



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2016

IN THE MATTER OF: AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI, MANDAMUS, INJUNCTIONS AND DECLARATORY ORDERS

AND

IN THE MATTER OF: IMPERIAL BANK LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF: ARTICLES 47, 20(1), 20(2), 20(4), 23(1), 21(3), 27, 35, 40, 10,232(1), 232(2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: CENTRAL BANK OF KENYA ACT CAP 491 LAWS OF KENYA, THE KENYA DEPOSIT INSURANCE ACT CAP 487 C, THE BANKING ACT CAP 488 LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

REPUBLICAPPLICANT

VERSUS

CENTRAL BANK OF KENYA.....1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION..2ND RESPONDENT

AND

DIAMOND TRUST BANK LIMITED.1ST INTERESTED PARTY

KENYA COMMERCIAL BANK LIMITED.... 2ND INTERESTED PARTY

JOSEPHINE AWINO OGWENO

T/A J. KOGWENO & ASSOCIATES.....3RD INTERESTED PARTY

EX PARTE

IMARAN LIMITED.....1ST EX PARTE APPLICANT

REYNOLDS & COMPANY LIMITED.....2ND EX PARTE APPLICANT

EAST AFRICA MOTOR INDUSTRIES

(SALES & SERVICES) LIMITED.....3RD EX PARTE APPLICANT

MOMENTUM HOLDINGS LIMITED.....4TH EX PARTE APPLICANT

ABDULMAL INVESTMENTS LIMITED.. 5TH EX PARTE APPLICANT

KENBLEST LIMITED..... 6TH EX PARTE APPLICANT

AND

KENYA TEA DEVELOPMENT AGENCY HOLDINGS

LIMITED.....INTENDED 4TH INTERESTED PARTY

RULING

Introduction

1. The applicants herein, which are limited liability companies registered in Kenya under the Companies Act, are shareholders in **Imperial Bank Limited**, (hereinafter referred to as “the Bank”), which is a company incorporated in Kenya and licensed by the 1st Respondent as a commercial bank under the **Banking Act**, Cap 488 Laws of Kenya to carry out banking business in Kenya and which bank is currently under receivership.
2. The 1st Respondent, the **Central Bank of Kenya**, (hereinafter referred to as “**the CBK**”) is a Constitutional body established under the provisions of Article 231 of the Constitution and is incorporated under the provisions of section 3 of the **Central Bank of Kenya Act, 2012** Cap 491 Laws of Kenya charged with the responsibility of inter alia regulating and overseeing the operations of financial institutions in Kenya.
3. The 2nd Respondent, the **Kenya Deposit Insurance Corporation**, (hereinafter referred to as “**the Receiver**”) is a statutory corporation established under section 4 of the **Kenya Deposit Insurance Act, 2012**, Cap 487C of the Laws of Kenya (hereinafter referred to as “**the KDI Act**”), and it is charged with the responsibility inter alia of providing a deposit insurance scheme for customers of member institutions under the **KDI Act**, and receiving, liquidating and/or winding-up any institution in respect of which it is appointed as receiver or liquidator.
4. The 1st and 2nd Interested Parties are companies incorporated in Kenya and licensed by the 1st Respondent as commercial banks under the **Banking Act**, Cap 488 Laws of Kenya. The 1st and 2nd Interested Parties shall hereinafter be referred to as “**DTB**” and “**KCB**” respectively.

