



REPUBLIC OF KENYA



KENYA LAW
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**Adsite Limited v Imperial Bank Limited (In Liquidation) (Civil Suit
49 of 2020) [2024] KEHC 1123 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 49 OF 2020
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

ADSITE LIMITED PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN LIQUIDATION) DEFENDANT

RULING

1. This is a Ruling for an Application dated 28/9/2023, seeks the following orders: -
 - a. Spent
 - b. Adsite Limited, the Plaintiffs be and is hereby granted leave to continue with the suit against Imperial Bank Limited (In Liquidation).
2. The Application is supported by the affidavit of Ramesh Shah. It is their case that the Bank was placed under liquidation on 8/12/2021 with the Kenya Deposit Insurance Corporation as the liquidator.
3. They state that they were seeking to offset their loan with deposits within the meaning of section 55(1) of the *Deposit Insurance Act*, 2012.
4. It is their case that they have loans for Ksh. 27,500,000/= and overdraft of Ksh. 1,750,000/= together with indemnity from the Plaintiff's directors for Ksh. 12,000,000/=. It is their case that the company and directors have an aggregate of Ksh. 30,000,000/=.
5. The defendant filed submissions opposing the application. They had The Defendant filed grounds of opposition dated 10th November 2023 in opposition to the Application. They state that The Plaintiff in its Application dated 28th September 2023 seeks leave from the Court to commence the suit as it fears it will lose its right of set off of its deposits against its liabilities which contravenes the liquidator's role under Section 55(1)(f) of the *Kenya Deposit Insurance Act*.



6. They state that the only issue is whether the Plaintiff's application is merited in law. This is not true. This is not an issue but conclusion. The only issue is whether, the Applicant has laid grounds for leave to proceed with the suit.
7. It is their submission that It is not in dispute that the Central Bank of Kenya vide a gazette notice number 13395 dated 8th December 2021, appointed the Kenya Deposit Insurance Corporation ("The Corporation") as a liquidator for the defendant. Section 5(1) of *Kenya Deposit Insurance Act* ("The Act") vests the power to receive, liquidate and wind up an institution to the Corporation only. 8. Section 55(1) of the Act has vested certain powers to the liquidator. In this instant case the corporation assumes full control of the operations of the defendant and exercises its power in accordance with Section 55. 9. The Plaintiff in its application fears that it will lose its right of set off of its deposits against its liabilities. 10. Section 55(1)(f) of the Act provides: "
 1. Notwithstanding the provisions of any other written law, the Corporation shall, where it is appointed a liquidator, have power to— set-off payment made to an insured depositor out of the Fund against any dividend subsequently determined as payable to such depositor;"
8. The defendant submitted that it is very clear that the above provision grants the liquidator the authority to address the concerns raised by the Plaintiff. The liquidator is statutorily mandated to handle such matters, making the initiation of this application unnecessary, given that the liquidator is actively exercising their statutory powers. It is their case that at the moment the liquidator has full control of the activities of the Defendant and this application is an abuse of the Court process as the liquidator is still in the process of liquidating the Defendant and has not made any egregious decisions to warrant this application. They submit that where an Act of Parliament has vested certain power in a corporation, the Court shall restrict itself and only step in where a party feels aggrieved by the exercise of powers.
9. Reliance was placed the decision by Odunga J in *Republic v KRA expert Interactive Gaming & Lotteries Ltd* Misc Civil Application 251 of 2014,

"specialized bodies created by statute ought to be given leeway to conduct their proceedings freely.... where such bodies act within their jurisdiction the court ought only step in to ensure that the proceedings are conducted fairly."
10. Further they stated that in it t was held in *Kenya Deposit Insurance Corporation v Richardson & David Limited & another* [2017] eKLR as follows: -

"It is clear from the reading of Section 5(1) of KDI Act that, the power to receive, liquidate and wind up an institution is vested in KDIC only. In issuing the orders as it did, the court stepped beyond the amplitude of its powers. It substituted itself in place of CBK. It had no inherent powers to make orders that were outside the purview of its jurisdiction. The law does not give the court the power to substitute itself in place of an institution where the latter is alleged to have erred in discharge of its duty. The role of the court is to sanction what is done in the right way or invalidate what is improperly done."
11. They state that the Court lacks jurisdiction in the first instance to hear and determine such matters unless the conduct of the liquidator is in question. In this case, the court cannot step in and issue the remedies pleaded by the Plaintiff as the Liquidator's actions have not been put into question. And as



such proceedings cannot continue. They relied in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. Where Nyarangi, JA posited that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. They submitted that application is an abuse of the court process as the court lacks the original jurisdiction to hear and determine the matters pleaded in the Application as emphasized in Kenya Deposit Insurance Corporation v Richardson & David Limited & another [2017] eKLR :-

“The court is not entitled to discharge the duties of the institution it censures or whose decisions it invalidates. Parliament has not given the court the power to step into the shoes of such institution. It was not within the purview of the judge’s jurisdiction to micromanage CBK and/or KDIC as institutions. A court of law is not an expert in the management of financial institutions. The Constitution has bestowed the mandate on Parliament to enact statutes to create bodies to manage and regulate such institutions. The KDI Act and the Central Bank of Kenya Act (CBK Act) are Acts of Parliament which have vested and entrusted CBK and KDIC with powers to regulate the financial sector. Pursuant to the provisions of the said Acts, KDIC carried out its mandate and recommended liquidation of DBK. It exercised its discretion. The orders issued by the court clearly show that the court took up the role of CBK and KDIC. That is not the province of a Judge.”

13. According to then this is an attempt by the Plaintiff to circumvent and prematurely involve the court in the liquidation proceedings is inappropriate and an abuse of the Court process. The court’s intervention is warranted only in instances of demonstrated abuse of power by the corporation. There was no authority for this assertion.

14. It is thus their case that Section 55(2) of the Act provides:

“Any party aggrieved by the exercise of any of the powers specified herein may apply to the High Court for orders as appropriate.”

15. They submit that the said section is very specific on when to involve the Courts yet the Plaintiff has chosen to ignore the same and cannot demonstrate how the exercise of the corporation’s power has negatively affected it. They rely on the case of the Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where the Court of Appeal held that:-

“... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”.

16. They argue that the Plaintiff has not yet established that they have been aggrieved by any decision of the liquidator hence they have come to this Court prematurely and in complete disregard of Section 55(2) of the Act.



Analysis

17. Both parties agree that the court has jurisdiction under section 55 of the KICD act to intervene. There is however a mild contestation whether the threshold has been met. The applicant swore on oath that the situation has arisen, including writing letters. Whether or not this is true is a question of evidence.
12. The duty of the Court has to be satisfied that there is a *prima facie* dispute under section 55. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR, the Court of Appeal stated:
- “So what is a *prima facie* case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
13. The question whether the liquidator has failed in its duty has to be settled by evidence. I shall refrain from commenting on the evidence to avoid prejudicing the hearing. I have however been satisfied that the application is merited. I allow the same.

Determination

14. I therefore make the following determinations: -
- a. Adsite Limited be and is hereby granted leave to continue the suit against the defendant.
 - b. The plaintiff to Amend the plaint within 14 days to reflect the changes.
 - c. The Respondent to reply within 14 days and;
 - d. The applicant to respond within 7 days of service of the Amended Defence
 - e. Costs be in the cause.
 - f. The court shall give directions on 7/5/2024

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant - Brian

