



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 44 OF 2013**

**KWANZA ESTATES.....APPLICANT/PLAINTIFF**

**VERSUS**

**DUBAI BANK OF KENYA LTD**

**KENYA DEPOSIT INSURANCE CORPORATION..DEFENDANTS/RESPONDENTS**

**RULING**

1. By a notice of motion dated 2/9/2015 expressed to be brought under the provisions of section 50(4) and 56(2) of the Deposit Insurance Act, (No 10 of 2012) the plaintiff/applicant sought from court the following orders:

- a. **Leave be granted for the plaintiff to proceed and continue with its present suit herein against Dubai Bank of Kenya Limited (now in liquidation) from where the same has presently reached.**
- b. **The injunction orders given by this court on the 2nd August 2013 against Dubai Bank of Kenya Limited (now in Liquidation) do continue being in force:**
- c. **The liquidator (Kenya Deposit Insurance Corporation) be enjoined in these Proceedings as a party thereto – in the position of Defendant, for purposes of continuity of this suit.**
- d. **Costs of this application be provided for.**

2. Prayer C was disposed of on the 28/10/2015 by consent and therefore what penalises the determination of this court are prayers a & b and d on costs.

3. The application is supported by the affidavit of Geoffrey Mukenya Asanyo and reiterates the grounds of the application to the effect that the plaintiff has an order of injunction against the defendant on pending suit and that the plaintiff intends to proceed with the suit against the liquidator of the Defendant who has been proved to these proceedings.

4. The defendant/Respondent opposed the application and filed a Replying Affidavit sworn by the one ADAN MOHAMMED BORU the appointed liquidation Agent of the Defendant, the gist of which is that the plaintiff's claim being a cause of action that subsisted against the institution prior to liquidation should be maintained against the liquidation that the court order of 3.9.2015 declared that no orders existing in the court file against the defendant may be enforced may be enjoined prior to compliance with the mandatory

provisions of section 56(2) of the Act, that the interlocutory judgment obtained by the plaintiff against the defendant can be proceeded with under the provisions of section 56(3).

5. In support of its position seeking the orders in the application the applicant filed a list of authorities dated the 1st December 2015 and at the hearing also refer to an additional decision of the House of Lords in **BREWER RWIKAN SHIFFBAN NAS CHIVEN FABRIC -VS- SOUTH INDIA SHIPPING COMPANY CORPORATION.**

#### **The Applicants arguments:**

6. It was Mr. Buti's submissions that section 56(2) KDIA mandates that a suit like the one before me cannot be proceeded with after appointment of a liquidator without the court sanction; that the appointment under KDIA mandates that a suit like the one before me cannot be proceeded with after appointment of a liquidator without the court sanction; that the appointment under KDIA has since effect as appointment by court under the Companies Act and that section 56(2) KDIA is word for word the provisions of section 228 of the Companies Act (He then relied on the decision of **BISAI -VS- KCB[2002] 2EA 346** for the proposition that an appointment of a liquidator under section 35 of the banking Act (now repealed and enacted as Section 56(2) KRIA) has the same effect as an appointment under companies Act (now section of the insolvency Act. It was pointed out that there is a good reason why the courts supervision is required; to award any impropriety being commenced on proceeded with as against or by the company to the detriment of itself and its shareholder and in the case of a bank even the banking public.

7. The decision by the court of appeal in **RADIA -VS- CITY FINANCE BANK [2003] 1EA 249** was also cited to the effect that a depositor to a banking institution is a creditor by virtue of being such depositor. Mr. Buti lastly the **S.K. MACHARIA -VS- CKB** in which the Supreme frowned upon acts that seek to direct vested rights an unconstitutional and maintained that the order by this dated the 2.8.2013 vested upon the applicant property rights that to render worthless would be in contravention of the constitution of Article 40.

8. Last the applicant cited **BREWER WILLIAMS -VS- SOUTH INDIA SHIPPING COMPANY** to the effect that the statutory power of the court are only supplemental to the inherent powers to do justice and avoid abuse of the court process.

#### **The Respondents submissions:**

9. Mr. Muchesi relied on the Replying Affidavit sworn by the liquidation agent Mr. Boru and reiterated that the Kenya Deposit Insurance Act was in force by the time the suit has filed and orders sought to be proceeded with issued. In his submissions the forbids proceedings with the matter once a liquidator was appointed. That the court had made orders on 3.9.2015 regarding further proceedings in the matter: that the leave must be obtained prior to filing suit and not after; that S.K.MACHARIA'S CASE was on jurisdiction only and last by that there was no jurisdiction in the court to grant the orders sought.

10. On section 54, Mr. Mwenesi submitted that, for the applicant to invoke that section in these proceedings it was incumbent upon it to prove that the reasons for appointment of a liquidator were not in good faith and without statutory backing.

11. Reference was made to section 432 of the insolvency Act to provide the consequences of liquidation but my reading of that provision reveals no relevance to the matter before me. Mr. Mwenesi tacitly submitted that in liquidation by Central Bank, the court has not supervising powers. Lastly it was submitted that any attack on the section 56 KDI Act cannot be taken here and in this proceedings stands and cannot be impugned.

