



**Doshi v Kenya Deposit Insurance Protection (Civil Case E270 of 2023)  
[2024] KEHC 67 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 67 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E270 OF 2023  
JWW MONG'ARE, J  
JANUARY 11, 2024**

**BETWEEN**

**ASHOK LABSHANKER DOSHI ..... PLAINTIFF**

**AND**

**KENYA DEPOSIT INSURANCE PROTECTION ..... DEFENDANT**

**RULING**

1. Before this Honourable Court is a Notice of Motion dated 13<sup>th</sup> June 2023 brought under the provisions of Sections 28 and 55 (2) of the *Kenya Deposit Insurance Act*, Regulation 22 of the *Kenya Deposit Insurance Regulation*, 2015 Regulation 10 of the *Insolvency Regulations*, 2016. Section 1A and 3A of the *Civil Procedure Act* and Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 and Article 159 of the *Constitution of Kenya*. The Plaintiff seeks the following orders:-
  - i. spent
  - ii. Pending hearing and determination of this suit there be and is hereby issued an order of temporary injunction to restrain the Defendant herein either directly or through, its agents, officers, employees, assigns or any other person appointed by acting on instructions and behalf of the Defendant from paying out protected deposits to depositors of Imperial Bank Limited (in Liquidation) and the publication of the final statement of account in respect thereof in the Kenya Gazette.
  - iii. Pending hearing and determination of this suit there be and is hereby issued an order of temporary injunction to restrain the Defendant herein either directly or through, its agents, officers, employees, assigns or any other person appointed by acting on instructions and behalf of the Defendant from paying out protected deposits to depositors of Imperial Bank Limited



(in Liquidation) before conclusion of the liquidation process of Imperial Bank Limited and the publication of the final statement of account in respect thereof in the Kenya Gazette.

- iv. Costs of this application be paid by the Defendant.
2. The application is supported by the grounds on the face of it and the supporting affidavit Ashok Labshanker Doshi sworn on 13<sup>th</sup> June 2023, in which the Plaintiff avers that the Defendant, has contrary to the provisions of Section 28(2) of the [Kenya Deposit Insurance Act](#), 2012 commenced to pay out protected deposits of Imperial Bank Limited, by publishing notices in the local newspapers calling on depositors to lodge their claims before the conclusion of the liquidation process.
3. The Defendant on 4<sup>th</sup> July, 2023 filed a replying affidavit sworn by David Irungu, an employee and a director in charge of Bank Resolution at the Defendant Company, stating that the Corporation upon its appointment on 8<sup>th</sup> December 2021 as the liquidator of Imperial Bank, its mandate was to recover all assets of the Bank for purposes of payment of the deposits with the provisions of [Kenya Deposit Insurance Act](#). That the corporation has been wrongly joined as a party to the present suit since the principal Bank (Imperial Bank Limited in Liquidation) can still sue and be sued in its name, as the Applicant has done elsewhere in other cases. The Respondent urged the Court to find that the present suit against the Corporation was an abuse of the court process and amounted to forum shopping and that the Plaintiff has exploited judicial processes to frustrate the liquidation process. Mr. Irungu further submitted that it was never the intention of the Corporation to lock out any investor from realizing its deposits but that to pay the protected depositors was a statutory mandate for which the corporation was set up to achieve.
4. Both parties filed written submissions and highlighted the same with the Plaintiff's submissions being filed on 17<sup>th</sup> July 2023 while Defendant's submissions were filed on 21<sup>st</sup> July, 2023.

### **Plaintiff's Submissions**

5. Mr. Oluga learned Counsel for the Plaintiff argued that the Applicant had met the threshold for grant of injunctive relief as laid down in the locus classica case of *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, which has set down the principles to be satisfied for an order of interlocutory injunction to issue. Counsel submitted that the Plaintiff had established a *prima facie* case with a probability of success. He argued that Section 28 (2) of the [Kenya Deposit Insurance Act](#) is clear that the Defendant can only make payment of protected deposits within six months or any shorter period after the conclusion of liquidation. He submitted that the liquidation process was yet to commence let alone concluded. It was the position taken by the Applicant that payment of protected deposits before the conclusion of the liquidation process was premature and in violation of section 28 (2) of the [Kenya Deposit Insurance Act](#) and therefore illegal.
6. Counsel argued that there appears to be a prima facie conflict between section 28 (2) of the [Kenya Deposit Insurance Act](#) which requires payment of protected deposits within six months after the conclusion of the liquidation process and section 33 (6) of the [Kenya Deposit Insurance Act](#) which requires payments to be made within 30 days of the appointment of the liquidator. Counsel further submitted that where there is a conflict between two sections of the law, the last section to have been enacted prevails and is deemed to have repealed the older provisions to that effect. That in his view, Section 28 (2) of the [Kenya Deposit Insurance Act](#) having been introduced on 22<sup>nd</sup> April, 2022 through the amendment Act 2022 is deemed to have repealed Section 33 (6) which enacted in 2012, even though the said Section of the law did not specifically state so.
7. On the issue of irreparable injury counsel submits no damages will be sufficient to compensate the injury that the Plaintiff and the general public will suffer if the protected deposits are paid in a manner



