



**Prime Catch (Exports) Limited & 9 others v Imperial Bank Limited  
in Liquidation (IL) & another (Commercial Case E875 of 2021)  
[2024] KEHC 14385 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14385 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E875 OF 2021**

**A MABEYA, J  
NOVEMBER 20, 2024**

**BETWEEN**

- PRIME CATCH (EXPORTS) LIMITED ..... 1<sup>ST</sup> PLAINTIFF**
- MARA FISH PACKERS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**
- J FISH KENYA LIMITED ..... 3<sup>RD</sup> PLAINTIFF**
- VICTORIAN DELIGHT LIMITED ..... 4<sup>TH</sup> PLAINTIFF**
- RUBY RED LIMITED ..... 5<sup>TH</sup> PLAINTIFF**
- FROM EDEN LIMITED ..... 6<sup>TH</sup> PLAINTIFF**
- AQUALITE LIMITED ..... 7<sup>TH</sup> PLAINTIFF**
- MARMO E GRANTOMINES (T) LTD ..... 8<sup>TH</sup> PLAINTIFF**
- MARBO MARBLE (U) LIMITED ..... 9<sup>TH</sup> PLAINTIFF**
- FISHWAYS UGANDA LIMITED ..... 10<sup>TH</sup> PLAINTIFF**

**AND**

- IMPERIAL BANK LIMITED IN LIQUIDATION (IL) ..... 1<sup>ST</sup> DEFENDANT**
- KENYA DEPOSIT INSUARANCE CORPORATION ..... 2<sup>ND</sup> DEFENDANT**



## RULING

1. Before Court is the defendants' application dated 6/7/2023. It was brought under sections 1A, 1B, 3A and 6 of the [Civil Procedure Act](#), Order 1 rule 10(2), order 51 rule 1 of the Civil Procedure rules 2010, sections 56(1), 56(2), 45(5) and 50(5) of the Kenya Deposit Insurance Corporation [Act No 10 of 2012](#).
2. The application sought the dismissal of the plaintiff's suit and in the alternative, that the same be stayed pending the hearing and determination of HCC NO 522 OF 2015 Imperial Bank (in receivership) v W.E Tilley (Muthaiga) Ltd & 19 others. It further sought that the 2<sup>nd</sup> defendant be struck out from the proceedings for being improperly joined.
3. The grounds therefor were set out in the body of the Motion and the affidavit of Dr. Andrew Rutto sworn on 6/7/2023. It was contended that the 1st defendant's license was revoked by the Central Bank of Kenya (CBK) through Gazette Notice No. 13394 dated 8/12/2021, leading to a transition from receivership to liquidation. Consequently, the 2<sup>nd</sup> defendant was appointed as the liquidator thereof.
4. That subsequently, the 1<sup>st</sup> defendant initiated proceedings in HCC NO 522 OF 2015, Imperial Bank (in receivership) v W.E. Tilley (Muthaiga) Ltd & 19 others ("the said suit"), to protect depositors and obtained injunctive orders against the plaintiffs. Those orders have not been varied or set aside, and the suit remains active. The defendants maintained that the current suit is therefore sub-judice, thereby violating section 6 of the [Civil Procedure Act](#). That the suit is fatally defective because no leave was sought to institute or continue proceedings against a company in liquidation.
5. The plaintiffs opposed the application via a replying affidavit of NASIR HAIDER ALO JESSA sworn on 25/8/2023. He stated that the 1st defendant filed the said suit against the ten plaintiffs and other parties for executing a fraudulent scheme. The plaintiffs claim that the defendants are accused of acting dishonestly by conspiring with the deceased and other bank officials to defraud the bank, breaching their fiduciary duties.
6. As a result of the injunctive orders granted in the said suit, the plaintiffs experienced extreme difficulties, with all their assets being seized and sold. In the present suit, the plaintiffs seek damages for the losses incurred due to the defendants' filing of HCC 522 OF 2015 and the injunctive orders obtained therein. They contended that the current suit is not identical to the suit filed by the defendants and is therefore not sub judice. They also argued that the provisions of section 56(1) of the [Kenya Deposit Insurance Act](#) No. 10 of 2012 do not apply since the suit was commenced prior to liquidation. Additionally, they noted that the 2nd defendant, being a corporation, is capable of suing and being sued, making it a proper party to the suit.
7. The defendants raised a preliminary objection dated 4/7/2023, arguing that the plaintiffs' suit is defective for improperly including the 2nd defendant, in violation of section 56(1) of the [Kenya Deposit Insurance Act](#) No. 10 of 2012 ("the Act"). That the suit was also defective for being commenced and continued against the 1st defendant without the court's sanction, contrary to section 56(2) of the Act.
8. Further, the defendants contended that the plaintiffs' suit violates sections 45(5) and 50(5) of the Act by seeking to have the 2nd defendant assume the liabilities of the 1st defendant. Further that the suit contravenes the doctrine of sub judice under section 6 of the [Civil Procedure Act](#).
9. The application was canvassed by way of written submissions which I have considered. The plaintiffs submitted that Court approval is required when a litigant wish to initiate a suit against an institution



under liquidation which is not the case here. That the 2<sup>nd</sup> defendant is a proper party to the case, as the suit seeks compensatory damages for losses incurred due to the injunctive orders.

