



**ALS Limited v Imperial Bank Limited (Under Receivership) & 3 others (Civil Case E825 of 2021) [2025] KEHC 1517 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1517 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E825 OF 2021  
F GIKONYO, J  
FEBRUARY 13, 2025**

**BETWEEN**

**ALS LIMITED ..... PLAINTIFF**

**AND**

**IMPERIAL BANK LIMITED (UNDER RECEIVERSHIP) ..... 1<sup>ST</sup> DEFENDANT**

**PATRICK NJOROGE ..... 2<sup>ND</sup> DEFENDANT**

**GOVERNOR, CENTRAL BANK OF KENYA CENTRAL BANK OF  
KENYA ..... 3<sup>RD</sup> DEFENDANT**

**KENYA DEPOSIT INSURANCE CORPORATION ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Receivership: Leave to commence or continue with suit**

1. The Plaintiff/ Applicant's Notice of Motion dated 23<sup>rd</sup> September 2021 expressed to be brought under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Orders 40 Rule 1, 51 of the Civil Procedure Rules, Sections 43, 50 and 51 of the *Kenya Deposit Insurance Act*, Section 9 of the *Banking Act* and Article 159 of the Kenyan Constitution, mainly seeks interlocutory orders directing: -
  - a. The 1<sup>st</sup> to 4<sup>th</sup> Respondents to render a detailed account of all monies paid out or withdrawn from the 1<sup>st</sup> Respondent by the 4<sup>th</sup> Respondent, from 13<sup>th</sup> April 2017 to 23<sup>rd</sup> September 2021; and
  - b. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to supply any reports and documents justifying the decision to place the 1<sup>st</sup> Respondent under Receivership in line with Section 43 of the *Kenya Deposit*



Insurance Act; and the resolution passed and notice thereof in line with Section 9 (5) of the Banking Act.

2. Alternatively, the Applicant seeks interlocutory orders, in the event of non-compliance with the foregoing, to:-
  1. halt any dealings with, the money held by the 4<sup>th</sup> Respondent acting as the receiver; or
  2. direct the Respondents to Deposit in Court (or in a joint interest-earning account in their joint names and that of the Plaintiff's Advocates, Murage Juma & Company, Advocates) Kshs. 15,921, 248. 25/-, USD 915,434. 06/- and 510, 603. 42/- Euros.
  3. The Application is supported by the affidavits sworn by the Applicant's Director, Mohamed Aslam Khan on 23<sup>rd</sup> September 2021, 28<sup>th</sup> October 2021 and 5<sup>th</sup> November 2021. It is also supported by written submissions dated 22<sup>nd</sup> October 2021.

### **Responses**

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Respondents, filed grounds of opposition dated 22<sup>nd</sup> October 2021. They also filed a replying affidavit sworn by the 3<sup>rd</sup> Respondent's General Counsel, Kennedy Kaunda Abuga on 22<sup>nd</sup> October 2021 and written submissions dated 9<sup>th</sup> November 2021.
5. The 1<sup>st</sup> and 4<sup>th</sup> Respondents filed grounds of opposition dated 29<sup>th</sup> October 2021. They also filed a replying affidavit sworn by the 4<sup>th</sup> Respondent's Deputy General Manager, Andrew Rutto on 4<sup>th</sup> November 2021 and written submissions dated 9<sup>th</sup> November 2021.

### **Analysis and determination**

6. I have considered the totality of the pleadings, the rival affidavits, submissions and the authorities cited.
7. In brief, the Applicant's case is that it held current and fixed deposit accounts with the 1<sup>st</sup> Respondent. Based on its instructions, the 1<sup>st</sup> Respondent transferred monies to fixed interest-earning accounts but just after, the 1<sup>st</sup> Respondent was placed under receivership. Consequently, the 1<sup>st</sup> Respondent failed to pay when the Applicant became entitled to payment.
8. The Applicant therefore questions the legitimacy of the placement of the 1<sup>st</sup> Respondent under receivership by the 4<sup>th</sup> Respondent. It argues that the receivership has now ensued for a period more than is stipulated by statute and that several statutory provisions have been contravened during the receivership.
9. The Applicant seeks orders directing the 1<sup>st</sup> to 4<sup>th</sup> Respondents to render a detailed account of the 1<sup>st</sup> Respondent and documentation supporting or justifying the decision to place the 1<sup>st</sup> Respondent under receivership; to restrain any dealings with the funds held by the 1<sup>st</sup> Respondent, to deposit in court or a joint account the monies claimed; a declaration that the receivership was illegal, and a declaration that the receivership lapsed on April 13, 2018.
10. The Applicant argues that it has satisfied the conditions for grant of the interlocutory orders sought through its application because it has established a prima facie case.
11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents assert that the suit discloses no reasonable action against the 2<sup>nd</sup> Respondent; that the suit is sub-judice due to HCC E102 of 2021; ALS Limited v Kenya Deposit Insurance Fund and Imperial Bank Limited (In Receivership) that was instituted earlier by the Applicant and an abuse of the court process and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have complied with



