REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

HCCOMMISC E1200 of 2020

RASHIK KUMAR PUNJA SHAH.....1st APPLICANT

MITTUN SHAH.....2ndAPPLICANT

VERSUS

CHASE BANK LIMITED (In Liquidation).....1st RESPONDENT

KENYA DEPOSITS INSURANCE CORPORATION.....2nd RESPONDENT

RULING

INTRODUCTION

1. The factual chronology of events which triggered these proceedings is essentially common ground or unconverted. It is common ground that Chase Bank Limited (in liquidation) was a financial institution duly registered under the Banking Act[1]providing banking services. There is no dispute that the applicants were its customers and they held accounts with the Bank. On **7th** April 2016, the Bank was placed under receivership by the Central Bank of Kenya in exercise of its powers under the Kenya Deposit Insurance Act[2](the KDIA) and it appointed the **2nd** Respondent as its receiver and placed a moratorium on all payments to its depositors and creditors.

2. The point of divergence is that the applicants contend that the assets and the business of the Bank were taken over by SBM Bank but their deposits were not transferred to SBM Bank. They state that the moratorium on deposits was subsequently lifted and the receiver released other accounts holders' deposits but it failed to release theirs which amounts to discrimination. They contend that the receiver classified them as secured creditors without affording them a hearing and it purported to determine the various contracts and agreements between them and the Bank in a manner that did not conform to the contracts and the KDIA.

3. They contend that the respondents have no basis to continue holding their huge deposits long after the moratorium on deposits was lifted, hence, it is necessary to obtain the courts leave to commence proceedings against Chase Bank Limited (in liquidation). Lastly, they state that despite demand the respondents have not made good their claim, and that they have a good case with overwhelming chances of success.

4. As a consequence of the foregoing, the applicants vide their Notice of Motion dated **29th** October 2020 expressed under section **56** of the KDIA and Order **52** of the Civil Procedure Rules, 2010 seek leave to commence judicial proceedings against Chase Bank Limited (In Liquidation) and Kenya Deposits Insurance Corporation. They also pray for costs of the application.

5. The Respondents' disputation is that by Gazette Notice No. **2321** dated **7th** April 2016 the **2nd** Respondent as the Receiver placed a moratorium on all payments by the **1st** Respondent to its depositors or creditors with effect from the said date under Section **50(2)** of the KDIA. The Respondents contend that prior to the **1st** Respondent by a letter of offer dated **29th**January 2016, the **1st** Respondent advanced to the **2nd** applicant a credit facility of US$ 1,050,000.00 to be used for issuance of a Standby Letters of Credit (SBLC) by the **1st** Respondent to guarantee a loan of even amount advanced to the **2nd** applicant by HDFC Bank Limited (Bahrain). Further, that that by a letter of offer dated **2nd**February 2016, the **1st** Respondent advanced the **1st** applicant a credit facility in the sum of USD 1,300,000.00 to be used for issuance of a SBLC by the **1st** Respondent to guarantee a loan of even amount advanced to the **1st** applicant by HDFC Bank Limited (Bahrain).

6. It is the Respondent's case that the credit facilities advanced by the **1st**Respondent to the applicants were secured by lien over their fixed deposits with the **1st** Respondent in the sum of **Kshs.145,864,438.35** and **Kshs. 121,000,000.00** respectively. Further, that on **16th**December

2016, HDFC Bank Limited wrote to inform the **1st** Respondent that it was drawing under the SBLC due to default by the **1st** applicant and called for satisfaction of the guarantee of USD 1,300,000.00. Further, that on **27th** January 2017, HDFC Bank Limited informed the **1st** Respondent that it was drawing under the SBLC due to default by the **1st** applicant and called for satisfaction of the guarantee in the sum of USD 1,300,000.00.

7. Additionally, the Respondent's content that on **17th** August 2018, SBM Bank Kenya Limited acquired some assets and assumed **75%** of the value of deposits under moratorium at the **1st** Respondent, and that as at the time of the acquisition of some of the **1st** Respondent's assets and deposits by SBM Bank Kenya Limited, the fixed deposits held in the names of the applicants were under lien securing the SBLCs that had been issued in favour of HDFC Bank Limited and the **1st** Respondent was therefore under obligation to remit to HDFC Bank Limited the whole amount demanded under the SBLCs.

