



Onyango & another (Suing as administrators of the Estate of Dismas Juma Onyango Kamb (Deceased)) v Meridien Biao Bank Limited (In Liquidation) (Environment and Land Case Civil Suit 851 of 2015) [2022] KEELC 12784 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 851 OF 2015
MD MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

PATRICIA ACHIENG' ONYANGO 1ST PLAINTIFF

BENEY AWINO ONYANGO 2ND PLAINTIFF

**SUING AS ADMINISTRATORS OF THE ESTATE OF DISMAS JUMA
ONYANGO KAMB (DECEASED)**

AND

MERIDIEN BIAO BANK LIMITED (IN LIQUIDATION) DEFENDANT

*((In respect of the Notice of Motion Application dated 7th April, 2022
seeking to strike out the Plaintiff's suit for failure to comply with
the provisions of Section 56 (2) of the Kenya Deposit Insurance Act))*

RULING

Background

1. By a Plaint dated September 4, 2015, the Plaintiffs commenced this suit against the defendant seeking for orders inter alia;
 - a. That there be a stay of any further transactions on the ownership of the suit property pending the hearing and determination of the suit.
 - b. A permanent injunction to issue restraining the defendant whether by itself or its agents from advertising for sale, selling by public auction or private treaty the suit property.



- c. An order directing the defendant to deliver up to the Plaintiff or their appointee, the title documents and an executed instrument of discharge of charge against the suit property registered in the deceased's names.
 - d. An alternative prayer that a declaration be made that the defendant was in breach of agreement by failing to substitute the deceased's security for Third Party's security and as such the Defendant be estopped and barred from claiming and recovering any sums from the deceased's estate.
2. The Plaint was accompanied by a certificate of urgency and a notice of motion application seeking injunctive orders against the defendant from interfering with the suit property.
3. Justice L Gacheru who had the conduct of this matter at the time in her ruling delivered on the September 7, 2017, granted the prayers as sought in the Plaintiffs' Application. She further directed the Plaintiffs to take out summons to enter appearance and serve them upon the Defendant to enable the Defendant enter appearance accordingly and file its statement of Defence.
4. The Defendant has now moved this court *vide* the Notice of Motion dated the April 7, 2022 under the provisions of Section 56 (2) of the [Kenya Deposit Insurance Act, 2012](#) and Order 5 Rule 6 of the [Civil Procedure Rules](#). The defendant prays for orders that the suit is fatally defective and should be struck out. In the alternative, the defendant seeks that the suit be marked as having abated. The Defendant prays for costs of the application and the suit as well.
5. The Application is based on the grounds that the Plaintiffs filed the suit contrary to the provisions of Section 56 (2) of the [Kenya Deposit Insurance Act](#), Cap 487C of the Laws of Kenya. The proceedings herein are therefore a nullity. Further, that the Plaintiff has never taken out Summons to enter appearance as directed by the court hence the suit has abated and should be struck out with costs.
6. The Application is further supported by the Affidavit of Daniel Kiragu deponed on the April 7, 2022. The deponent restates the grounds in support of the application and prays that the suit should be dismissed for failure by the Plaintiffs to seek leave before filing the case against a bank under liquidation. The suit is therefore incurably defective and ought to be struck out. Secondly on the premises that the suit has in any event abated for failure to take out Summons to enter appearance.

Court's Directions

7. The Plaintiffs' counsel was served with the Application and confirmed service in court. He was present in court when the directions on the disposal of the application were given on the May 30, 2022. The Plaintiffs' Advocate sought more time to file a response, which additional time was granted. The court then directed that the application be dispensed with by way of written submissions. The defendant complied. It filed its submissions dated the July 21, 2015.
8. The Plaintiffs did not file any document in response to the application. The application is therefore unopposed. The Plaintiffs too did not file any submissions.

Defendant's Submissions

9. The Defendant sets out the facts of the case and aver that sometime back in the year 1995, it offered various loan facilities to Sunwise Travel Limited. The suit property was registered as security to the facility. The charge was signed by the registered owner of the suit property, Mr Dismus Juma Onyango (deceased). The Borrower and the Chargor failed to pay the loan and the arrears stood at Kshs 49,622,007.45 as at August 6, 2013.



