



Chase Bank Kenya Limited (In Liquidation) v Khan & 14 others (Commercial Case 159 of 2017) [2024] KEHC 15814 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 159 OF 2017
A MABEYA, J
DECEMBER 13, 2024**

BETWEEN

CHASE BANK KENYA LIMITED (IN LIQUIDATION) PLAINTIFF

AND

ZAFRULLAH KHAN 1ST DEFENDANT
DUNCAN KABUI 2ND DEFENDANT
MAKARIOS AGUMBI 3RD DEFENDANT
JAMES MWAURA 4TH DEFENDANT
RIVERSIDE MEWS INVESTMENTS LIMITED 5TH DEFENDANT
RINASCIMENTO GLOBAL LIMITED 6TH DEFENDANT
KEN OBIMBO 7TH DEFENDANT
DANIEL MAVINDU 8TH DEFENDANT
ALI CHEEMA 9TH DEFENDANT
RINASCIMENTO PROPERTIES LIMITED 10TH DEFENDANT
NINE FIFTY LIMITED 11TH DEFENDANT
RIVERSIDE MEWS LIMITED 12TH DEFENDANT
MATHATANI LIMITED 13TH DEFENDANT
THE LIGHTHOUSE PROPERTY COMPANY LIMITED 14TH DEFENDANT
FRIENDS PROPERTY HOLDINGS LIMITED 15TH DEFENDANT



RULING

1. The application before Court is a Motion on Notice by the 1st - 6th, 10th - 15th & 17th defendants dated 21/6/2024. It was made under Article 40 of the *Constitution of Kenya* 2010, Section 3A of the *Civil Procedure Act*, Order 40 Rule 10, Order 20 Rule 2, & Order 51 of the *Civil Procedure Rules* 2010.
2. The applicants sought for a joint inspection of several properties across Nairobi and Machakos (identified by their LR numbers) by the parties to the suit, the taking of true accounts of the rental income of the said properties and thereafter a joint inspection report and account be filed within 45 days. Additionally, they sought that upon issuance of the aforesaid order and hearing, an independent real estate manager be appointed jointly by the parties to preserve and oversee the said properties to be submitting regular reports to the court.
3. Further, the applicants sought that the Branch Manager at HFC Limited, Rehani House, be directed to release all funds held in account No. [particulars withheld] under Riverside Mews Limited to the same company within five days of the order.
4. The application was premised on the grounds set out on the face of the Motion and an affidavit of James Mwaura Mwenja, the 4th defendant, sworn on 21/6/2024. The applicants' case was that, following Court's orders and ruling of 19/5/2023, the defendants refrained from managing or interfering with the suit properties which are under the plaintiff's control. However, they now contend that the plaintiff's neglect and misconduct have endangered the ownership, beneficial interest and value of some properties.
5. They contended that the plaintiff had failed to fulfill its statutory obligations, resulting in arrears and penalties on property rates and land rents, which could lead to adverse legal consequences, including potential forfeiture. Mr. Mwenja swore that, arrears on property rates and land rent place the suit properties at risk of forfeiture by local authorities, as evidenced by a Nairobi City County public notice listing seven of the suit properties, which could be auctioned due to unpaid invoices.
6. In addition, LR No. 4275/13 charged to Equity Bank by the 13th defendant for a \$9.5 million loan, is at risk due to the plaintiff's failure to service the loan after assuming management, with outstanding arrears of \$112,413.79 as at 7/8/2023 and a balance estimated over \$7.5 million. The plaintiff's neglect to restructure the loan or use rental income for repayments has escalated this risk. He further stated that while leasing some properties, the plaintiff had failed to file VAT returns on rental income resulting in tax demands from the KRA, including assessments dated 10/8/2020 and 8/11/2022.
7. They contended that, prior to the institution of this suit, the suit properties generated sufficient rental income to cover taxes, loans and other liabilities. However, now, due to the plaintiff's mismanagement, arrears in property rates, VAT and the Equity bank loan have accumulated, subjecting the properties to a financial risk and potentially subjecting the applicants to suffer prejudice in the event they succeed in this suit. They averred that the plaintiff's neglect of the suit properties had left some of them vacant, in disrepair and vulnerable to vandalism, thus decreasing their value.
8. The defendants contended that the 13th defendant had been restricted from accessing funds in a fixed deposit account at HFC Bank, with a balance of KES 100,533,008.62 as at 29/6/2023. They argued that these funds are unrelated to this suit thus they should be released to avoid unnecessary litigation.
9. In opposition, the plaintiff filed a replying affidavit sworn on 16/10/2024 by David Irungu, the Director of the Kenya Deposit Insurance Corporation (KDIC), appointed as the Liquidator of