5. The 3rd interested party, **Josephine Awino Ogweno T/A J. Kogweno & Associates**, is a customer and depositor of the Imperial Bank.
6. The genesis of this suit seems to have been the events leading up to the appointment of the 2nd Respondent, by the 1st Respondent on 13th October, 2015, as receiver of the Bank for a period of twelve months, pursuant to section 43(1) and (2) and section 53(1) of the **KDI Act** pursuant to which **Mr Peter Gatere** was appointed as the Bank's receiver manager. The said appointment also coincided with the declaration of a moratorium on the Bank.
7. By a Notice of Motion dated 30th March, 2016, the intended 4th interested party herein, **Kenya Tea Development Agency Holdings Limited** (hereinafter referred to as KTD AHL), sought leave of this Court to be joined to these proceedings as an interested party and to participate actively herein.
8. The application was supported by an affidavit sworn by **John Kennedy Omanga**, who described himself as the Group Company Secretary of the said KTD AHL on 31st March, 2016.
9. According to the deponent, vide the letters dated 28th May, 2015, 4th June, 2015, 15th June 2015 and 29th September, 2015, KTD AHL placed substantial deposits for the aggregate sum of Kshs 2.9 Billion in fixed deposits in Imperial Bank Limited which deposits were to mature on 21st October, 2015 and 28th December, 2015 respectively. It was averred that vide a letter dated 8th August, 2015, the Bank confirmed that as at the close of business on 30th June, 2015, KTD AHL held deposits from an aggregate of Kshs 2.9 Billion.
10. KTD AHL is however concerned that notwithstanding such substantial deposit held in the Bank, the amount currently being offered by the Receiver is a paltry sum of Kshs 1,000,000/= without any indication as to the prospects of recovery of the entire deposit.. Despite an indication by the Central Bank that it was considering a proposal for injection of new capital by shareholders and conversion of large deposits to equity, it was averred that KTD AHL had not been approached on the proposal.
11. KTD was further apprehensive that there was an intention to place the bank in liquidation, an action that would directly and materially affect the interests of KTD AHL as it would scuttle the chances of KTD AHL's recovery of its deposit held in trust for farmers countrywide.
12. It was therefore the intention of KTD AHL to be heard in these proceedings in order to assist the Court resolve all the matters in controversy herein. Further KTD AHL contended that its joinder would advance the overriding objective of this Court which is to facilitate the just, efficient and timely and economical disposal of this matter while avoiding a multiplicity of proceedings. To KTD AHL, no party would be prejudiced if it joined these proceedings hence its prayers herein.
13. While reiterating the foregoing, **Mr Kibicho**, learned counsel for KTD AHL relied on the case of **Meme vs. R, Trusted Society vs. Mumo Matemo** and submitted that in view of the substantial deposits of the KTD AHL, it has a stake in these proceedings which none of the parties hereto can articulate adequately taking into account the fact that it is an institutional depositor holding funds belonging to farmers hence public interests warrant its joinder. In further support of this position learned counsel relied on Senate proceedings.
14. According to learned counsel, KTD AHL does not intend to support any of the parties to these proceedings but only seeks to champion its own cause. He also relied on **R vs. Transglobal Cargo Centre** and contended that KTD AHL had been substantially mentioned in the application.

Applicants' Case

15. The applicants through their learned counsel, **Mr Wandabwa**, supported the application. According to learned counsel, based on R vs. Pharmacy & Poisons Board, KTD AHL has a direct interest in these proceedings being a huge depositor which interest is likely to be affected by the outcome of these proceedings since if the process of liquidation was to commence, KTD AHL would only be entitled to Kshs 1,000,000.00. He supported the position taken by KTD AHL that none of the parties to these proceedings can adequately articulate KTD AHL's interests.
16. **Mr Wandabwa** disclosed that given that KTD AHL identifies with the ex parte applicants' position, it was challenging the powers of the Receiver hence its interests cannot be catered for by the Receiver. Similarly, the applicants had not articulated the concerns of the depositors in so far as their deposits are concerned. Since KTD AHL intends to address the unlawfulness of the

exercise of the Receiver's statutory powers, it was submitted that it has no alternative remedy.

