



**Katambo & another v SBM Bank (Kenya) Limited & 2 others (Petition 004 of 2022)  
[2023] KEHC 22963 (KLR) (Commercial and Tax) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22963 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
PETITION 004 OF 2022  
JWW MONG'ARE, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**HENRY MUTUA KATAMBO ..... 1<sup>ST</sup> PETITIONER  
KATSRAN LIMITED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SBM BANK (KENYA) LIMITED ..... 1<sup>ST</sup> RESPONDENT  
CENTRAL BANK OF KENYA ..... 2<sup>ND</sup> RESPONDENT  
CAPITAL MARKETS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion application dated 1<sup>st</sup> March 2023 filed under Certificate of Urgency the Applicants have moved this Honourable Court seeking the Petition filed on 29<sup>th</sup> September 2022 heard on priority basis by the Honourable Court.
2. The Petition dated 29<sup>th</sup> September 2022 was first filed in the Constitutional and Human Rights Division of the High Court and administratively transferred to the Commercial and Tax Division of the High Court after it determined that the reliefs sought were of a commercial nature. In the Petition, the Petitioner has moved this Honourable Court seeking the following reliefs:-
  - i. A declaration be and is hereby issued that failure to transfer the Asset owned by the 1<sup>st</sup> Petitioner, being an investment of a sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) vide a corporate bond under a Chase Bond Number CHBD 02/06/22-0044-13.25 to the 1<sup>st</sup> Respondents, which poses a risk of loss of the said sum, is an infringement of the 1<sup>st</sup> Petitioner's right to property.



- ii. A declaration be and is hereby issued that the failure to transfer the Asset owned by the 1<sup>st</sup> Petitioner being an investment of a sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) vide a corporate bond under a Chase Bond Number CHBD 02/06/22-0044-13.25 to the 1<sup>st</sup> Respondents; subject to the transfer of certain assets and assumption of liabilities of Chase Bank Kenya Limited(in Liquidation) to the 1<sup>st</sup> Respondent; was discriminatory and hence a violation of the 1<sup>st</sup> Petitioner's Constitutional Right of equality and freedom from discrimination.
- iii. A declaration be and is hereby issued that the transfer of the liability held with Chase Bank Kenya (in Liquidation) by the 2<sup>nd</sup> Petitioner to the 1<sup>st</sup> Respondent subject to the transfer of certain assets and assumption of certain liabilities of Chase bank Kenya Limited (In liquidation) to the 1<sup>st</sup> Respondent, was discriminatory and hence a violation of the 2<sup>nd</sup> Petitioner's Constitutional right of equality and freedom from discrimination.
- iv. A declaration be and is hereby issued that the intended auction of property LR. NO. Kwale/ Ngomeni/240; Kiteje Area Kwale County which is registered in the names of the 1<sup>st</sup> Petitioner and another, is a threat to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners Constitutional right to property.
- v. A declaration be and is hereby issued that the Administrative decisions and actions by the Respondents herein were not expeditious, efficient, lawful, reasonable and/or procedurally fair hence a violation of the Petitioners' Constitutional right to fair administrative action.
- vi. An order directed at the 1<sup>st</sup> Respondent to compensate the 1<sup>st</sup> Petitioner for the sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) invested vide a corporate Bond under Chase Bond Number CHBD 02/06/22-0044.13.25, together with accrued interests therein be and is therein be and is hereby issued.
- vii. In the alternative to (VI) above, an order directed at the 1<sup>st</sup> Respondent to utilise the corporate Bond above to offset the loan facility of the 2<sup>nd</sup> Petitioner and compensate the 1<sup>st</sup> Petitioner for the balance.
- viii. A judicial review order of Certiorari be and is hereby issued quashing the decision of the Respondents not to transfer the asset and investment of the 1<sup>st</sup> Petitioner, being the sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) invested vide a corporate bond under a Chase Bond Number CHBD 02/06/22-0044.13.25, to the 1<sup>st</sup> Respondent.
- ix. A Judicial Review Order of Prohibition be and is hereby issued restraining the 1<sup>st</sup> Respondent either in person, through its agents or servants from interfering with the Petitioners' property rights and quiet enjoyment of property LR NO. Kwale/Ngomoni/240-Kiteje Area, Kwale County.
- x. An order for General Damages for breach of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners constitutionally protected right to property and for inconvenience caused to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners by the Respondent be and is hereby issued.
- xi. An order for Damages for breach of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, constitutionally protected right to fair administrative action and for the inconvenience caused to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners by the Respondents be and is hereby issued
- xii. The Costs of this Petition be issued to the Petitioner against the Respondents herein.
- xiii. Interest on (x), (xi), (xii) and (xiii) above at court rates,