that is in breach of the law and therefore illegal. He further argued that it will be impossible to recover the illegally paid out deposits to the rest of the depositors which in his view will occasion irreparable injury to the Applicant and the same cannot be compensated by an award of damages

8. Finally, on the balance of convenience, counsel submitted that the same tilts in his favor of granting the order of injunction because having filed this suit before any deposits were paid out. It is more convenient to nip the illegality in the bud early rather than seeking to correct the same after deposits have been paid out, it is more convenient to stop the payments of deposits before the same are made because it will be impossible to recover the same should there be a finding on illegality, and the depositors have waited since 2015 when Imperial Bank was placed in receivership. They will not suffer if the payments are stopped momentarily to let the court interrogate the legality or lack thereof of the process.
9. Mr. Oluga submitted that there is no misjoinder of the Defendant in the suit even if Imperial Bank Limited has the capacity to sue, the complaint in issue is based on the omission and commission of the Defendant and the manner in which the Defendant exercised its powers by seeking to pay out deposits in a manner that is against the law, which are not issues that Imperial Bank Limited (IL) can answer to since it has no control whatsoever on how the Defendant exercises its powers being that the Defendant is an independent actor.
10. Counsel further submitted that Section 51 (2) of the *Kenya Deposit Insurance Act* allows any person aggrieved by the manner in which the Defendant has exercised its liquidation powers to apply to the High Court. Since the Plaintiff is aggrieved by the manner in which the Defendant exercised its powers, the Plaintiff exercised his right under Section 51(2) by applying to this High Court in the current suit.
11. In its response to the argument by the Defendant that the Plaintiff has frustrated the liquidation process, Counsel submitted that the said argument was baseless and malicious and was only raised to paint the Plaintiff in a bad light. The Applicant argued that the Defendant should simply do what the law says by first conducting liquidation and then paying the deposits after liquidation is concluded, instead of clogging the process of liquidation by seeking to pay out protected depositors prematurely and in contravention with the law.

### **Defendant's Submissions**

12. In her submissions, Ms. Kungu, learned Counsel for the Defendant, submitted that Central Bank of Kenya revoked the banking license of Imperial Bank (IL) vide Gazette Notice No. 13994 published on 8th December 2021. Subsequently, Kenya Deposit Insurance Corporation was appointed as the Liquidator of Imperial Bank (IL) pursuant to Section 54 of the *Kenya Deposit Insurance Act*. She further stated that in a clear abuse of the court process and following the appointment of the Defendant, the Plaintiff filed several suits and applications seeking to challenge the said appointment and halt the appointment. Central Bank of Kenya and Imperial bank filed an appeal in the Court of Appeal challenging the orders issued in Mombasa HCCOMM No. 36 of 2016: *Ashok Doshi & Another versus Central Bank of Kenya and Imperial Bank* (IL), where the Court had granted an injunction. Subsequently, the Plaintiff filed another application in Mombasa HCCC No. 27 OF 2023: *Ashok Labshanker Doshi Versus Central Bank of Kenya*, seeking to stay the liquidation process for the second time and the application was dismissed on 15<sup>th</sup> May 2023.
13. Ms. Kungu in her response urged the court to find that the application before it fell short of the principles for grant of injunction set out in the case of *Giella v. Cassman Brown & Co. Ltd* [supra]. In addition, she also to consider the fourth principle introduced by the decision of the Supreme Court in *Gitarau Peter Munya vs. Dickson Mwenda Kitbinji and 2 Other* (2014) eKLR of public interest, as



a consideration where the Court is making a determination as to the grant of conservatory orders, in addition to those set out in the Giella case(supra).