the provisions of Section 43 of *Kenya Deposit Insurance* (KDI) Act and Section 9 of the *Banking Act* to the letter.

12. On their part, the 1 and 4<sup>th</sup> Respondents cite non-compliance with the requirement to seek the leave of Court before instituting a suit against the 4<sup>th</sup> Respondent under Sections 46(1)(a) and 56(2) of the KDI Act; that the Applicant cannot seek private law remedies in a civil suit against the exercise of statutory power by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents; that under Section 45(5) of the KDI Act, the Applicant is precluded from instituting proceedings against the 4<sup>th</sup> Respondent regarding actions and omissions of its disclosed agent, the 1<sup>st</sup> Respondent; that the Applicant seeks to interfere with the 4<sup>th</sup> Respondent's independence contrary to section 51 of the KDI Act; that the Court granted the order of 26<sup>th</sup> September 2018 in HCCC No. 303 of 2018; Kenya Tea Development Agency v Central Bank of Kenya & 2 Others maintaining the receivership status of the 1<sup>st</sup> Respondent.
13. The 1<sup>st</sup> and 4<sup>th</sup> Respondents also assert that the information sought by the Applicant is private and confidential; that any disclosure would contravene the 1<sup>st</sup> Respondent's right to privacy, Section 32(1) of the *Banking Act*, Section 6(2) (j) of the *Access to Information Act*, No. 31 of 2016 and Section 15 of the KDI Act due to ongoing investigations.
14. The 1<sup>st</sup> and 4<sup>th</sup> Respondents further contend that the transaction which did not require consent of the creditors, debtors or security holders is irrevocable under Section 50(8) of the KDI Act.

#### **Competence issues: leave of court**

15. Parties have placed as eminent; the competence of this suit as well as the application; for leave of the court to commence or continue with the suit was not obtained. More specifically, the controversy is whether leave was required; and whether the Applicant complied with Section 56(2) of the *KDI Act*.
16. The Plaintiff does not dispute that it did not seek leave before instituting this suit.
17. The 1<sup>st</sup> and 4<sup>th</sup> Respondents argue that the Applicant's failure to seek leave of the Court before instituting this suit contravenes Section 56(2) of the KDI Act and renders the suit and the instant application incurably defective. They also argue that the proceedings should be struck out solely on this basis.
18. Section 56 of the *Kenya Deposit Insurance Act*, 2012 provides as follows:  
Stay of proceedings.  
56. (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 proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.  
(3) No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue.

#### **Quite exhilarating debate: leave of court during receivership**

19. Application of Section 56(2) of the *KDI Act*, especially, to receivership has attracted quite exhilarating judicial as well as legal debate.
20. Some Courts have held that if leave is not sought to institute a suit against a company under receivership under Section 56(2) of the KDIA 2012, the suit is incompetent and should be struck out. For instance,



in *Charity Wangui Ngumo v Chase Bank Limited (In Receivership) & Antique Actions Agencies* [2018] eKLR, *Andrew Gikuni Muchai -vs- Chase Bank Ltd & another* (supra), Nzioka J, *George Mureithi and others -vs- Kenatco Taxis Limited (In Receivership)* (supra) where Wasilwa J,

