</sup> November 2016 and leave was not required as argued.

25. The question however remains as to what was the legal status of the Applicant's Company as at, 28<sup>th</sup> November 2016, when the suit was filed. Once again before I answer this question, I shall consider the provisions of Section 933 of the Companies Act No. 17 of 2015. These provisions states as follows;-

*“A scheme involves a merger if under the scheme:-*

*(a) The undertaking property and liabilities of one or more public companies (including the company in respect of which the compromise or arrangement is proposed) are to be transferred to another existing public company; or*

*(b) The undertaking, property and liabilities of two or more public companies (including the company in respect of which the compromise or arrangement is proposed) are to be transferred to a new company”*

26. It is therefore clear from these provisions that, there may be a scheme of arrangement, between two Public Companies that may involve, transfer of the undertaking, property of one or more Public Companies to another existing Public Company or to a new Company.

27. In this context, the Respondents argue that, the undertaking, property and liabilities of the 1<sup>st</sup> Applicant Company were transferred to Kenya Commercial Bank as an existing Public Company. Is that the position? To answer that question, I have considered the content of the Press News Release of; 20<sup>th</sup> April 2016, by the Governor of the Central Bank of Kenya and I that first and foremost, Chase Bank Limited (the Applicant) is described as “Chase Bank Ltd (“In Receivership”), which means right from the outset, it was placed in Receivership, as at that date.

28. Secondly, it states that, Central Bank of Kenya, (CBK) and the Kenya Deposit Insurance Corporation (KDIC) have reached an “understanding” with Kenya Commercial Bank Ltd on “modalities” to re-open Chase Bank Ltd in Receivership and the eventual acquisition of a majority stake in the Bank. This in my considered opinion does not mean that the Applicant has been acquired by Kenya Commercial Bank Ltd. An acquisition has legal consequences of the censure of existence of the Acquired Company. It is not a mere understanding, even then, it is clearly stated that the Kenya Commercial Bank Ltd was to acquire majority shareholding not the entire Company.

29. Thirdly, the Press release states clearly that Kenya Deposit Insurance Corporation (KDIC) as the “Receiver” has appointed Kenya Commercial Bank as the “Manager” under the provisions of Section 44 (2)(5) and 44(3) of the Kenya Deposit Insurance Act, 2012 to carry out the business and manage the assets of Chase Bank Ltd. Again it does not state that there has been an Acquisition of the Applicant.

30. Fourthly, it further states that “Kenya Commercial Bank Ltd, will undertake a detailed due diligence review of Chase Bank Ltd that will inform the decision relating to Kenya Commercial Bank's interest in a majority stake. That additional information about this process including the timelines of acquisition and exit from Receivership would be made available in due course.

31. The question that arises is, whether the anticipated exit of Chase Bank Ltd from Receivership took place and in particular before the filing of the suit herein. Further is there any evidence that Kenya Commercial Bank Ltd acquisitioned the 1<sup>st</sup> Respondent before the suit was filed?

32. In further researched on the legal status of the Applicant's Company after the 4<sup>th</sup> April 2016, and I found that there was a further Press Release by Central Bank of Kenya on 2<sup>nd</sup> May 2017, entitled; “Update for the process of an Investor to take an equity stake in Chase Bank Ltd (in Receivership). The Release reads as follows:-

**PRESS RELEASE**

**UPDATE ON THE PROCESS FOR AN INVESTOR TO TAKE EQUITY INTEREST IN CHASE BANK (KENYA) LIMITED (IN RECEIVERSHIP)**

Following the March 30, 2017 announcement inviting investors to present an initial Expression of Interest (“EOI”) to take an equity interest in Chase Bank (Kenya) Limited (In Receivership) (“CBL” or “the Bank”), the deadline for submission of EOIs expired on April 21, 2017.

During this period, a total of 12 replies to the EOI were received. The respondents comprised of three Kenyan banks, four foreign banks, and five other financial institutions and consortia.

The evaluation of the EOIs has now been completed and a shortlist of qualifying investors (“Shortlisted Investors”) has been identified. The Shortlisted Investors were determined using appropriate and objective criteria based on, inter alia, regulatory imperatives and prudential guidelines which will ensure a speedy and optimal recovery for depositors, creditors and other stakeholders of CBL, whilst also mindful of seeking to preserve and develop a sound and innovative banking system in Kenya. Shortlisted Investors and other respondents have been informed of the outcome of this process.

Shortlisted Investors will be granted access to comprehensive confidential data that will allow them to develop a formal proposal for taking an equity interest in CBL.

Shortlisted Investors have been requested to submit their formal proposals by June 9, 2017, 5:00 p.m. (East African Time).

The Central Bank of Kenya and the Kenyan Deposit Insurance Corporation, the appointed Receiver, are executing their mandates in this matter in accordance with the Laws of Kenya.

CENTRAL BANK OF KENYA

May 2, 2017

33. As can be noted, the release was in further to the announcement made on 30<sup>th</sup> March 2017, inviting Investors to present an Expression of Interest (EOI) to take up interest in the Applicant’s Company. The release clearly states that, the CBK and KDIC “the appointed Receiver” were executing their mandates in accordance with the Laws of Kenya.

