



REPUBLIC OF KENYA



**KENYA LAW**  
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**Doshi v Central Bank of Kenya (Civil Case 27 of 2023)  
[2023] KEHC 18286 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 27 OF 2023  
DKN MAGARE, J  
MAY 16, 2023**

**BETWEEN**

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

**AND**

**CENTRAL BANK OF KENYA ..... DEFENDANT**

**RULING**

1. This matter escaped my attention, for some time. The matter was filed while I was on duty but unfortunately, or fortunately, whichever way you look at it, I was representing the Presiding Judge at an ADR Conference, at School of Government.
2. The matter was placed before Justice Wangari, my twin Court who placed the same before me on 5/4/2023. However, on that day Justice Mutai was on duty. He issued interim orders for the matter to be heard before me on 12/4//2023. On that day I had cleared my cause list for Family Division Rapid Results Initiative in Nairobi. The matter was brought to my attention, but I could not proceed.
3. I fixed the matter for 4/5/2023. On the said date, I heard parties highlighting their submissions. On 12/4/2023 I had requested parties to address me on 4 issues.
4. The plaintiff on the other hand is a male adult residing in Mombasa. Vide a Application dated 28/3/2023 the plaintiff seeks for various orders the main one being:
  - a. This application be certified urgent and heard ex parte in the first instance.
  - b. Pending hearing and determination of this application, there be and is hereby issued an order of temporary injunction staying the enforcement, effectuation, implementation, operationalization and the legal effect of the appointment of Kenya Deposit Insurance Corporation as Liquidator of Imperial Bank Limited by the Defendant vide Gazette Notice No. 13395 contained in Vol. CXXIII dated 8<sup>th</sup> December, 2021.



- c. Pending hearing and Determination of this application, there be and is hereby issued an order of temporary injunction restraining the Defendant either by itself, its employees, officers, staff, Kenya Deposit insurance Corporation and/or any other agent or person appointed by and acting on behalf and instruction of the Defendant from proceeding with the liquidation process of Imperial Bank Limited pursuant to Gazette Notice No. 13395 contained in Vol. C CXXIII dated 8<sup>th</sup> December, 2021.
  - d. Pending hearing and determination of this suit, there be and is hereby issued an order of temporary injunction staying the effectuation, enforcement, implementation, operationalization and the legal effect of the appointment of Kenya Deposit Insurance Corporation as liquidator of Imperial Bank Limited by the Defendant vide Gazette Notice No. 13395 contained in Vol. CXX III dated 8<sup>th</sup> December, 2021.
  - e. Pending hearing and deamination of this suit, there be and is hereby issued an order of temporary injunction restraining the Defendant either by itself, its employees, officers, staff, Kenya Deposit Insurance Corporation and/ or nay other agent or person in appointed by and attaching on behalf of and instruction of the defendant from proceeding with the liquidation process of Imperial Bank Limited pursuant to Gazette Notice No. 13395 contained in Vol. CXXIII dated 8<sup>th</sup> December, 2021.
  - f. Costs of this application be paid by the Defendant.
5. The Appointment of Kenya Deposit Insurance Corporation is being challenged. The said corporation is not a party to the suit.
  6. Simultaneously, with the filing of the suit the plaintiff applicant filed an Plaintiff seeking orders in more less the same line
  7. As noted above, one of the parties sought to be injuncted as Kenya Deposit Insurance Corporation. The impugned decision to put Imperial Bank under liquidation, was communicated vide a decision communicated vide gazette notice 13395 in Vol CXXIII dated 8/12/2021. The plaintiff/applicant maintains that the appointment is null and void.

### **Parties submissions**

8. Parties filed lengthy submissions. Since I am using the decisions they annexed, I found it useful to intertwine their submissions and my analysis. this is uniquely so, since the matter in dispute raises issues that appear to have been raised elsewhere and as such the court has not bear the concept of res subjudice in mind.
9. In the certificate of urgency, the Applicant discloses existence of two suits High Court HCC 36 of 2016. The said decisions stayed the decision to appoint Kenya Deposit Insurance Corporation. The court permitted the liquidation to go subject to certain condition.
10. The liquidation remained in force till the Court of Appeal in Misc. E094 of 2022 – Central Bank of Kenya =vs – Ashok Doshi & 2 Others. There is no order staying liquidation as of now.
11. In the supporting affidavit, the Applicant gives a history of the Matter leading to, reportedly, noncompliance with section 53 of the [Kenya Deposit Insurance Act](#).
12. In Oral submission he stated that the court has no jurisdiction to extend receivership and as such I should invalidate those actions. THEIR VIEW was that in the circumstances the liquidation had lapsed.



