



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. E5 OF 2020

DONALD EARLE SMITH.....1ST PLAINTIFF

SONAL SMITH.....2ND PLAINTIFF

-VERSUS-

KENYA DEPOSIT INSURANCE CORPORATION (*as receiver of*

CHASE BANK LIMITED).....1ST DEFENDANT

WILLIAM OSIEMO T/A WILLIMA AUCTIONEERS.....2ND DEFENDANT

RULING

1. By a Plaint dated 7th October 2020, Donald Earle Smith and Sonal Smith (*the Plaintiffs*) pray for:

- (a) A declaration that the Plaintiffs are not indebted to the Defendant in the sum of Kshs.678,714,322.90 or any other sum at all;
- (b) A declaration that the Plaintiff is entitled to the equity of redemption of the charge over its properties Gede/Kirepwa/B56 and Gede/Kirepwa/B57 in Kilifi County;
- (c) A permanent injunction restraining the Defendants whether by itself, its servants, its agents and/or officers from advertising for sale, offering for sale, selling or alienating in any other manner whatsoever the Plaintiff's property or exercising its purported statutory power of sale over the Plaintiff's properties Gede/Kirepwa/B56 and Gede/Kirepwa/ B57 in Kilifi County;
- (d) An order compelling the 1st Defendant to execute a Discharge of the Charge and to release the said duly executed Discharge of Charge and the original Title to Gede/Kirepwa/B56 and Gede/Kirepwa/B57 in Kilifi County to the Plaintiffs within 14 days of the Judgment;
- (e) USD 1,000,000 held by Chase Bank (Kenya) Limited together with accrued interest on the said amount;
- (f) General damages for breach of contract;
- (g) Costs of the suit;
- (h) Interest on (f) and (g) above at court rates from the date of filing of the suit; and
- (i) Such other or further relief this Honourable Court may deem just to grant.

2. Filed contemporaneously with the suit was a Notice of Motion dated same 7th day of October, 2020 seeking orders of injunction to restrain the Defendants from selling the suit properties either through a public auction, private treaty or in any manner

whatsoever pending the hearing and determination of the suit.

3. Having filed a Statement of Defence to the claim on 4th November 2020, Kenya Deposit Insurance Corporation (*as Official Receiver of Chase Bank Ltd*) and William Osiemo T/A Willima Auctioneers (*the 1st and 2nd Defendants*) have by a Notice of Preliminary Objection dated 24th November, 2020 objected to the suit and the application on the grounds that:

1. *This Honourable Court lacks jurisdiction to hear and determine this matter given its specialized jurisdiction under Article 162(2) (b) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act and as held by the Court of Appeal in Co-operative Bank of Kenya Ltd -vs- Patrick Kang'ethe Njuguna & 5 Others (2017) eKLR;*

2. *The Plaintiff's application cannot be salvaged by transfer to the High Court since this court lacks jurisdiction to handle the matter in any way including transfer as was held by the Supreme Court in Albert Chaurembo Mumba & 7 Others -vs- Maurice Munyao & 148 Others (2019) eKLR;*

3. *The 1st Defendant is not a proper Defendant under Section 50(4) (f) of the Kenya Deposit Insurance Act, 2012 which only sanctions suits against the Kenya Deposit Insurance Corporation "... in the name of an institution ...";*

4. *The 1st Defendant is statutory recognized as an agent of the institution under receivership at Section 45(5) of the Kenya*

Deposit Insurance Act, 2012 whereas the 2nd Defendant stated it was working under instruction of Chase Bank (K) Ltd (in receivership) hence they cannot be enjoined as a substantive party to the suit for a claim against a disclosed principal to wit Chase Bank (K) Ltd (in receivership);

5. *The Plaintiffs never sought leave prior to the filing of the suit and the contemporaneous application dated 7th October, 2020 as required under Section 56(2) of the Kenya Deposit Insurance Act, 2012 hence the suit is fatally defective.*

6. *For the foregone reasons, the suit, all proceedings taken and the interim orders issued on 10th November, 2020 against the Defendants/Respondents are therefore a nullity ab initio; and*

7. *The Plaintiffs/Applicants' suit and application are therefore incurably defective, bad in law and ought to be struck out.*

4. By the consent of the parties it was agreed that the Defendants' Preliminary Objection be disposed of first by way of written submissions. I have carefully considered the Notice of Preliminary Objection as well as the submissions and authorities placed before me by the Learned Advocates for the parties.

5. The first point of objection to the suit by the Defendants is that this Court lacks jurisdiction to hear and determine this matter given its specialized jurisdiction under **Article 162 (2)(b) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act** as held by the **Court of Appeal in Co-operative Bank of Kenya Ltd -vs- Patrick Kang'ethe Njuguna & 5 Others (2017) eKLR.**

6. In this respect the Defendants submit that the dominant issues that fall for determination in this case are whether the Plaintiffs fully settled the loan advanced to them by Chase Bank Kenya Ltd (*In Receivership*) on account of a contractual relationship of a lender and borrower, and if not, how much would be a just and legal amount still owing. It is further the Defendants' case that the said loan was secured by the suit properties and that hence the Court would then have to determine if the intended exercise of the statutory power of sale by the Defendants is justified and legal.