21. The reasons given in those decisions include: -
  - a. The wording of Section 56(2) of the KDI Act is mandatory that failure to seek leave of the court before commencing proceedings against a company under receivership, the suit cannot be sustained as against that party.
  - b. The 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 interest of its depositors, creditors and members of the public.
  - c. 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 flood gate of actions, which may involve some of the matters placed under suspension.
  - d. Absence of leave of the court renders the suit incompetent ab-initio.
22. Other Courts have found that leave is a prerequisite for instituting suits against companies under liquidation and not against those under receivership. *Coast Hauliers Limited v Imperial Bank Limited (In Receivership)* [2021] eKLR, Thomas and Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chasebank Kenya Limited (In Receivership) and another (Interested parties)
23. the major reasons for this school of thought draws upon the decision by Tuiyot J (as he then was) in Thomas and *Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chasebank Kenya Limited (In Receivership) and another (Interested parties)* (supra) where he stated thus: -

“The concept of Receivership and liquidation as contemplated by the KDI Act are different. The circumstances under which Central Bank can place a Bank under receivership are set out in Section 43(2) of the KDI Act and include when assets of an institution are less than its obligations to its creditors or the institution has engaged in malpractices or activities contrary to provisions of any Kenyan law or other applicable law ..... Perhaps I need to add that while proceedings against an institution under receivership can be commenced or continued without the necessity of court sanction, a decree holder will not be able to reach the assets of the institution if it is shielded by a moratorium under the provisions of Section 50(2). I have come to the conclusion that the provisions of Section 56 of the KDI Act do not apply to institutions placed under receivership and the preliminary objection is misplaced.”
24. So profound and requiring much serious thought in any formulation of application of Section 56(2) of KDI Act to companies under receivership, is the statement; ‘The concept of Receivership and liquidation as contemplated by the KDI Act are different.’ Thomas and Piron Grands Lacs Limited (supra).
25. The court does note that, under section 46(2) of KDI Act, any person who sustains losses from any action of the Corporation or the appointed person may institute an action for damages for the losses suffered by such person. This is one of the subtle nuances in respect of receivership which need be evaluated in cutting its space in Section 56(2) of KDI Act.



26. Be that as it may, the 1<sup>st</sup> defendant was placed under liquidation on 9<sup>th</sup> December, 2021. Hence Section 56(2) of KDI Act would apply to pending proceedings such as these.
27. Leave of court to commence or continue with proceedings against the liquidator or company under liquidation is mandatory. *Bougainville Estate Limited v Kenya Deposit Insurance Corporation (KDIC) (Suing in their capacity as Receiver Managers of Imperial Bank Limited-(In Receivership) & 3 others* (Civil Application 34 of 2021) [2021] KECA 132 (KLR) (5 November 2021) (Ruling) the Court of Appeal confirmed that leave is mandatory.
28. Arguably, the use of terms may be ‘commenced or continued’ in relation to judicial proceedings in Section 56(1) of the KDI Act, denotes filing of or continuing with pending proceedings, respectively. Making the distinction profound and relevant characterization. But, each of these actions requires the sanction of the court where the company is under liquidation.
29. See also the Court of Appeal in *Kwanza Estates Limited v Dubai Bank of Kenya limited (In Liquidation) & Kenya Deposit Insurance Corporation (The Liquidator of Dubai Bank Kenya Limited)* [2016] KECA 465 (KLR), where it was held that: -

“Plainly, no attachment, execution or other method of enforcement can take place or continue upon the company being placed under liquidation. The learned Judge, in our considered opinion properly relied on the provisions of sub-section 3. A Judge in determining a dispute is not restricted only to the provisions of the law cited by a party. Subsection (2) which the appellant relied on cannot be read in isolation from the rest of the section.

We reiterate that committal for contempt of court is an enforcement method. This is not in dispute. What is in controversy is whether the protection of the 1<sup>st</sup> respondent under section 56 (3) would apply to its officials in proceedings that commenced before the liquidation. There can be no debate that the suit having been brought against the 1<sup>st</sup> respondent, all the orders arising from the suit can only be enforced against it through its organs. Where the law prohibits an order of injunction, attachment or execution or garnishee against the institution in the same vein its officers are equally insulated and it is immaterial that the proceedings against the officials commenced prior to the liquidation.”

30. No sanction has been granted by the court to continue with this suit or application for injunction against the liquidator or the company under liquidation.

## **Disposal**

31. Therefore, the application for injunction is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Mr. Gitahi for Mr. Murage for the plaintiff
2. Ms Arora for Mr Oraro for 1<sup>st</sup> & 4<sup>th</sup> Respondent



3. Mr. Chege for 2<sup>nd</sup> & 3<sup>rd</sup> Respondent

