



**Shah & another v Imperial Bank Limited (In Receivership) (Commercial Case E135 of 2020) [2023] KEHC 20273 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL CASE E135 OF 2020**

**A MABEYA, J**

**JULY 17, 2023**

**BETWEEN**

**ATUL R SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**NEELAM ATUL SHAH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP) ..... DEFENDANT**

**RULING**

1. Before Court are two applications for determination. The first application dated April 27, 2021 was brought by the plaintiffs and was brought under Order 2 Rule 5 and Order 8 Rules 3, 5 ad 8 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.
2. In the application, the plaintiffs sought leave to amend the plaint and that the amended plaint be deemed as duly filed upon payment of the requisite fee.
3. The grounds thereof were set in the body of the application and in the supporting affidavit of Atul R Shah on May 27, 2021. It was contended that following this Court's order of April 8, 2021 which struck out the 2<sup>nd</sup> defendant from this suit, the plaintiffs needed to amend their plaint dated May 5, 2020.
4. That the plaintiffs had made several averments against the 2<sup>nd</sup> defendant and sought prayers against it that needed to be amended to align the suit with that ruling. That the amendment would also bring out all the issues in contention and enable the Court to determine the matter in its entirety.
5. The respondent opposed the application vide grounds of opposition dated June 7, 2021 and vide the replying affidavit sworn by Andrew Rutto on September 10, 2021. It was contended that Kenya Deposit Insurance Corporation (KDIC) was not a party to these proceedings pursuant to the ruling



of April 8, 2021. That any amendment sought ought to have been for the purpose of striking out its name from the pleadings.

6. That the intended amendments however disregarded that ruling by preferring prayers against KDIC in prayers iii, v, vi and vii of the draft amended plaint. That the intended amendments were not intended to bring the true substantive merits of the case or real questions in controversy. That orders against a third party not party to the suit were irregular and against Article 50(1) of *the Constitution*.
7. The 2<sup>nd</sup> application was also brought by the plaintiffs and was dated March 1, 2022. It was brought under section 56(2) of the *Kenya Deposit Insurance Act*, Section 432 (2) of the *Insolvency Act*, Section 35(2) of the *Banking Act*, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*.
8. The application sought that leave be granted to proceed and continue with the suit against the respondent herein, Imperial Bank Limited (In Liquidation).
9. The grounds for the application were set out on the face of the Motion and in the supporting affidavit sworn by Atul R Shah on March 1, 2022. It was contended that the plaintiffs had several accounts with the respondent which held colossal amounts of money which the respondent had declined to release.
10. That Central Bank of Kenya placed the respondent under liquidation and appointed KDIC as the liquidator under Sections 53(2) and 54(1) of the *KDIC Act*.
11. That unless leave was granted and the suit herein concluded, the respondent would continue making discriminatory payments on some depositors leaving others including the plaintiffs and apply its assets elsewhere. That unless this suit was concluded at the earliest, the plaintiffs would be left without a remedy especially now that the respondent was under liquidation.
12. The respondent opposed the application vide the grounds of opposition dated April 6, 2022 and the replying affidavit sworn by Andrew Rutto on May 6, 2022. It was contended that in High Court HCCC No 36 of 2016 Ashok L Doshi & Another v CBK and IBL, the court had on December 22, 2021 stayed the liquidation of the respondent until the determination of the plaintiff's application challenging CBK's decision to appoint a liquidator.
13. That consequently, the respondent was not under liquidation thus the application was unwarranted.
14. The Court has considered the applications and the entire record. In *St Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR, it was held: -

“The law as regards the grant of leave to amend are well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See *Eastern Bakery v Castelino* (1958) EA 461). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see “Chitaley, PBB”).”
15. In *Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 147 of 1991, the Court of Appeal held: -
  - a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
  - b) the amendments should be timeously applied for;



- c) power to amend can be exercised by the court at any stage of the proceedings;
- d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
- e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”

16. It is not in dispute that vide a ruling delivered on April 8, 2021, this Court allowed the preliminary objection dated December 12, 2020 and the 2<sup>nd</sup> defendant was struck out from the suit. The effect of this was that as of April 8, 2021, the 2<sup>nd</sup> defendant was no longer a party to the suit.
17. The applicant proceeded to file the instant application seeking leave to amend the plaint and delete the various clauses concerning the 2<sup>nd</sup> defendant. This Court has seen the draft amended plaint. In as much as the 2<sup>nd</sup> defendant is deleted from the pleadings, the applicant still maintained the claim against the 2<sup>nd</sup> defendant who was now referred to as the receiver.
18. Be that as it may, since it may not prejudice any party since, if at the trial the Court finds that there were prayers made against a 3<sup>rd</sup> party not party to the proceedings, it will make appropriate orders. Accordingly, leave to amend the plaint is hereby allowed.
19. The Court now turns its attention to the 2<sup>nd</sup> application wherein the plaintiffs sought leave to proceed and continue with the suit against the defendant which was in liquidation.
20. The application was opposed on the basis that liquidation had been stayed vide Mombasa HC Comm Case No. 36 of 2016 Ashok L Doshi & Anor v Central Bank of Kenya and Imperial Bank Limited. That stay has since been lifted by the Court of Appeal. In the premises, there is no prejudice to be suffered by any of the parties if the leave sought is granted. The plaintiffs need to fully ventilate their grievances at the full trial of the suit. Accordingly, the 2<sup>nd</sup> application is merited and is likewise allowed as prayed.
21. In the end, both applications dated April 27, 2021 and March 1, 2022 are found merited and are hereby allowed as follows: -
- a. Leave is granted to the plaintiffs to amend their plaint. The amended plaint be filed and served within 14 days of the date hereof.
  - b. The amended defence be filed and served, if need be, within 14 days of service of the amended plaint.
  - c. The plaintiffs are granted leave to continue this suit against the defendant as prayed.
  - d. The costs of the applications shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