34. Therefore, it is evident that Chase Bank Limited was still under Receivership and KDIC still the Receiver, as at 2<sup>nd</sup> May 2017. It suffices to note that by this time, the Plaintiffs had filed this suit by 28<sup>th</sup> November 2016.

35. The next issue to consider is whether in the circumstances, leave was required to file this suit. The Respondents maintain that leave was not required but the 1<sup>st</sup> Applicant maintains that any party seeking to commence or continue proceedings against an Institution under Receivership should first seek the leave of the Court. That any contrary holding will open flood gates of many other scenarios as herein which would be inconsistent with the law.

36. The Applicant made reference to the cases of; Andrew G. Muchai Vs. Chase Bank Ltd 241 of 2016 and Amos Peter Omutotsi V. Bulleys Tanneries (under receivership) and Another 2016 eKLR. Further reference was made to the case of; George Murethi & Another V. Kenatco (in receivership) 2016 eKLR.

37. I have considered the submissions on the subject issue and the provisions of Section 56 of the Kenya Deposit Insurance Corporation Act that deals with the issue of leave to commence proceedings. It states that;-

“no injunction may be brought 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.”

38. The Institution referred to under Section 56(2) of the Act is defined under Section 2 of the Act to include a Bank/ the 1<sup>st</sup> Applicant being a Bank thus falls there under. It therefore follows that, if indeed the 1<sup>st</sup> Applicant was in Receivership at the time the suit was filed as seems to be the case herein, then leave was required under Section 56 of the Act.

39. The next question to consider is whether, the suit is fatally defective, if leave was required and was not sought and whether then the suit, the Application and/or all consequential orders granted there under are null and void ab initio and whether they should be struck out.

40. Before I answer this question I wish to consider another issue whether the issues raised by the Respondents as to whether the issues raised by the 1<sup>st</sup> Applicant can be raised through a Preliminary objection? In this regard, the Respondents have submitted at length that the Preliminary Objection is on a pure point of law and that Courts frown at Preliminary Objections improperly raised, which are intended to delay the hearing of the main suit.

41. The Respondents made reference to several authorities on this issue which includes the celebrated case of; Mukise Biscuit Manufacturing Ltd V. West End Distributors (1969) EA 696 and the case of; Litein Tea Factory Ltd & Another V. Davis Kiplang’at Mutai & 5 Others (2015) eKLR.

42. Further reliance was placed on the case of; Oraro V. Mbajia (2005) eKLR and The Hon. Lady Justice Kaplana H. Rawal V. The Judicial Service Commission & The Secretary, Judicial Service Commission. All these authorities were quoted to stress the argument that, a party cannot raise an issue through a Preliminary Objection where the objection requires factual evidence. That in the instant case, the issue of Receivership and the suit being a nullity will require probing of evidence, as it is already clear from the submissions of the 1<sup>st</sup> Applicant.

43. Finally, the Respondents argued that the suit against the 2<sup>nd</sup> Defendant is independent of that of the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup> Defendant is not sued as an agent of the 1<sup>st</sup> Defendant.

44. In my considered opinion, all the authorities indeed set out the correct position in law on the issue of what constitutes a preliminary objection. However, I find that the issue raised herein in the preliminary objection is a pure issue of law as to whether a suit could have been instituted against the 1<sup>st</sup> Applicant without complying with the provisions of the law being section 43(1) and (2), 53(1) and 56(2) of the Kenya Deposit Insurance Act 2012.

45. In the given circumstance, the resolution of this issue does not require evidence be adduced and it is purely a consideration of the law. All that the Court is required to consider is when the 1<sup>st</sup> Applicant was placed under Receivership and when the suit was commenced. The end result is either to find the suit as properly instituted in law and therefore competent or otherwise, and whether the issue is raised through the preliminary objection or a formal application, the Court will still take regard to the said provisions of the Act. I therefore do not find merit in the submissions that the preliminary objection is misplaced.

46. All in all, I find that, the Preliminary objection filed by the 1<sup>st</sup> Defendant/Applicant dated 30<sup>th</sup> November 2016, has merit in that the Respondents did not seek for leave or Court's sanction to commence the suit against the Applicant in Receivership. Therefore, the suit and all proceedings taken against the 1<sup>st</sup> Defendant/Applicant are therefore null and void ab initio. The suit is consequently declared incurably defective and/or incompetent as against the 1<sup>st</sup> Defendant/Applicant and is consequently struck out with costs to the 1<sup>st</sup> Defendant/Applicant.

47. However, the suit and all consequential orders remain valid as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents.

48. Those then are the orders of the Court.

**Dated, delivered and signed in an open Court this 25<sup>th</sup> day of June 2018.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Osundwa for the Plaintiffs/Respondents

Mr. Muriuki for the 1<sup>st</sup> Defendant/Applicant

No appearance for the 2<sup>nd</sup> Defendant/Respondent

Mr. Muriuki for the 3<sup>rd</sup> Defendant/Respondent

Hassan .....Court Assistant