1st Respondent's Case

17. The application was opposed by the 1st Respondent, the CBK, which filed the following grounds of opposition:

1. **The application goes against the provisions of sections 1A and 1B of the *Civil Procedure Act*.**
2. **To allow this application would open a flood gate of litigation and similar applications are likely to be filed by the over 50,000 customers of Imperial Bank (K) Limited (In Receivership).**
3. **The application is based on falsehoods.**
4. **That the 2nd Respondent is mandated in consultation with Central Bank of Kenya to protect and preserve the interests of depositors as a whole.**
5. **There is nothing unique in the interests of the intended interested party so as to be exempted from the operation of the *Kenya Deposit Insurance Corporation Act* which was intended by Parliament to take care of depositors' interests.**
6. **The joinder of the intended 3rd interested party is likely to open flood gates of litigation and clog/delay the matter further.**

18. Apart from the said grounds, the 1st Respondent also opposed the application through a replying affidavit sworn by **Kennedy K. Abuga**, its Director in charge of Legal Affairs and also Legal Advisor to the Governor of CBK on 5th April, 2016.

19. According to the deponent, the CBK has not commenced the process of exclusion and transfer and alienation of the Bank's assets as alleged by KTDAHL. It was averred that 80% of the depositors were paid in full in execution of the CBK's legal mandate. It was disclosed that contrary to the apprehension of KTDAHL, the Bank was not placed into liquidation.

20. The deponent was of the view that since this Court will not decide which depositor will be paid what amount, the grounds for the joinder of KTDAHL were completely misplaced. To the deponent, since there are over 50,000 customers and depositors with the Bank, allowing the present application will open flood gates of litigation which will overwhelm this Court.

21. On behalf of CBK, it was submitted by **Mr Murgor** that from the documents filed by KTDAHL, there is no certainty as to what interests KTDAHL has in these proceedings. In support of this submission, learned counsel drew the Court's attention to the various documents exhibited by KTDAHL some of which seemed to support the case of other entities other than KTDAHL. It was therefore submitted that in light of the discrepancies in the documentation furnished one cannot state with certainty that KTDAHL has any interest in the deposits made with the Bank.

22. Learned counsel disclosed that in light of the statement made by the Governor of CBK there was no imminent threat of the Bank going into liquidation. In support of his submissions, **Mr Murgor** relied on the case of **R vs. Pharmacy & Poisons Board** (supra) and submitted that what the Court is concerned with is not the interest of the individual depositors but the judicial review process.

2nd Respondent's Case

23. The 2nd Respondent, the Receiver, similarly opposed the application vide a replying affidavit sworn by **Mohamud Ahmed**, the Bank's appointed Receiver Manager, on 5th April, 2016.

24. According to the Receiver, the instant application was predicated on the misconceived notion that the Governor of CBK intended to announce the placing of the Bank into liquidation which did not occur.

25. According to the Receiver, the spirit and purpose of the ***Kenya Deposit Insurance Act***, which established the Receiver is to ensure and provide protection for the interests of all depositors in member institutions, and once appointed to articulate their grievances, safeguard and ensure recovery of deposits for the benefit of all depositors.

26. It was the Receiver's position that since KTDAHL had expressed an intention to support the applicants herein, KTDAHL's involvement in this matter will do nothing more than to prejudice

- and incapacitate the Receiver in undertaking its statutory obligations, to the detriment of the other depositors of the Bank.
27. The Receiver contended that for a party to be joined to these proceedings, it must demonstrate why it feels that its interests will not be well articulated unless it appears in the proceedings, and champions its own cause. In this case it was contended that KTDAHL's cause as expressed is similar to that of the ex parte applicants. In any case, it was averred that the interests of KTDAHL cannot be different from those of the other 50,000 depositors of the Bank which is to recover their deposits.
28. It was therefore the Receiver's case that it had not been demonstrated what value KTDAHL would add to these proceedings, keeping in mind that in these proceedings the Court is only concerned with whether the due process was followed and whether the applicants were afforded an opportunity of being heard. It was contended that in order to be joined, KTDAHL must demonstrate that it has a stake in these proceedings, why and how it will be affected by the decision of the Court when it is made, which it had not demonstrated.
29. According to the Receiver one of the accounts under investigations belonged to KTDAHL, hence the motivation for KTDAHL to join these proceedings in order to assist the applicants in distracting the Receiver from its investigations.
30. To join KTDAHL to these proceedings, it was contended would only implicitly open the door for thousands of depositors to seek to be joined hence duplicate the roles and cause confusion and prejudice and incapacitate the Receiver in undertaking its statutory obligations.
31. On behalf of the Receiver, **Mr Chege** associated himself with **Mr Murgor's** submissions and added that there was nothing special about KTDAHL's interests as a depositor which distinguishes it from the other depositors.