13. In Liquidation lingua, the plaintiff Applicant was a large creditor and as such not protected.
14. The Respondent Replied Vide a replying affidavit sworn by Kennedy Kaunda Abuga on 31/3/23. They say they have understood the application. They attack the orders sought for: -
  - a. They seek to restrain the CBK from exercising its statutory powers.
15. They rely on the CBK Act Cap 491 and the Banking Act, Cap 488. There is a suit in existence that is Judicial Review 46 of 2016 R – vs- CBK KDIC & Others where the period was extended.
16. The recommendation from the receiver on 7/12/2021 was the bank be put in liquidation. This resulted in the gazette of 8/12/2021. The bank was under receivership when the bank was placed under liquidation. They state that a notice of motion dated 28/12/2021 was filed in 36/2016 on 20/12/2021.
17. Orders were issued by Justice Onyiego on 22/12/2021 staying the Respondent decision. The issue was submitted on which resulted in the Ruling of 25/11/2022.
18. The orders Judge Njoki issued were to the effect that the Respondent to deposit an undertaking and once deposited to continue with liquidation.
19. The same resulted in an appeal to the Court of Appeal. The Court of appeal Civil Appeal No. 94 of 2023 same staying the order by Justice Njoki.

### **Analysis**

20. The application dated 21/12/2021 raised issues of irregular Appointment of the receiver. The said application was allowed being the appeal.
21. Before going into the issue of the merit of the application herein is to ask myself, what is the effect of the pending judgment before the Court of Appeal.
22. If the Court of Appeal dismissed the appeal, all the issues herein will collapse. If the appeal is allowed, then the Ruling by justice Njoki will prevail.
23. I therefore cannot see where this case differs with the one in the Court of appeal, my humble view is that the applicant was going round the Court of Appeal decision staying Mombasa HCCA proceedings and execution in 36 of 2016
24. I therefore hold and find that the matter herein is sub judice the matter in the Court of Appeal.
25. I am aware that the Court of Appeal has had occasion to decide this very issue in KDIC = vs= Richards & David Ltd. (2017) eKLR where they stated as doth: -

“The law does not give the Court the power to substitute itself 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. 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 instructions.



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.”

## Injunction

26. The application needs to meet the elements set out in *Giella =vs= Cassman Brown & Co. Ltd* (1973) EA, 358, 360 the court must be satisfied in the words or of Spry VP as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

27. The Court of Appeal set out 3 requirements

- a. A Prima facie case
- b. Irreparable loss.
- c. Balance of convenience

28. In the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

29. This means that the remedies are sequential. This means that one limb should be proven before moving to the next limb. The plaintiff is one of the many creditors of the bank under Liquidation. Under the KDI Act has two types of depositors. The object of and purpose for which the corporation is



established is to provide a deposit insurance scheme for customers of member institutions and to receive liquidation and wind up any institution of which the corporation is a pointed receiver or liquidator in accordance with the Insurance Act No. 10 of 2012.

30. The Kenya Deposit Insurance Corporation is established under section 4 of that Act. It is capable of suing and being sued. Under Section 44, corporation notices the defendant herein of non-viability of the of the institution governed under that Act. This decision was made on 7/12/ 2021. The defendant acted on the 8/12/2021. The decision made, however right or wrong, the decision was a statutory decision. The CBK may have erred or may have been correct. To my mind the time for challenging a statutory decision is within 6 months. The decision has already been made and is being implemented by the Kenya deposit Insurance Corporation. The Acts of liquidation are being done by the corporation. They are not parties. It is not possible to give an ardor to that effects a person without hearing them.
31. The version of events was started by Kenya deposit corporation. The corporation is not party to the suit. I am unable to make a decision whether the actions of the said corporation were illegal since they are not parties to the suit. I cannot condemn them unheard. the right to fair hearing is ring fenced by article 25 of the constitution.

32. In Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kabawa West) [2018] eKLR, the court had this to say: -

“Applicant’s version on the same heard and considered before the decision which clearly was adverse to the Applicant’s interests was taken. It is in this respect that I associate myself with the position in *Board of Education vs. Rice*; [1911] AC 179 in which Lord Loreburn LC stated that:

“a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is ‘a duty lying upon everyone who decides anything.”