- xiv. Any other relief the Court shall deem just and expedient.
3. At the hearing of the Petition the Court was informed that the Petition against the Capital Markets Authority, the 3<sup>rd</sup> Respondent was struck out by consent of the parties. The parties thereto moved to canvass the Notice of Motion dated 29<sup>th</sup> September 2022 seeking the following reliefs:-
- i. Spent
  - ii. Spent
  - iii. That an Order of Permanent Injunction be and is hereby issued restraining the 1<sup>st</sup> Respondent from taking any step and/or interfering with the Petitioners rights with regard to LR. NO. Kwale/Ngomoni/240- Kiteje area, Kwale County- status quo be maintained.
  - iv. That the 1<sup>st</sup> Respondent be ordered to render a true account regarding the 1<sup>st</sup> Petitioner's Corporate Investment Bond Number CHBD 02/06/22-0044.13.25 of Kshs.15,000.000/- with Chase Bank (under Liquidation).
  - v. That costs for this Application be provided for.
4. The application is supported by the grounds set on its face and the supporting affidavit of Henry Mutua Katambo, the 1<sup>st</sup> Petitioner herein. The Affidavit is opposed and the Respondents have filed a Replying affidavit sworn by Kevin Kimani, the legal Officer of the 1<sup>st</sup> Respondent, SBM Bank (Kenya) Limited.
5. The Applicants seek to have the 1<sup>st</sup> Respondent render accounts on the 1<sup>st</sup> Petitioner Corporate Investment Bond No. CHBD. 02/22-0044-13.25 for Kshs.15,000,000/- invested with Chase Bank Kenya Limited (in liquidation). The Applicants urge the court to order that the proceeds of the corporate bond be used to redeem the loan secured by the LR. NO. Kwale/ Ngomoni/240 – in Kiteje area, Kwale County which has fallen due. The Applicants argues that upon inheriting part of the assets of the Chase Bank Kenya Limited (in Liquidation) the 1<sup>st</sup> Respondent assumed responsibility of its liabilities and should therefore render accounts on the corporate bond. The Applicants contend that no notices were issued by the 1<sup>st</sup> Respondent as required by law when assets of the Chase Bank Kenya Limited(in liquidation)were taken over by the 1<sup>st</sup> Respondent and therefore they are liable to pay the 1<sup>st</sup> Applicant on the corporate bond.
6. The Applicants argue that despite the case in Mombasa, this court has jurisdiction to determine the matter before it since the Mombasa case is yet to be determined and hence the principles of res judicata do not apply.
7. On the injunctive relief being sought to restrain the 1<sup>st</sup> Respondent from exercising its statutory power of sale over LR.Kwale/Ngomoni/240, the Applicants argues that it they have a prima facie case with a likelihood of success since the 1<sup>st</sup> Respondent has acted in a manner likely to deny or interfere with their right to property.
8. On their part, both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents oppose the application. Both have filed written submissions and a response to the issues raised herein through the Affidavit of Kevin Kimani, the legal officer of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent argues that the issues being raised herein have been fully determined between the parties by this court in HCCC No. 111 of 2018- Katsran Limited -V- SBM Bank (K)Limited (2022) eKLR and therefore this court's jurisdiction to determine this matter is ousted as the issues before this court are similar to the ones in the case heard and determined in Mombasa HCCC No. 111 of 2018(supra). The Respondents further argue that the corporate bond



was not one of the liabilities assumed by the 1<sup>st</sup> Respondent during the partial liquidation of the Chase Bank Kenya Limited (in Liquidation) and they cannot therefore be called upon to render accounts as they are not party to the contract thereto. The said liability remained with Chase Bank Kenya Limited (in Liquidation) and according to the Respondents, that is the correct party to answer to the issues therein.

**Analysis and Determination: -**

9. I have considered carefully the pleadings filed in respect of this case by all the parties. I note from the onset this matter was filed as a constitutional reference in the Constitutional and Human Rights Division of the High Court which upon perusal determined the dominant question to be of a commercial nature and transferred the matter to this division. Having carefully considered the rival submissions and arguments by the parties I have identified one issue for determination; to wit, “Whether the instant proceedings are res judicata and if the Court has jurisdiction to hear and determine the application and the Petition before it.”

10. As relates to “Whether the instant proceedings are res judicata and if the Court has jurisdiction to hear and determine the application and the Petition before it,” It is a well-established principle in the Court of Appeal case of *Owners of Motor Vessel “Lillian S” vs. Caltex Oil(Kenya)limited* (1989)KLR:-

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

This court must therefore first determine the issue of whether it has the requisite power to determine the matter before it.