- the plaintiff company by Gazette Notice No. 3651 of 16/4/2021. He stated that this Court lacks jurisdiction to hear and determine the instant application. That KDIC, as the bank's liquidator, holds full authority to manage and realize assets for the creditors' benefit.
10. He contended that issues of access to the 13th defendant's assets and the plaintiff's property management were already settled by the Court in its ruling delivered on 19/5/2023, and therefore res judicata.
 11. He stated that the plaintiff was placed under receivership by the Central Bank of Kenya on 7/4/2016 due to financial instability, with KDIC subsequently appointed as the receiver. Following this, the bank filed this suit in 2017 to compel the defendants to return assets allegedly acquired with depositors' funds. A forensic audit by Deloitte & Touche found that Kshs. 7.5 billion, authorized by the 3rd & 4th defendant, was used to fraudulently to purchase properties registered under special purpose vehicles (SPVs) held by the 5th- 6th & 11th- 15th defendants. These SPVs, created by the 1st & 2nd defendant, were admitted by the defendants to hold property in trust for the plaintiff. Notably, the defendants in their statement of defence admitted that the SPVs held these properties on behalf of the bank.
 12. It was averred that a Mareva Injunction was issued 13/4/2017 restraining the defendants from interfering with the assets. This injunction was later extended and modified by consent to allow KDIC to manage the assets, including restructuring a loan related to Riverside Office Block.
 13. In an application dated 18/2/2022, the defendants sought to review this injunction and the consent order, citing coercion and property neglect. In a ruling delivered on 19/5/2023, the Court partially granted this request, modifying the consent order to restrict further sales of the suit properties until this suit is determined. In the premises, the plaintiff argued that the matters in the application had already been sufficiently addressed by this Court previously.
 14. That the Court lacked jurisdiction to appoint an independent real estate manager for the suit properties, as KDIC, as the bank's liquidator, had exclusive rights under Kenyan law to manage all the plaintiff's assets. That the SPV assets belonged to the plaintiff, as acknowledged by the defendants in their defense.
 15. Mr. Irungu further averred that KDIC, being an independent statutory entity, operated autonomously and cannot be supervised by others in managing the plaintiff's assets. Contrary to the applicant's allegations of neglect, he stated that KDIC appointed Town & Country Management Limited to manage the suit properties, with several properties generating rental income, others under renovation and some facing challenges such as flooding or construction delays. That KDIC regularly inspects the suit properties and had even filed a statement of accounts as required by law.
 16. Further, restrictions had been placed on the suit properties to prevent unauthorized transactions, legal actions such as a petition in Machakos Court, have been taken to safeguard the suit properties from encroachment or illegal dealings. KDIC has also hired security services to protect the properties from damage or dissipation. The plaintiff maintained that the original 2017 Mareva Injunction adequately protects the suit properties. Additionally, KDIC is not responsible for covering the plaintiff's liabilities.
 17. In any event, the suit properties are protected from seizure by third parties during liquidation under statutory provisions. The plaintiff contended that KDIC had settled outstanding dues to the Nairobi City Council, ensuring compliance with statutory obligations related to the properties.
 18. That the plaintiff had been using rental income from the Riverside Office Block to service the loan from Equity Bank, after Equity Bank converted the loan repayments from USD to Kshs. That the plaintiff was engaging with KRA to restructure a Kshs. 71.3 million pre-assessment notice, thus the



suit property was not at risk of forfeiture. That the property cannot be attached while the Mareva Injunction was in place.