8. It is also the Respondent's position that the fixed deposits were not assumed by SBM Bank Kenya Limited which acquired unencumbered deposits in the acquisition, which made the applicants secured creditors. Further, that due to the moratorium on payments issued by the **2nd** Respondent effective **7th** April 2016 and the fact that the **1st** Respondent was under receivership, the payments to HDFC Bank Limited were not made.

9. Additionally, it is the Respondent's position that by letters dated **22nd** July 2019 and **30th** August 2019 to the **1st** Respondent, HDFC Bank Limited withdrew its claim under the SBLCs for the recovery of the unpaid loan amount by the applicants respectively and indemnified the **1st**Respondent against any future claims on the SBLCs. Further, that the **1st** Respondent has since been discharged from its obligations to HDFC Bank Limited, and that the applicants still remain classified as secured creditors, hence, the applicants cannot purport to make any claims as ordinary depositors in law. Also, that the deposits to be released in tranches was only in regard to the **75%** of moratorium deposits transferred to SBM Kenya Limited, and the applicants' fixed deposits did not form part of the transferred deposits as at the time of the transfer the **1st** Respondent held them as lien for securing the SBLCs.

10. Further, that vide Gazette Notice No. **2321**, there still subsists a moratorium on all payments by the **1st** Respondent to its creditors and depositors, which moratorium protects the **1st** Respondent while it is under receivership to enable the **2nd** Respondent properly carry out its functions as a receiver, hence, by the instant application and the intended suit, the applicants seek preference in payment contrary to Section **50(9)** of the Act. Also, they should lodge a claim for payment and await payment in the normal order in accordance with Section **50(9).** Further, the facts of this case do not warrant the exercise of the court's discretion to grant the leave sought under Section **56(2)** of the Act. Lastly, that the intended proceedings are premature as the moratorium is still in force, hence, this court ought to dismiss the application with costs to the Respondents.

11. The applicants' rejoinder to the Respondents' averments as enumerated in the supplementary affidavit of Mr. Rashik Kumar Punja Shah dated **22nd** February 2021 is that it is not within the mandate of this court to determine the merits of a contemplated action under section **56(2)** but its role is restricted to considering whether or not the proposed action presents *bona fide* credible claim so as to ensure that the Receiver of the **1st**Respondent is not saddled with defending frivolous lawsuits, and that the Respondents' reply essentially sets out their defence to the proposed proceedings.

Changed circumstances

12. On **16th** April 2021, during the pendency of these proceedings, the Central Bank of Kenya issued a f press statement stating *inter alia* that effective from the said date, it appointed the KDIC as liquidator of CBLIR in terms of Sections **53(2)** and **54(1)(a)** of the KDIA. This development necessitated some changes to the pleadings already filed in court. On **12th** May 2021, the parties recorded a consent amending prayer **(2)** of the application to read "Chase Bank in Liquidation" instead of "Chase Bank in Receivership" and that the said amendment would apply anywhere in the pleadings where the expression "Chase Bank in Receivership." Some parts of the party's written submissions were also rendered obsolete by the said development. However, in their oral arguments in court, both aligned their submissions to the said changes.

The submissions

13. Mr. Amoko, counsel for the applicants submitted that there are conflicting court decisions as to the scope and requirements of section **56 (2)** of the KIDA whether or not leave is required. He urged the court to clarify the position. Mr. Amoko submitted that the requirement for leave is that the financial institution should not be confronted with suits hindering it from its functions. He relied on *Charity Wangui Ngumu v Chase Bank Limited (In receivership & Antique Actions Agencies*[3] which held that the essence of seeking leave to commence a suit, is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation and to avoid a flood gate of actions, which may involve some of the matters placed under suspension. He submitted that the court should consider the issues before it to determine whether the intended suit is frivolous.

14. Mr. Amoko submitted that the basis for the case is loss as a consequence of representations by the Statutory Manager which the applicants relied upon and suffered loss. He argued that the applicants have a case for fraudulent misrepresentation, which occurred post receivership, hence, whatever immunity is conferred by the law, it should not apply. He submitted that the role of the court is to determine that the application is not frivolous. He urged the court to grant the leave sought arguing that if the Respondents deserve to say anything, they can file a defence to the suit while filed.