33. The other major aspect of the challenge is that the extension were made by the order of the court. The plaintiff posits that the court did not have jurisdiction to extend. The courts that extended the orders were sitting in this court. I cannot set aside their orders without sitting on Appeal on the decision of my colleagues. The order issued on 24/3/2027 by the High Court in Judicial Review 3 of 2016 were lawful court orders.
34. There is said to be a consent order to extend the term of the reliever. The consent orders are is situ consent orders aware of a natural of a contract. they are binding unless set aside. In the case of Paul Kiplangat Keter v John Koech [2021] eKLR, the court stated as doth: -

“Hancox JA (as he then was) in the case of *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625, held as follows:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

The Court of Appeal in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266 held as follows:-

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”



Further in *Hirani v. Kassam* (1952), 19EACA 131, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7<sup>th</sup> edition, Vol.1 p.124 as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”

35. The second limb in that the matter was handled by justice Njoki in Mombasa HCC 36 of 2016. She allowed the liquidation to proceed. The said order has not been set aside. It has been stayed by the Court of Appeal. The court of appeal is interrogating that very question.
36. In a manner of speaking, the matter has been this matter appears to be an Appeal from Justice Njoki’s decision. This is the same decisions being interrogated by the Court of appeal with the admission that the High Court had already allowed liquidation to go on. It is unfathomable that imagine deal with the same question.
37. Lastly, to be able to succeed in this matter, there will be a need to quash the gazette notice. This is a decision that can only be questioned though an order of certiorari. They order can only be issued within 6 months, if the same was m de without jurisdiction.
38. Does it make sense to make a decision on a matter being handled by the court of appeal? I will have differed the Ruling till I get site of the court of Appeal ruling. However, there are interim orders that need to be dealt with in one way or another.
39. I take judicial notice that the same matter has been filed in the court of Appeal. There matter is ultimately binding on myself. I adjourned this ruling today hoping that the court of Appeal could have rendered itself in the matter. I was guided by the supreme court in the case of *Law Society of Kenya v Attorney General & another* [2019]eKLR, where the supreme court had this to say regarding proceeding on a matter before itself. The court stated as doth: -

“(91) The present Appeal was straight-forward and we have settled the questions placed before us for determination. However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this Appeal. While this matter was before us awaiting determination, E.K. Ogola J, on 10<sup>th</sup> June 2019, in the High Court of Kenya at Mombasa, rendered a decision in the case of *Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party)*, Constitutional Petition No. 196 of 2018 [2019] eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of *the Constitution* 2010.

(91) We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all.



40. The principles for the grant of an injunction established in *Giella vs Cassman Brown* [1973] EA 358 are still good law and hold that in order to succeed, an Applicant must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour.
41. The remedies are sequential. Having been sequential then after finding that the issue of statutory power of sale has been determined there is no need to proceed to the next level.
42. In *Nguruman Limited v. Jan Bonde Neilsen, Herman Philipus Steyn Also known as Hermannus Phillipus Steyn & Hedda Steyn* [2014] eKLR, the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (Supra) and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions. The court stated as doth: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to: -

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

43. My first duty is to find a prima facie case, I am unable to find that there is a prima facie case. The matters complained of were from 2021. The same were applied for in 2 years later. The issue of issues being raised with a probability of success cannot be discerned from the pleadings. The matter having been dealt with in other suits, there is nothing to go on trial with.
44. The matter was raised in the former suit. The suit is in the court of Appeal. I defer to its jurisdiction. It does not make judicial economy to be proceeding in these matters simultaneously. In *Kivanga Estates Limited v National Bank of Kenya* [2014] eKLR, the court, Havelock J held as follows: -

“In my view, the other authorities quoted by the Plaintiff herein were all along the same principles as expounded in the Court of Appeal authority, as above, by which I am bound. From the Defendant’s authorities I found some assistance from the Judgement



of my learned brother Majanja J. in the *Fleur Investment case (Fleur Investment Ltd v the Permanent Secretary, Ministry of Roads & 4 Ors (2012) eKLR* as well as *the Chairman District Alcoholic Drinks Regulation Committee & 4 Ors & 2 Ors ex-parte Detlef Heier & Anor (2013) eKLR*) at paragraph 35 of his Judgement:

“35. In my view, this petition is another suit filed to litigate the same matter between the same parties seeking similar relief. It is an abuse of the court process to file a multiplicity of suits seeking similar relief in respect of the same subject matter.” Further, Angote J. came to a similar conclusion in the *Chairman District Alcoholic Drinks Regulation Committee case* (also *supra*) when he detailed at paragraphs 38 and 39 thereof:

“38. A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit(s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process.

39. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.” (Emphasis and expansion added).

45. Having found, that there is no prima facie case, I do not need to consider the issue of prima facie case. In any case, it is unfathomable that Central Bank of Kenya will be unable pay any damages. The plaintiff is a depositor. He definitely has no right to bank specifically at Imperial bank.
46. He may have some deposited at Imperial Bank. Those are definite amounts. We cannot consider any other person since they are not party to the suit. It cannot be said and it has not been said that CBK cannot refund.
47. The Argument I got is that the liquidation will render the suit nugatory. That may be so. however, it is KDI which is carrying out that task. The case herein is on the actions of CBK. I therefore do not find that the Applicant will suffer any irreparable loss.
48. It is unnecessary to consider the third limb. Before I proceed, the liquidation and Insolvency laws are meant to ensure that creditors are not preferred over and above others. In the circumstance, I am unable to find, the special circumstances placing the plaintiff over and above other creditors.
49. He may have some deposited at Imperial Bank. Those are definite amounts.
50. The Argument I got is that the liquidation will render the suit nugatory. That may be so. however, it is KDI which is carrying out that task. The case herein is on the actions of CBK. I therefore do not find that the Appellant will suffer any loss.
51. It is unnecessary to consider the third limb. Before I proceed, the liquidation and Insolvency laws are meant to ensure that creditors are not preferred over and above others. In that context, I am unable to find, the special circumstances placing the plaintiff over and above other creditors.



52. In the case of *CG Waitbima & Company Advocate v Africa Merchant Assurance Company Limited; UBA Bank Kenya Limited & 2 others (Garnishee)* (Miscellaneous Tax Cause 14 of 2018) [2023] KEHC 2344 (KLR) (13 March 2023) (Ruling), the court was of the considered view that: -

“Once the applicant has satisfied the above, the burden of proof then shifts to the garnishee to satisfy that he is indebted to the judgment-debtor. Therefore, in law, the onus placed on a Garnishee would only be discharged where it successfully establishes that the account or accounts covered by the Garnishee Order nisi do not exist in its system or if it exists, it is in debt and not in credit or that it has a right of set off or lien which are due effective against the customer. Lord Denning M R in *Choice Investments Ltd vs Jeromnimon (Midland Bank Ltd, Garnishee)* [1981] 1 All ER 225 at page 227 held as thus: -“There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate.”

53. *BGP Kenya Limited v East African Exploration (K) Limited* [2018] eKLR the court, Justice F. TUIYOTT, as then he was, had this to say: -

“

“37. It is for this reason, I should think, that a Liquidation Court is entitled to interrogate a Judgement against the Company (even where execution has completed) where there is reason to believe that it has been simulated by the Company and a Creditor to give preferential treatment to a Creditor or to overstate a debt. This Court is persuaded that the observation made in the following old Decision holds true in respect to the current Insolvency Laws:-  
“It is the settled rule of the Court of bankruptcy, on which we have always acted, that the Court can inquire into the consideration for a judgement debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor’s goods among his just creditors. In a judgment were conclusive, a man might allow any number of judgements to be obtained by default against him by his friends or relations without any debt being due on them at all; it is, therefore, necessary that the consideration of the judgement should be liable to investigation” (Per Sir W M James LJ in, *In Re Onslow, ex p Kibble* (1875) LR 10 Ch App 373, 376

54. The court is entitled to interrogate bona fides to avoid fraudulent preference of creditors. I am unable to find any special circumstances that place the Plaintiff, in a pedestal higher than other creditors.
55. In the circumstances, the plaintiffs application dated 28/3/2023, is bereft of merit, it is accordingly dismissed with costs of Ksh. 30,000/= to the respondent. I shall mention the matter on 3/7/2023, for directions after the ruin of the Court of Appeal Mombasa CACA 94 of 2023.
56. Consequently, lift the interim orders issued on 5/4/2023.



**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 16<sup>TH</sup> DAY OF MAY, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

Mr Oluga for the plaintiff

Mr Peter Chege for the defendant

Court Assistant – Firdaus