10. Consequently, Kenya Deposit Insurance Corporation (KDIC) issued statutory notices to the borrower and the chargor. The chargor failed to comply with the notice prompting the defendant to issue a further notice. Consequently, when the notices crystallized, the Lender then instructed Auctioneers who issued a 45 days' notice but the loan was not settled. The Auctioneers advertised the suit property for sale after the expiry of the notice. It is then that the Plaintiffs filed this suit on September 4, 2015.
11. It is the defendant's submission that the defendant Bank was under liquidation and KDIC was appointed as the Liquidator by the time the Plaintiffs filed this suit. Therefore, no suit could be instituted without leave of court. Failure to seek leave of the court renders the suit defective for breach of Statute. The suit should therefore be struck out.
12. The Defendant relies on amongst others, the case of *Dickson Jomo Kebatta v Deposit Insurance Corporation in Liquidation of Middle Africa Finance Ltd* (2017) eKLR where the court held the proceedings instituted without leave of the court against a bank in liquidation, improper and struck them out.
13. The defendant further avers that although the Plaintiffs were directed to take out summons to enable the defendant enter appearance, that has not been done to date. Failure to do so contradicts the provisions of Order 5 Rule 1 (6) of the *Civil Procedure Rules*. The defendant cites the case of *Feuze Investment Limited v Kenya Way Limited* (2001) eKLR where the court held that "failure to file and serve summons upon the defendants was fatal to the suit." The defendant therefore submits that the delay in taking out the summons by the Plaintiff is inordinate and inexcusable. The Plaintiff's suit should therefore be dismissed with costs.

Issues for Determination

14. In this court's opinion, the only issue for determination is whether the defendant/applicant's notice of motion is meritorious.

Analysis and Determination

15. I will first start with the issue of failure by the Plaintiffs to seek leave of the court before instituting these proceedings. Section 56(2) of the *Kenya Deposit Insurance Act* (No 10 of 2012) provides as follows: -

"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."
16. In *Bisai & Another v Kenya Commercial Bank Ltd* (2002)2 EA 346, Mwera J (as he then was) stated that; -

"in order to commence any action or proceedings against the 3rd defendant (a company in Liquidation), the Plaintiffs were obliged, mandatorily by the *companies Act* to first obtain leave from the court. That the Leave ought to be sought before bringing an action or proceedings and not retrospectively."
17. Explaining the import of the said provision in the case of *Andrew G Muchai v 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. Thus 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."

18. I agree with the opinions expressed in the above cited cases. Where leave is mandatorily required as in the instant case, it is a prerequisite prior to the filing of the case. Arising from the foregoing and noting that from the record the Plaintiffs never sought leave of the court before filing this suit, I am persuaded that the defendant's prayer to strike out the suit has merit.
19. The defendant's application was two-pronged. Apart from seeking to strike out the suit for failure by the Plaintiffs to seek leave of the court, the defendant also seeks an alternative prayer that the suit be struck out on the basis that it has abated for failure to take out and serve the summons to enter appearance as required in law and as directed by the court.
20. Order 5 of the [Civil Procedure Rules \(2010\)](#) places the duty upon the Plaintiff to prepare and serve summons. On preparation, Order 5 rule (1) (5) provides that: -
 - "(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule."
21. There are consequences for inaction on the part of a Plaintiff as order 5 rule 1 sub rule 6 provides that: -
 - "(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate."
22. The court had earlier on noted from the record that a ruling was delivered in this matter on the September 7, 2017 where the court directed the Plaintiffs to take out summons and serve them upon the defendant to enable the defendant enter appearance accordingly and file its defence.
23. Unfortunately, five years after, the Plaintiffs have not acted on the direction. The Plaintiff filed the Plaint without the summons despite the provisions of Order 5 Rule 1 (1), (3), (5) and (6) of the Rules. The Court exercised its discretion and granted the Plaintiff leave to extract the Summons and serve them out of time. The delay is not only inordinate but inexcusable. The consequences of the said non-compliance are clearly stipulated in Order 5 Rule 1(6) of the [civil Procedure Rules](#); the suit has abated.
24. Consequently, the defendant succeeds on this aspect as well.

Orders

25. The conclusion is that the defendant's notice of motion application dated April 7, 2020 succeeds. The Plaintiffs' suit is hereby struck out with costs to the defendant. The defendant shall also have the costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022



M.D. MWANGI

JUDGE

In the Virtual presence of: -

Mr. Kiragu for the Defendant/Applicant.

No appearance for the Plaintiffs.

Court Assistant- Hilda

M.D. MWANGI

JUDGE