19. I have considered the parties' contestations. The issues that arise for determination are: -
 - i. Whether the application is *res judicata*; and
 - ii. Whether the applicants have made out a case for grant of the orders sought.
20. On the first issue, the doctrine of *res judicata* is provided for under the provisions of section 7 of the [Civil Procedure Act](#) which provides: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue 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.”
21. For this doctrine to be effectively invoked, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that;
 - i) the suit or issue raised was directly and substantially in issue in the former suit,
 - ii) that the former suit was between the same parties or parties under whom they or any of them claim,
 - iii) that those parties were litigating under the same title,
 - iv) that the issue in question was heard and finally determined in the former suit and
 - v) that the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
22. In this case, the plaintiff contended that the application was *res judicata* on the grounds that the issues surrounding the release of funds held in the 13th defendant's account with HFC Limited and the joint appointment of an independent real estate manager were already decided by the Court in its ruling of 19/5/2023, following the defendants' application dated 18/2/2022.
23. The Court has reviewed the defendants' application dated 18/2/2022. It is observed that that application sought to review or set aside prior orders issued on 13/4/2017, confirmed on 13/12/2018 and varied by consent on 22/1/2020, take an account of rental income and expenses and address the liabilities of the 11th, 12th, 13th, 14th, & 15th defendant from 4/4/2016.
24. The application was determined vide the ruling of 19/5/2023, where the Court determined whether the consent orders ought to be varied, reviewed and/or set aside, and whether the claim by the plaintiff as against the defendants was extinguished by virtue of the respondent's sale of the suit properties to SBM bank. The Court opined that grievances regarding the respondent's conduct and KDIC's management of the properties should be addressed under the [Companies Act](#) 2015 before the Insolvency Court, as this Court's jurisdiction was confined to determining ownership of the suit properties.
25. From the foregoing, it is clear that the issue of the release of funds held in the 13th defendant's account with HFC Limited and the joint appointment of an independent real estate manager were neither



raised in the defendant's application of 18/2/2022 nor determined in the ruling of 19/5/2023. In the premises, this Court finds that the application is not *res judicata*.

26. On the second issue, the applicants contend that the plaintiff's neglect and misconduct had endangered the ownership, beneficial interest and value of some properties. They contended that the plaintiff had failed to fulfill its statutory obligations, resulting in arrears and penalties on property rates and land rents, which could lead to adverse legal consequences, including potential forfeiture. Thus, the orders sought ought to be granted in the interest of justice.
27. It is not disputed that the plaintiff was placed under receivership by the Central Bank of Kenya on 7/4/2016 due to financial instability and subsequently KDIC was appointed as the receiver. Some of the orders sought in the present application is for a joint inspection of the suit properties by the parties, the taking of accounts of the rental income of the said properties and thereafter a joint inspection report and account be filed within 45 days. That upon issuance of the aforesaid order and hearing, the parties on the joint inspection report and account, an independent real estate manager be appointed jointly by the parties herein to preserve and oversee the said properties, submitting regular reports to the court.
28. This Court opines that in order to aptly determine whether or not the aforesaid orders ought to issue, the Court will be forced to look into the conduct of the plaintiff and the management of the suit properties by KDIC. This Court in its ruling delivered on 19/5/2023 at paragraph 26 found that allegations concerning the plaintiff's conduct and KDIC's management of the suit properties should be addressed under the *Companies Act* 2015 before the Insolvency Court, as this Court's jurisdiction was confined to determining ownership of the suit properties. This Court still maintains the above position and finds that it has no jurisdiction to determine the said issue, let alone grant such orders.
29. The applicants also sought for a court order directing the Branch Manager at HFC Limited, Rehani House, to release funds held in Account No. [particulars withheld] under Riverside Mews Limited. The applicants argued that the 13th defendant has been restricted from accessing surplus funds held in that account, which relate to a retired loan facility taken over 10 years ago and are not part of the plaintiff's claims in this suit. The plaintiff, however, argued that these funds are part of the 13th defendant's assets and one of the main issues for the Court to determine is the ownership of the 13th defendant. Therefore, granting an order for release of the aforesaid monies will be tantamount to prematurely determining the said issue.
30. It is not in contest that the funds sought to be released by the applicants do not form part of the plaintiff's claim in this suit. However, upon review of the plaint, it is manifest that there is a dispute on the ownership/acquisition of the 13th defendant as can be seen from prayer No. (k) of the plaint where the plaintiff seeks an order that the defendants including the 13th defendant do deliver to the plaintiff, duly executed instruments of transfer of all their shares including documents of resignation of directorship.
31. In the premises, I opine that granting an order for release of the said funds at this stage would be akin to making a determination on the legitimate ownership/directorship of the 13th defendant without first hearing the evidence of the parties on the issue.
32. Accordingly, this Court declines to grant the said order. In any event, upon determination and/or conclusion of this suit, the successful party can seek for an order for costs and interest on the said monies, curing the prejudice (if any) that will have been suffered by the said party by having been kept away from its monies.



33. The upshot is that the application is devoid of merit and is hereby dismissed with costs. The parties should now proceed and prosecute the suit and abstain from making any further unwarranted applications.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER, 2024.

A. MABEYA, FCI ARB

JUDGE