10. On sub judice, it was submitted that the matters in the two suits are not identical. That the defendants' suit focuses on allegations of fraud and the misappropriation of funds from the 1<sup>st</sup> defendant, while the plaintiffs' suit pertains specifically to compensatory damages.
11. For the defendants, it was submitted that the plaintiffs failed to seek the necessary leave before filing the current suit, as the company was under receivership, and did not request leave to continue the suit. That the provisions of sections 56(1) and (2) apply to both institutions in receivership and those in liquidation.
12. It was further submitted that after the 2<sup>nd</sup> defendant's appointment, KDIC could not be sued alongside the institution in liquidation. The provisions of the KDIC Act are mandatory, meaning KDIC cannot be held liable for the actions, omissions or liabilities of the 1<sup>st</sup> defendant. Furthermore, the defendants pointed out that allowing both cases to proceed could lead to differing outcomes resulting in potential judicial confusion.
13. I have considered the pleadings on record and the submissions by Learned Counsel. Two issues arise for determination. These are; whether the preliminary objection is merited and whether this suit should be struck out.
14. The preliminary objection is dated 4/7/2023. It is against the plaint dated 15/10/2021. The objection challenged the plaintiffs' suit for being defective for failing to comply with sections 56(1), 56(2), 45(5) and 50(5) of the Act. Further, that suit was sub-judice and offended section 6 of the *Civil Procedure Act*.
15. In *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696, a preliminary objection was defined to consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. It is in the nature of what used to be a demurrer and is usually on the assumption that all the facts pleaded by the other side are correct.
16. In *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR, the Supreme Court of Kenya observed that: -

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

17. The threshold set out in the foregoing dictums is that a preliminary objection should be made from a point of law in the assumption that the facts presented are true and it has the effect of determining a case with finality.
18. Sections 56(1) and 56(2), 45(5) and 50(5) of the *Kenya Deposit Insurance Act* provide as follows: -

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- (1) No cause of action which subsisted against the Stay of directors, management or the institution prior to liquidation shall be maintained against the liquidator.



- (2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.

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- (5) Where the Corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall—
- (a) be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, businesses and affairs, including disposal of assets; and
- (b) not, by reason of having assumed control of the institution or any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account
- (5) Where the Corporation, exercises one or more powers under this section, the Corporation, shall not, by reason of the exercise of such powers, be held to have assumed or incurred any obligation or liability of the institution for its own account.”

19. In addressing the first ground of objection, Sections 56(1) and (2) clearly indicate that leave of Court must be obtained for proceedings to be commenced or continued. The Court determines that this issue constitutes a point of law, as it directly questions the legality of the present suit.
20. The plaintiffs argue that they were not required to seek leave since they had initiated the suit before the liquidation. However, section 56 of the Act explicitly states that leave must be obtained to either commence or continue with a proceeding. Further, the plaintiffs have not provided adequate reasons for the failure to seek leave even after the liquidation was confirmed. Their claim that seeking leave was unnecessary does not hold up against the clear legal requirement that it must be obtained in these circumstances.
21. The defendants also raised the issue that the present case was sub-judice. The doctrine of sub-judice applies when a matter is currently under judicial consideration or is actively being adjudicated in court. Section 6 of the [Civil Procedure Act](#) provides that: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

22. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [202] eKLR)*, the Supreme Court of Kenya stated that: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This



means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

23. For sub judice to stand, the following must exist; there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya.
24. In the present case, the 1<sup>st</sup> defendant indicated that there is an ongoing case in which it has sued the plaintiffs jointly with other parties. The Court was informed that an injunction was granted to preserve the plaintiffs' assets in the said suit. On the other hand, the plaintiffs contended that the present suit arises from the injunctive orders obtained against them in the said suit.
25. Given this context, it is evident that the parties are the same and are litigating under the same title, with the defendants' suit still pending in another court. The court finds that the orders leading to the plaintiffs' suit originated from the injunction issued in the said suit. Why file a separate suit? That may lead to different findings by different courts leading to judicial embarrassment.
26. Since the issues to be litigated are the same, the same claim raised here could be raised in the said suit. That would avoid a multiplicity of suits. The doctrine of sub judice emphasizes that matters already before a court should not be litigated elsewhere to maintain order and avoid confusion. In this regard, the Court finds that the issues being raised here could be raised in the said suit. In the premises, there is merit in the preliminary objection.
27. Accordingly, the Court finds merit in the defendants' application and strikes out the suit for being in breach of the law. The costs of the application and the suit is awarded to the defendants.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