1st and 2nd interested parties case

32. On behalf of the 1st and 2nd interested parties, **Mr Ohaga** took the same position as that of the Respondents and added that the parameters for joinder of a party to the proceedings of this nature had not been met by KTDAHL.

KTDAHL's Rejoinder

33. In a rejoinder, **Mr Kariuki** on behalf KTDAHL submitted that the supporting affidavit was sworn by the Group Secretary of KTDAHL Holdings hence an indication of the existence of a group of companies. It was submitted that KTDAHL was therefore applying on behalf of the holding companies and the farmers.

Determinations

34. I have considered the foregoing.
35. Order 53 rule 3(2) and (4) of the **Civil Procedure Rules** provide:

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

36. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are "**directly affected**", subrule (4) on the other hand gives the Court wide discretion

to order that the application be served on any other person notwithstanding that that person ought to have been served under subrule (2) or not and the Court's decision to do so is only subject to ***such terms (if any) as the court may direct***. It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary

37. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word "direct" is defined by ***Black's Law Dictionary***, 9th Edn. page 525 as "straight; undeviating, a direct line, straightforward, immediate." Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation.
38. It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are determined. As was held in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, judicial review is properly regarded as a remedy of last resort.
39. The role of an interested party was the subject of the decision of the Supreme Court in **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others [2014] eKLR** in which the said Court expressed itself as follows:

"Black's Law Dictionary, 9th Edition, defines "intervener" (at page 897) thus:

"One who voluntarily enters a pending lawsuit because of a personal stake in it" (emphasis provided);

and defines "Interested Party" (at p.1232) thus:

"A party who has a recognizable stake (and therefore standing) in a matter".

Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an *amicus's* interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an *amicus* is only interested in the Court making a decision of professional integrity. An *amicus* has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his cause is to ensure that a legal and legitimate decision is achieved."

40. In my view, where no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.
41. Article 159(2)(b) dictates that the Court ought to be guided by *inter alia* the principle that justice

shall not be delayed. In other words legal proceedings ought to be disposed of speedily and this is critical where the Court is dealing with public law disputes such as judicial review applications. Such proceedings, in my view cannot be determined speedily, if the Court readily permits persons whose participation will not add any value to the proceedings or whose contribution can be made without necessarily joining them to the proceedings to participate therein. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707**: “*Speed and promptness are the hallmarks of judicial review.*” Judicial review, it has therefore been held, acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116**.