7. Relying on the directions issued by the Honourable the former Chief Justice Abdul Majid Cockar on 18th November, 1997 on "*Classification of Commercial Matters – 1997*", the Defendants submitted that the dispute herein is a commercial dispute arising

from the loan agreement between the Plaintiffs and Messrs Chase Bank Kenya Ltd and that therefore it falls under the unlimited original jurisdiction of the High Court in Civil matters pursuant to

Article 165(3)(a) of the Constitution of Kenya, 2010.

8. I have looked at the pleadings filed herein. The Plaintiffs deny that they have charged the suit properties to the 1st Defendant on account of a loan advanced to Messrs Five Forty Aviation Ltd which is said to be the 1st Plaintiff's company. The Plaintiffs aver that they use the two properties as their rural home and that they have developed a cottage and family restaurant thereon which if sold as proposed by the Defendants would occasion them grave and irreparable loss.

9. I have also had occasion to look at the decision in **Co-operative Bank of Kenya Ltd -vs- Patrick Kang'ethe Njuguna.** At Paragraph 40 thereof, the Learned Judges of Appeal observed as follows:

"[...] However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main question to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale."

10. By that statement the Court of Appeal appeared to me to suggest that where creation of a charge and enforceable interest are in dispute, the Environment and Land Court would assume Jurisdiction. In the matter before me, it is clear that the Plaintiffs are seeking the Discharge of the Charge on account of its illegality and/or fraud. The suit thus disputes the creation of an enforceable interest.

11. While it is true that the Court of Appeal at Paragraph 35 in the Kang'ethe holding expressly declared that charging land does not connote land use as described under **Article 162(2) of the Constitution and Section 13(2) of the Environment and Land Court Act**, I note from the pleadings herein that one of the issues in contention is whether or not the suit properties were developed with a cottage and family restaurant. At Paragraph 4 of the Amended Statement of Defence, the Defendants have actually put the Plaintiff to strict proof of the contention that the properties are developed thereby inviting this Court to determine a material fact on land use.

12. At any rate, it was clear to me that a charge is a creation of the Land Act, 2012. Section 2 of the said Act on the definition of court provides thus:

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2017; No. 19 of 2011.”

13. In regard to the Jurisdiction of the court, Section 150 of the same Act provides as follows:

“The Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

14. Arising from the foregoing, I was not persuaded that this Court had no Jurisdiction under **Articles 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act** as stated on the first ground of the Preliminary Objection.

15. Grounds 3 and 4 of the Objection were to the effect that the suit is bad in law in so far as the 1st Defendant is not a proper party to the suit and that the Defendants were mere agents of a disclosed principal and should therefore not have been enjoined as substantive parties.

16. I did not however think that those were issues capable of invalidating the suit herein. I say so because under **Rule 10(2) of Order 1 of the Civil Procedure Rule**, it is provided as follows:

“The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

17. That being the case I was again not persuaded that mere misjoinder of parties can dispose of the suit to warrant its being raised by way of preliminary objection.

18. The third limb of the objection as raised under ground 5 of the Preliminary Objection is that the Plaintiffs never sought leave of the Court prior to the filing of the suit and the application dated 7th October, 2020 as required under **Section 56(2) of the Kenya Deposit Insurance Act, 2012** and that the suit is hence fatally defective.

19. **Section 56 of the Kenya Deposit Insurance Act, 2012** provides as follows:

“56. Stay of proceedings –

(1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.

(2) No injunction may be brought or any other action or civil proceedings may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.”

20. Explaining the rationale of the said provision in **Andrew G. Muchai --vs- Chase Bank Ltd (2016) eKLR, Nzioka J.**, observed and I concur as follows:

“... In my opinion, to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. This receivership is a preservation process put in place to protect the assets, liabilities and business affairs of a bank with the aim of protecting the interests of its depositors, creditors and members of the public. In this case to preserve the bank's liquidity, assets and to find the best way to return it into normal business.

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 floodgate of actions, which may involve some of the matters placed under supervision. This is informed by the fact that when Chase Bank Kenya (*in receivership*) was placed under receivership, the Kenya Deposit Insurance Corporation declared a moratorium to the Bank's business to be undertaken by all stakeholders of the bank; including limiting the Bank's services. A moratorium is a temporary delay or suspension of an activity. The same prohibits a Bank from *inter alia*, receiving deposits and making payments, unless it is partially or fully listed by the Kenya Deposit Insurance Corporation. Thus suits cannot be commenced *suo moto* without the court's leave and/or sanction. That will create anarchy. I hold that; for a

company under receivership, a party suing it must seek the Court's leave before commencing a suit against it. Therefore, institution of any proceedings will require the sanction of the Court ..."

21. It is not in dispute in the matter before me that no leave was sought prior to the commencement of this suit. One of the prayers sought is for the release of the sum of USD 1000,000/- said to be held by the Bank together with accrued interest. The suit therefore touches on the assets of the institution under receivership.

22. In the result, I am persuaded that there is merit in Ground 5 of the Preliminary objection. The suit as filed is defective and misconceived. The same is struck out with costs to the Defendants.

Ruling dated, signed and delivered virtually at Nyeri this 27th day of January, 2022 via Microsoft Teams.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant - Mugambi

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J. O. Olola

JUDGE