11. Parties agree that there is a matter in Mombasa being HCCC No.111 of 2018- Katsran Limited - v- SBM Bank (Kenya)Limited. While the Respondents argues that in the said case the issue arising and being canvassed herein have been heard and determined, the Applicants argues that the same are pending for determination and there is no final outcome of the case. The Respondents has therefore argued that by virtue of the principles espoused under the law on res judicata, this court’s jurisdiction has been ousted. The Petitioners have in support of their arguments on the principle of res judicata cited the case of *John Florence Maritime Services Limited & another -v- Cabinet Secretary for Transport and Infrastructure & 3 others* (2021)eKLR where the court set out the elements that must be proven for a court to conclude that the matter is res judicata as follows, “for Res Judicata to be invoked in a civil matter the following elements must be demonstrated:-

- a. There is a former judgment or order which was final,
- b. The judgment or order was on merit,
- c. The judgment or order was rendered by a court having competent jurisdiction over the subject matter and parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action”



12. Black's Law dictionary 10<sup>th</sup> Edition defines "res judicata" as follows:-

"an issue that has been definitely settled by a judicial decision. The three essentials are (1) an earlier decision on the issue (2) a final Judgment on the merits and (3) involvement of the same parties, or parties, or parties in privity with the original parties."

Further the Civil Procedure Act, under section 7 has the following to say on "res judicata":-

"7. Res judicata; No court shall try any suit or issue in which the matter directly and substantially in issue is in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. The expression "former suit" means a suit which has been  
(1) decided before the suit in question whether or not it was  
— instituted before it.

Explanation. For the purposes of this section, the competence of a court shall  
(2) be determined irrespective of any provision as to right of appeal  
— from the decision of that court.

Explanation. The matter above referred to must in the former suit have been  
(3) alleged by one party and either denied or admitted, expressly or  
— impliedly, by the other.

Explanation. Any matter which might and ought to have been made ground  
(4) of defence or attack in such former suit shall be deemed to have  
— been a matter directly and substantially in issue in such suit.

Explanation. Any relief claimed in a suit, which is not expressly granted by the  
(5) decree shall, for the purposes of this section, be deemed to have  
— been refused.

Explanation. Where persons litigate bona fide in respect of a public right or  
(6) of a private right claimed in common for themselves and others,  
— all persons interested in such right shall, for the purposes of this  
section, be deemed to claim under the persons so litigating.

13. The Applicants argues that the principle of res judicata cannot be invoked in the matter before this court to oust the jurisdiction while the rival argument by the Respondents is that the matter and issues being canvassed are similar to the ones before the Mombasa High Court case. Although this matter was filed in Constitutional and Human Rights Division of the High Court seeking declaratory reliefs and order of certiorari and prohibition, once transferred to the Commercial Division the court identified the dominant question to relate to the commercial aspect of the dispute, which is the issue of the Corporate Bond issued by Chase Bank Kenya Limited and the loan secured by a charge over LR. No. Kwale/Ngomeni/240. In view of the above observations, have considered the orders now capable of being granted in this court to revolve around the injunctive orders being sought to stay the sale of the charged property being LR. NO. Kwale/Ngomeni/240 and the Order for Accounts for the Chase Bank Corporate Bond No. CHBD. 02/22-0044-13.25 for Kshs.15,000,000/- invested with Chase Bank (now under liquidation). I note that the High Court in Mombasa being faced by



an application in HCCC No. 111 of 2018 Katsran Limited -v- SBM Bank (Kenya) Limited seeking similar orders, made a determination of the two issues available for determination by the Commercial Division of the High Court. I note that the Applicants do not dispute that the court dismissed similar orders and therefore the matter being placed before this court have already been determined by a court of competent jurisdiction.

14. Arising from the above findings and despite the fact the suit in the Mombasa Court may still be pending for final determination, I am persuaded that the issues available for determination are indeed the same as those before the Mombasa court and having been determined thereto, the same are now res judicata and this court cannot sit to determine a similar application arising from the same cause of action with the same parties or parties in privity with the original parties to the matter.
15. Since courts agree that jurisdiction is everything and having found the matter before it is properly pending on the same issues is properly pending before the High Court in Mombasa and to avoid issuing two conflicting decrees emanating from the same High Court on the same issues, this court will therefore down its tools as it holds it has no jurisdiction to entertain the application and the Petition before it.
16. The upshot of the above findings is that the Petition and the Application filed herein are struck out forthwith. The Applicants are directed to raise the issues herein in the case pending before the High Court in Mombasa, being HCCC No. 111 of 2018- Katsran Limited -v- SBM Bank (Kenya) Limited.
17. Costs follow the event. Costs for this application are awarded to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2023**

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

**JUDGE**

In the Presence of:-

Mr. Asule for the Applicants/Petitioners.

Aisha holding brief for Mr. Chege for the 2<sup>nd</sup> Respondent.

Ms. Aurora with Ms. Otieno for the 1<sup>st</sup> Respondent.

