



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. E135 OF 2020

ATUL R. SHAH.....1ST PLAINTIFF

NELAM ATUL SHAH.....2ND PLAINTIFF

-VERSUS-

IMPERIAL BANK LIMITED.....1ST DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION.....2ND DEFENDANT

RULING

1. Before me is a Preliminary Objection to the suit dated 2/12/2020 filed by the 2nd defendant. The objection was raised on the following points of law, that: -

- i. Upon appointment as a receiver of the 1st defendant, the 2nd defendant is deemed to act as agent of the 1st defendant;
- ii. The 2nd defendant is not to be held to have assumed or incurred any obligation for liability of the 1st defendant for its own account.
- iii. **Section 45(5) of the Kenya Deposit Insurance Act No. 12 of 2012** applies.

2. The objection was argued vide the submissions dated 8/3/2021. The 2nd defendant submits that it is the receiver of the 1st defendant. That any available deposits remain with the 1st defendant and is not property of the 2nd defendant and payments to depositors are made by the 1st defendant.

3. It is further submitted that under **Section 45 and 46 of the Kenya Deposit Insurance Act No.12 of 2012**, it is prohibited to institute a suit against the 2nd defendant. That what is excepted is for claims by a party for sustained losses as a result of actions of the Corporation.

4. It is further submitted that the plaintiffs are not seeking damages as a result of any actions by the 2nd defendant, but that they are seeking deposits held by the 1st defendant. The 2nd defendant asserts that its appointment as receiver is statutory and that the statute protects it from such liability.

5. I have seen the plaint dated 5/5/2020. In that statement of claim, the plaintiffs are seeking to have the defendants pay them part of their deposits held in the 1st defendant as had been the case for other insured depositors of the bank.

6. **Section 45(5) of the Kenya Deposit Insurance Act No.10 of 2012** provides: -

“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.”

7. Further, **Section 46** of the same Act provides: -

“1) Where the Corporation or the appointed person, as the case may be, has assumed control of an institution under section 44(2)(b)—

a. no injunction may be brought or any other action or civil proceeding commenced against the Corporation or the appointed person in respect of the assumption of control;

b. no creditor has any right of set-off against the institution, which for greater certainty, does not include the consolidation of accounts maintained in the normal course for the purpose of providing clearing and settlement services or other services referred to in section 48; and

c. no person may terminate or amend any agreement with the institution or claim an accelerated payment under any such agreement with the institution by reason only of—

i. the insolvency of the institution;

ii. a default, before the assumption of control under section 44(2)(b) by the Corporation or the appointed person, as the case may be, takes effect, by the institution in the performance of its obligations under the agreement; or

iii. assumption of control under section 44(2)(b) by the Corporation or the appointed person, as the case may be, as from the date of the assumption of control of the institution.

2) Subsection (1) shall not prevent any person who sustains losses from any action of the Corporation or the appointed person from instituting an action for damages for the losses suffered by such person”.

8. While **section 50 (5) of the Act** provides: -

“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.”

9. The upshot of the foregoing is that, when the 2nd defendant is appointed as receiver of any entity, it acts as an agent of such entity. It assumes no liability of such entity at all. Its liability is restricted to damages suffered by any party as a result of its own actions. See **Andrew Muma And Charles Kanjama Trading as Muma & Kanjama Advocate & others v Deloitte & Touche East Africa & 5 others [2020] eKLR.**

10. In view of the foregoing, the plaintiffs claim in the plaint should be directed at the 1st defendant and should not extend to the 2nd defendant. This is so because it relates to the release of part of the deposit to the insured depositors of the 1st defendant. Although the 2nd defendant may be exercising its powers as a receiver of the 1st defendant, it is not to be held liable for its carrying out that mandate.

11. In view of the foregoing, the Preliminary Objection dated 7/12/2020 is meritorious. The court allows the same and strikes out the 2nd defendant from the suit. Costs are awarded to the 2nd defendant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021

A. MABEYA, FCI Arb

JUDGE