



Selecta Kenya GmbH & Co. KG v Chase Bank Kenya Ltd & 2 others (Commercial Case 548 of 2013) [2023] KEHC 18848 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 548 OF 2013
FG MUGAMBI, J
JUNE 16, 2023**

BETWEEN

SELECTA KENYA GMBH & CO. KG PLAINTIFF

AND

CHASE BANK KENYA LTD 1ST DEFENDANT

MOHAMED ESMALI 2ND DEFENDANT

PETER WANDERI 3RD DEFENDANT

RULING

1. Before the court is an application dated May 3, 2021 brought under section 1A, 1B and 3A of the *Civil Procedure Act*, order 2 rule 15(d) and order 51 rule 1 of the *Civil Procedure Rules 2010*, section 53(2) of the *Kenya Deposit Insurance Act, 2012*, the inherent jurisdiction of the Honourable Court and all other enabling provisions of the law.
2. The application seeks the following orders;
That this Honourable court be pleased to strike out the plaintiff/respondent's pleadings as against the 1st defendant/applicant
That the costs of this application be borne by the plaintiff/respondent.
3. The application is premised on the grounds on the face of it and supported by the affidavit sworn by Kelvin Mbogo and submissions dated January 14, 2022.
4. The applicants' case was that vide a gazette notice dated April 16, 2021, the applicant was placed under liquidation and the Kenya Deposit Insurance Corporation was appointed as its liquidator. This meant that no action or civil proceedings could be continued against the 1st applicant without leave of court



pursuant to *Kenya Deposit Insurance Act*. According to the applicant, the respondent had not sought leave to proceed with the suit as against the applicant and as such the proceedings were defective.

5. The applicant submitted that once an institution is placed under liquidation section 56(2) of the *Kenya Deposit Insurance Act* comes into operation. Counsel submitted that failure to seek leave of court before commencing or continuing a civil suit against an institution renders the suit fatally defective and incompetent in law.
6. The application was opposed by the respondent vide grounds of opposition dated July 2, 2021 on the grounds that;

The notice of motion dated May 3, 2021, is frivolous, vexatious and is a clear abuse of the court process. It is a total waste of judicial time and ought to be dismissed in limine.

That the 1st defendant is not a party to the suit as per the plaint dated December 16, 2013
7. Any other grounds to be adduced at the hearing hereof.

Analysis

8. I have considered the pleadings and the rival submissions by counsel. The main issue for determination is whether the court should strike out the plaintiff/respondent's pleadings as against the 1st defendant/applicant.
9. Order 2 Rule 15 deals with striking out of pleadings and provides as follows;

“ 15.

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

10. As I consider the application before me, I am conscious not to get into the substance of the dispute, as this is a province of the trial court. I am guided in this by Madan, JA in the case of *DT Dobie and Company (K) Ltd v Joseph Mbaria Muchina & another* [1982] KLR 1. The Learned Judge stated that:-

“ The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”



11. Section 56(2) of the *Kenya Deposit Insurance Act*, on which this application is premised, states as follows-

“No injunction may be brought or any other proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the court.”

12. The respondent on its part stated that the 1st defendant was not a party to the suit as per the plaint dated December 16, 2013. It is evident from the record that the plaintiff instituted two suits against the defendants being HCC 547 of 2013 and HCC 548 of 2013. In a ruling dated 20th March the two suits were consolidated and the parties were granted leave to amend their pleadings. While in HCC 548 of 2013 the 1st defendant was not a party to the suit, is still a party in HCC 547 of 2013. There is an application in HCC 547 of 2013 seeking to join the Liquidator on behalf of the 1st defendant therein. For that reason, this application is overtaken by events and it is not in the best of judicial time to say any more.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