12. In response Mr. Buti ask the court to ignore submissions on section 56(3) as being the subject of an appeal from the courts orders of 3.9.2015; that the applicant does not intend to take any steps against the liquidator but the institution and list that section 56(2) allows the court to grant orders for purposes of

continuing with a suit already filed at before the appointment of a liquidator.

**Analysis and determination:**

13. To determine the application before court I have considered the affidavits filed, the law cited both from statute and decided case, and taken into account the oral submissions.

14. From that task I have isolated the following issues as availing themselves and begging for answers.

- Does the law under Kenya Deposit Insurance Act, allow grant of orders for a plaintiff to continue with a suit against a bank placed under liquidation.
- Does the court orders of 3.9.2015 determine the issues in the application dated 2.9.2015.

15. My reading of Act No. 10 of 2012 make me develop the view that it is a special legal tool designed to assist the Regulator, the Central Bank of Kenya to execute its mandates under both the Banking Act and the Central Bank Act.

16. It is preamble the Act discloses the purpose of the Act to be

***“...to provide for the establishment of deposit insurance system, and for the receivership and liquidation of deposit taking institutions, to provide for the establishment of Kenya Deposit Insurance Corporation and for the connected purposes.”***

17. Historically, there was the Deposit Prosecutor Found Board established under section 36 Banking Act and whose functions and purposes have been assumed and taken over by the corporation. It must be appreciated and acknowledge that the Act seeks to regulate only those insertations described as deposits taking and licensed by Central Bank. The target group to be protected must be seen to be the depositing Kenya Public. And the justification being us from where we are today with their type of legislation is not difficult to relate with the turbulent financial past in the Kenyan financial sections which has seen many financial institutions collapse with untold suffering to the depositing public some of whom lose entire lifelong savings.

18. That history must have informed and necessitated the need to have the regulation and handling financial turbulence of such institution under a specialised regime away from the general company practice.

19. As designed and enacted, the Act clearly donate the power to appoint a receiver upon the Central Bank without recourse to any other entity save for the courts supervisory powers. It however acknowledges that even where under liquidation an institution may have contingent vested and even accruing interests that may need litigation by and even application against the company. At that juncture then the Act acknowledges that the institution is failed with limitations to conduct own affairs and therefore need protection of the court.

20. It may not be far fetched to say that a company under liquidation is like those natural persons who suffer disabilities as to be able to conduct that own affairs. I have in mind, persons of unsound mind and children who have their rights vested in the court which then must sanction suits against and by them.

21. Section 56(2) of the Act, provides;

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

22. This provision, as I understand it bar any fresh suit from being commenced without a court sanction and for that forbid continuance with any subsisting litigation without the same sanctions.

23. The rationale for such a legal requirement is founded on the need that a neutral arbiter oversees the affairs of the company to ensure that some improper, ignoble, ingenuine or unjustified activities are not undertaken by or against the company to the disadvantage of its shareholders, creditors, other stakeholders and the company itself.

24. In opposing the application, Mr. Mwenesi however while apparently agreeing that leave must be sought and obtained prior to the institution of the suit and only then not after.

25. On my part, that position is not reconcilable with the plain and unequivocal words of the Act,

***“or continued with against the institution ...***

***without the sanction of the court.”***

26. I take it that section 56(2) carries toward the spirit of section 228 of the Companies Act. The only difference is that under Act No.10 of 2012, the intention is to give liquidation a focused and specialised hand under the sanction of the statutory Regulator.

I find and hold that this court has the jurisdiction under section 56(2) to grant sanction that this matter having been filed prior to the appointment of the liquidator be continued with after such appointment.

Having found that the court has the jurisdiction to grant sanction for the continuation with the suit, the next question/issue for determination does not require so much industry to be determined. It merely calls upon the court to look at the orders it granted on that day. In the ruling the court found and ordered that no further proceeding would be undertaken in this file prior to the determination of the application now under consideration and further that no enforcement of whatever order then in existence would proceed prior to compliance with section 56(2).

Now that I have granted court sanction under section 56(2) the question as to the effect of the orders of 3.9.2015 stand resolved. Needless to add that the totality and tenure of the decision of 3.9.2015 to which an appeal has been preferred and await determination was that this matter was to remain in abeyance pending a decision on whether or not to grant sanction to proceed under the law.

On whether or not the injunction earlier on given by the court should continue to be in time, the answer would be found in the justification for granting sanction and the essence of that order as granted by the court. The orders by Muya J, dated 2.8.2013 were granted pending the hearing and determination of the suit. They were, in the view of the court, to safeguard and secure the plaintiffs interest in the litigation.

Now that I have granted sanction to continue, it would be meaningless if I would turn a blind eye to that interest. I take it that the continuation of such orders will not serve the intended purpose with no prospects of visiting any injury on the defendant.

32. The upshot of all the foregoing is that the plaintiffs application date of 2.9.2015 succeeds and is allowed as prayed with costs, which I order to the plaintiff.

**Dated, signed and delivered at Mombasa this 19th day of February 2016.**

In the presence of:-

No appearance for the Applicant/plaintiff.

No appearance for the Defendant/Respondent.

**P.J.O.OTIENO**

**JUDGE**