14. It was the submissions by the Defendant’s Counsel that the subject matter of the entire suit was against Imperial Bank (IL) since the Plaintiff’s cause of action arose as a result of his relationship as a depositor of the Bank currently under liquidation. The Defendant’s counsel took the position that the application before the Court was based on the ignorance of the Plaintiff on the statutory mandate of the Defendant and misapprehension of the provisions of the [Kenya Deposit Insurance Act](#) No. 10 of 2012 (KDI Act) and [Banking Act](#) cap 488. She argued that the powers of the liquidator are provided under Section 55 of the Act. Specifically, Section 55 (1)(o) allows the Corporation to sue in the name of an institution in liquidation, without sanction of the Court or a committee of inspection. The Defendant argues that pursuant to its appointment as a liquidator it cannot be held liable for the obligations or liabilities of the Bank as provided by dint of Section 45(5) of the [Kenya Deposit Insurance Act](#), which prohibits the Corporation where it has assumed control of any institution from assuming the liabilities of the institution. The said section 45(5)states as follows:-

‘Where the Corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall—

- a. Be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, businesses and affairs, including disposal of assets; and
  - b. Not, by reason of having assumed control of the institution or any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account.
15. Counsel urged the Court to be persuaded by decision in the case of [Atul R. Shah & another v Imperial Bank Limited & another](#) [2021] eKLR, where Hon. Justice Mabeya stated in part: “The upshot of the foregoing is that, when the 2nd Defendant is appointed as receiver of any entity, it acts as an agent of such entity. It assumes no liability of such entity at all. Its liability is restricted to damages suffered by any party as a result of its own actions.”
16. On the second issue counsel submits the application as filed an abuse of the court process and that the Plaintiff has frustrated the liquidation process of the Bank through filing of different suits currently pending before the High Court and the Court of Appeal in Mombasa. That the question of payment of protected deposits was determined in the case of Mombasa Civil Application No. E094 of 2022: [Central Bank of Kenya versus Ashok L. Doshi & 2 Others](#) where the decision by Honourable Justice Onyiego stopping the payments to the protected deposits having been overturned by the Court of Appeal, the present suit seeking similar orders was indeed an abuse of the court process and should not be entertained.
17. Counsel further submitted that the present suit and the application was *sub-judice* since there were several matters pending before the High Court in Mombasa seeking similar orders between the same parties including in the Court of Appeal. She further stated that this was in violation of Section 6 of the [Civil Procedure Act](#) which prohibits a Court from entertaining any suit where a similar case is pending before another Court. The said section provides as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under



the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

18. Consequently, counsel argued that the resultant effect of all the orders of the various courts had crippled the mandate of the Defendant and that the issues argued before this Court can be determined by the High Court in Mombasa where the Plaintiff had filed similar suits as stated herein before. She argued that the cause of action in all the cases was similar as it related to the liquidation of Imperial Bank, the Plaintiff is the same, the subject matter is the same in all cases and the issue for question and determination by the court are the same as well as the reliefs sought are the same. She urged the court to find that the present suit was a duplication and should therefore not be entertained.
19. The fourth issue counsel submits the application by the Plaintiff against the Defendant, does not only prejudice the powers of the Corporation as a liquidator of Imperial Bank (IL) but also prejudices the depositors of the Bank who are denied their rights to the protected deposits. That Imperial Bank (IL) and its depositors suffer immensely due to the costs incurred in defending numerous cases filed by the Plaintiff and miscellaneous expenses incurred in the liquidation process. Sections 50(4)(i), 59(2) and 57(2) of the *KDI Act* provides that such costs are borne by the bank in liquidation and hence eroding the ability of the Bank to meet its obligations to its depositors in the long run.
20. Counsel submits that Payment of protected deposits is not an illegality as alleged by the Plaintiff. Section 28(2) of the *KDI Act* cannot be read in isolation of Section 60(1) of the Act. It is further submitted that section 28(2) of the Act was introduced to set the limit to the maximum period within which the balance of the insured deposit to be paid on conclusion of the liquidation process. This is guided by section 60(1) of the *KDI Act* where the Corporation ought to publish in the Gazette the final statement of account in respect of the institution if it considers that liquidation has been substantially completed.
21. Counsel further stated that the Defendant is guided by Section 33 of the *KDI Act* in payment of protected deposits. Section 33(6) of the Act as read with subsection (1) provides as follows:-
  1. The Corporation shall make payment in respect of any insured deposit with the Corporation where it is appointed as liquidator under this Act...
  - (6) Where the Corporation is obliged to commence payments under subsection (1) in respect of any insured deposits, the Corporation shall, unless there are extraneous circumstances hindering the Corporation, within thirty days after being appointed liquidator make payment to the depositor based on the records of the institution and the opinion of the Corporation as regards entitlement of the amount claimed.
22. Counsel submits the Plaintiff has not put before the Honourable Court compelling evidence to illustrate how he will be prejudiced if the Defendant continue with the payment of the protected deposits. It was the submissions of the Defendant that the application before the Honourable Court serves the personal interests of the Plaintiff to the detriment of other depositors of the Bank. That the application was contrary to public interest as the orders affect a large class of depositors of the bank who hope to be paid their deposits and granting the orders sought amount to favoring the Plaintiff only, the Plaintiff's deposits are protected and payment shall be made in accordance with Section 28(1), 33 and 57 of the *KDI Act*. She urged the court to find that there would be no prejudice to the Plaintiff if the Corporation continued with the payment of the protected deposits in accordance with the law.
23. Counsel urged the court to find the Plaintiff has not established a prima facie case since no evidence had been adduced to demonstrate that the Defendant has committed an illegality. She further argued that the Plaintiff had failed to prove the irreparable harm to be suffered if the orders sought are not