42. These being public law proceedings, dealing with the process rather than the merits of the case, it is the issues to be canvassed that dictate whether parties ought to be joined as opposed to mere personal aggrandisement.
43. In this case, KTD AHL’s case is that it has substantial deposits in the Bank and therefore if the Bank goes into liquidation, it is likely to be affected by such eventuality. At this stage however, there is no evidence that the Bank’s fortunes has taken a nosedive with imminent signs that it is soon going into liquidation. To the contrary the Respondents’ position is that there is still a need for complex investigation before a decision can be made either way. Therefore to join KTD AHL on the basis of the likelihood of the Bank going into liquidation is in my view speculative and a matter of conjecture at this stage.
44. Apart from that as I have stated herein above judicial review proceedings deal with the process as opposed to the merits of the decision unless it is alleged that the decision complained of is irrational in which case some element of a merit investigation may be injected into the determination though to a very limited measure. It is therefore not a question of the amount involved but the questions to be determined that give rise to grounds for judicial review. Whereas, KTD AHL may well claim substantial deposits in the Bank, when it comes to determination of the justice of the case, it may well be that some small depositors who deposited their lifelong earning may stand to lose more than even KTD AHL.
45. That however is not an issue for determination in this matter. What is required of an applicant for joinder is to place before the Court precisely the issues it wishes to bring before the Court so that the Court can make an informed decision whether the issues cannot be adequately canvassed by the parties already admitted to or participating in the proceedings. It ought to disclose its case upfront in order to enable the Court determine whether or not the application for joinder is merited. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.
46. In this case KTD AHL has not precisely indicated what issues it intends to regurgitate before this Court apart from its interest as a depositor. In my view it is not sufficient in these matters for a person intending to join the proceedings to show that it has some interests in the subject of dispute however remote. Whereas the alleged role of the KTD AHL in assisting the Court to effectively and completely adjudicate the matter may be a consideration in an application under Order 1 rule 10 of the ***Civil Procedure Rules***, in judicial review especially where a party’s interests can be catered for by another party already a party to the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto.
47. In this the interests of the depositors are pursuant to ***Kenya Deposit Insurance Act***, meant to be catered for by the Kenya Deposit Insurance Corporation, the Receiver herein. That is the general rule. Whereas to the said general rule there may be exceptions, the onus lies on the particular depositor who contends that there are exceptional circumstances to prove so. In so doing it is upon the said depositor to satisfy the Court that its interests cannot be adequately catered for by the Receiver. That onus cannot be said to have been satisfied by simply alleging that the deposit is substantial and that the said depositor is a trustee for other depositors.
48. I must point out that it is not the number of persons who wish to be joined to the proceedings that determine whether or not their joinder ought to be allowed. In my view it is the diversity in those

- interests and the inability to satisfactorily take them into account in the existing mode of proceeding that is a factor assuming the other factors are satisfied.
49. In this case, Kenya Tea Development Agency Holdings Limited, though not described in the application, is prima facie, a limited liability company hence a legal person in its own rights. The exhibits annexed are variously in the names of Kenya Tea Development Agency Limited, Kenya Tea Development Agency Management Service Limited and Kenya Tea Development Authority Limited. There was no attempt to explain in an evidentially admissible way the nexus between these seemingly distinct legal persons and KTDAHL. An attempt was however made in the rejoinder to allege that KTDAHL is a holding company. That may be so but that does not derogate from the fact that a holding company is, in law, a different legal entity from its subsidiaries and is to be treated as such save in cases where circumstances justify the lifting of the corporate veil.
50. Without this Court being satisfied as to the position of the alleged subsidiary companies in these proceedings, the Court would be acting in the dark if it assumed that the legal position to be adopted by KTDAHL is the position of the said subsidiaries.
51. Apart from the foregoing I am not satisfied based on the scanty material placed before me on behalf of KTDAHL that none of the parties in these proceedings can adequately articulate the position KTDAHL intends to adopt in these proceedings which position remains a mystery to this Court. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected by disclosing upfront its legal position in the matter and what it intends to place before the Court that makes his case distinct from the case presented by the other parties to the proceedings. In other words there ought to be material disclosure of the intended case.
52. It bears reiteration that an issue as to what sum ought to be paid to which depositor, which seems to be KTDAHL's concern is an issue that ought to be canvassed in the ordinary civil proceedings preferably before the Commercial Court since such matters would remove the dispute from the ambits of judicial review and transmute it into a merit determination hence unnecessarily cloud the issues for determination and delay the determination of the matter herein. This Court, sitting as a judicial review Court will not and is not permitted, in its decision, to dwell on the merits but only the process and will leave the issue of the merits to be dealt with in appropriate forums.
53. In the premises, I find no merit in the Motion dated 30th March, 2016 which Motion fails and is hereby dismissed with costs to the Respondents.
54. Orders accordingly.

Dated at Nairobi this 25th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wandabwa for the ex parte applicants

Mr Chege for the 1st Respondent

Mr Murgor for the 2nd Respondent

Miss Muika for the 1st and 2nd interested parties

Mr Kibicho and Mr Kariuki for KTDAHL

Cc Mutisya