



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO. 455 OF 2000**

**EURO BANK LTD.....PLAINTIFF**

**VERSUS**

**G.K. MEENYE t/a  
MEENYE & COMPANY ADVOCATES.....DEFENDANT**

**RULING**

By this application, the Defendant seeks an order that the Plaintiff's suit has abated as no application has been made to substitute the Plaintiff after the same was put under statutory liquidation on 21<sup>st</sup> February, 2003. He also applies for an order that the cost of this application and the entire suit be borne by the liquidator, M/s Deposit Protection Fund Board.

The application is made by Chamber Summons dated 21<sup>st</sup> May, 2010, and taken out under Order XXIII Rules 3 (2) and 12 of the Civil Procedure Rules. It is supported by the annexed affidavit of G K Meenye, the Defendant/Applicant, and is based on the grounds that by Gazette notice No. 1404 dated 24<sup>th</sup> February, 2003, and published on 7<sup>th</sup> March, 2003, the Plaintiff herein was placed under statutory liquidation by the Deposit Protection Fund Board, and that no application to substitute the plaintiff has ever been made since the said notice. He therefore contends that in the circumstances, the suit has abated.

The Plaintiff opposed the application by a replying affidavit sworn on 17<sup>th</sup> June, 2010, by Job Kipelian Naisho, the Liquidation Agent of Euro Bank Ltd., (in liquidation) appointed by the Deposit Protection Fund Board. In that affidavit, the deponent avers that the Plaintiff was placed under statutory liquidation by the Deposit Protection Fund Board by Gazette Notice No. 1404 dated 24<sup>th</sup> February, 2003 and published on 7<sup>th</sup> March, 2003. He refers to Section 35 (1) of the Banking Act and the Finance Act of 2003 which conferred on the Board the power to carry on business so far as may be necessary for the beneficial winding up thereof. He also deposed that Section 228 of the Companies Act was not applicable if it is a bank which is under liquidation. He further states that the law applicable to a Company under liquidation or in respect of which a winding up as been made is different from the law applicable in the event of a bank being liquidated by the Deposit Protection Fund. He therefore prays that the Defendant's application be dismissed with costs.

At the hearing of this application, Mr Nderitu appeared for the Applicant while Mr Ngaca appeared for the Respondent. After considering the pleadings and the submissions of the respective counsel, I note that under Section 228 of the Companies Act, once a winding upon order has been made or an interim

liquidator has been appointed under Section 235 of the said Act, no action or proceeding can be proceeded with or commenced against the Company except by leave of the court and subject to such terms as the court may impose.

In the instant case, the Director, Deposit Protection Fund Board, issued Gazette Notice No. 1404 dated 24<sup>th</sup> February, 2003, giving notice that the Central Bank of Kenya in exercise of its powers under Section 31 (1) of the Banking Act, had on 21<sup>st</sup> February, 2003 appointed the Deposit Protection Fund Board to be the liquidator of the Respondent in this matter. Section 35 (5) of the Banking Act in turn provides that – **“Notwithstanding the provisions of any other written law, the Board shall have power to –**

**(a) Carry on the business of the institution so far as may be necessary for the beneficial winding up thereof...”**

The words **“notwithstanding the provisions of any other written law”** in the above subsection make it clear that it is the law as provided in the Banking Act that rules Banking Companies in liquidation and not Section 228 of the Companies Act.

This places Banks on a different footing altogether. If a Bank was to be treated like an ordinary Company, this would defeat the purpose for which the Banking Act was enacted, as it was expressly enacted to regulate the operations of Banking Companies. Section 35 (5) (a) of the Act as provided above expressly confers on the Deposit Protection Fund Board jurisdiction to **“carry on the business of the institution so far as may be necessary for the beneficial winding up thereof”**. The plain meaning of these words is that the Deposit Protection Fund Board may continue carrying on the Bank’s business even though the Bank is in liquidation, and there is no requirement for the substitution of the Bank by another person as would be in the case of non-Banking Companies. At the same time, the addition of the words **“(in liquidation)”** after the Bank’s name may serve to better inform the public that a particular bank is currently under liquidation. Although it is not mandatory, it is a good practice to do so.

For these reasons, I find that there was no need for applying for the Plaintiff’s substitution as ordained in Order XXIII of the Civil Procedure Rules, and therefore this application is uncalled for.

I accordingly dismiss the application with costs to the Respondent. Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of June, 2011.

**L NJAGI**  
**JUDGE**