granted, and that the Balance of convenience tilts in favor of the Defendant and the dismissal of the suit as the application will prejudice other investors of Imperial Bank. In conclusion, counsel urged the court to dismiss the application dated 21<sup>st</sup> July 2023.

### **Analysis and Determination**

24. I have carefully considered the pleadings by both parties and the written submissions and oral arguments put forth by both parties in the matter before the court. I note that an issue touching on the Jurisdiction of this court arises from the argument put forward by the Defendant that the matter before the court is sub-judice, the same issues having been considered or being considered by the court in different suits brought by the Plaintiff against the Defendant seeking similar orders and others pending for determination by the court elsewhere. I will therefore before considering the issue “whether the applicant has met the threshold to warrant the grant of an Order of injunction,” address the issue brought forth by the Defendant that the suit and the application as filed is sub-judice and that it violates section 6 of the Civil Procedure Act. Section 6 of the Civil Procedure Act provides as hereunder:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

25. The concept of sub-judice is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that claim so long as the first suit is pending determination. For the doctrine of sub-judice to be upheld the court must be satisfied that the following key conditions exist as set out in the case of Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR the court held that:-

- a. The matter in issue in the subsequent suit is directly and substantially in issue in the previous instituted suit.
- b. The parties in the both suits are the same.
- c. Both must be pending in Courts in Kenya established under the authority of the Constitution.
- d. The Court in which the first suit is instituted is a Court with competent jurisdiction to grant the relief claim in the subsequent instituted suit.
- e. The parties must be litigating under the same title in both suits.

26. In its submissions the Defendant avers that this matter is sub-judice because in the suit pending vide HCCC No. 36 of 2016: Ashok L. Doshi & Amit A. Doshi versus Central Bank of Kenya & Imperial Bank LTD (IL), the Defendant obtained similar orders as being sought in the present suit that were issued by Justice J. Onyiego on 22<sup>nd</sup> December 2021. Specifically, Order 3 of the said Ruling read as follows:-

“That pending hearing and determination of this application there be and is hereby issued an order to restrain the Defendant either through Kenya Deposit Insurance Corporation or through any of the Defendant’s appointees, agents, employees, officers, or any other person acting for the Defendants from paying out deposits in execution and implementation of the 1<sup>st</sup> Defendants decision to appoint Kenya Deposit Insurance Corporation as liquidator of Imperial Bank Limited (in receivership) inter parties.”



I note that this fact was not disputed by the Plaintiff nor controverted either in his affidavit or the submissions thereto.

27. I find also that there are four different suits already filed by the Plaintiff herein being Mombasa HCCC No. 27 of 2023, Mombasa HCCC No. 36 of 2016, and this case being Nairobi HCC no. E270 of 2023 and the Court of Appeal CA No.94 of 2023, all dealing with the same subject matter, seeking similar orders and involving similar parties. In the circumstances I find that the instance orders sought by the Plaintiff have been sought and been granted elsewhere and similarly set aside. In the circumstance I find and hold that the matter herein is sub- judice and amounts to an abuse of the Court process. It is my considered view that this court in light of provisions of Section 6 of Civil Procedure Act, lacks the requisite jurisdiction to determine the suit or the Application as filed.
28. Flowing from the above finding that the present suit is indeed sub judice, it will therefore be not necessary to interrogate whether the other issues framed from the suit. The effect of the above finding is that the suit and the Application herein is dismissed and struck out in its entirety. The Plaintiff is directed to prosecute the matters pending before the High Court in Mombasa and the Court of Appeal. The Defendant may proceed to execute its mandate under the Kenya Deposit Insurance Act unless otherwise lawfully restrained.
29. Costs follow the event. The Application before this court having been dismissed, the court directs the Plaintiff to bear the costs of the Defendant for the same.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF JANUARY, 2024.**

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**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Ogenjoh for the Applicant/Respondent.

Ms. Kungu for the Respondent.

Amos - Court Assistant