15. Mr. Mwangi, appearing with Mr. Amoko submitted that the application is not intended to derail the liquidator or to forestall the process, but the applicants have a genuine claim.

16. Mr. Issa, the Respondent's counsel recalled that the application was filed when the Respondent was under receivership, but since then, it

had been placed under liquidation. He submitted that his earlier position was that the leave sought was superfluous, but with the changed circumstances, he concedes that that leave is required. However, he submitted that that an applicant should demonstrate the intended suit is not frivolous by annexing the draft pleadings. It was his submission that the court may not determine the frivolous test without the draft pleadings. He however, acknowledged that the omission to annex the draft pleadings is not fatal.

17. Regarding the legislative intent of the Act, Mr. Issa cited *Ashok L. Doshi & Another vs Central Bank of Kenya & Another**[4]* and invited the court to examine the structure of the Act and submitted that section **43** to **61** of the Act deal with aspects of receivership while section **53** deals with termination of receivership. He argued that the transition to liquidation status is at section **53**. He urged the court to note the shift from receivership to liquidation. He submitted that section **54** talks of liquidation, that is, it moves receivership to liquidation at section **56** which deals with stay of proceedings. He submitted that section **56 (2)** speaks to liquidation and not receivership which requires courts sanction in mandatory terms. He invited the court to clarify the position of the law.

Determination

18. A useful starting point in analyzing the core issue in this case is to examine the meaning and ambit Section **56** of the KDIA provides for stay of proceedings in the following words:

> *(1) No cause of action which subsisted against the 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*

19. A reading of sub-section (1) of the above provisions leaves no doubt that it in peremptory terms prohibits continuation of all proceedings against the directors, management or the institution which subsisted prior to liquidation. Sub-section (2) bars filing injunctions or commencing any other action or civil proceedings against the financial institution or in respect of its assets without the sanction of the court. The bar contemplated by sub-section (2) is wide and all-embracing, extending to injunctions, or any other action or civil proceedings against the institution or in respect of its assets. As was held in *Kwanza Estates v Dubai Bank of Kenya Ltd & Another*[5] this provision bars any fresh suit from being commenced without court sanction and forbids continuing with any subsisting litigation without the same sanctions.

20. A clear reading of the above provision leaves no doubt that it explicitly refers to financial institutions in liquidation. The import of this provision is that since the **1st** Respondent was put in liquidation, (after the filing of these proceedings), the application now falls properly within the ambit of section **56 (2),** hence the sanctioning of this court is required as contemplated by the above section.

21. The intent and purpose of section **56 (2)** is to eliminate any applications which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to institute the proceedings if the court is satisfied that there is a case for further consideration. The requirement that the court sanctions the proceedings is designed to shield the liquidator from busy bodies with misguided or trivial complaints, and to remove the uncertainty as to whether a liquidator could safely proceed with his functions while court proceedings pend in court even though misconceived. The court is called upon to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*.

22. At this stage an applicant must show that: - (i) 'sufficient interest'in the matter otherwise known as *locus standi*; (ii) that he/she is affected in some way by the decision being challenged; and, (iii) that he/she has an arguable case and that the case has a reasonable chance of success. The applicant has the burden of demonstrating that the application raises a serious issue. This is a low threshold. If the court is not persuaded as aforesaid, sanction will be denied and the matter proceeds no further. The facts relied upon must be clearly set out in the founding affidavit or draft pleadings or both. The court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases.

23. I have considered the grievances cited by the applicants and the Respondent's response. I have also considered the Respondents arguments which to me are essentially their defence to the proposed proceedings. I find and hold that the applicants meet the threshold for the grant of the orders sought. I find no prejudice will be caused to the Respondents since they will have the opportunity to respond to the case once filed and any inconvenience can be adequately compensated by way of costs at the end of the proceedings should the applicants' claim fail.

24. Accordingly, I allow the applicants' Notice of Motion dated **29th** October 2020 and grant the applicants sanction to commence judicial proceedings against Chase Bank Limited (In Liquidation) and Kenya Deposits Insurance Corporation. I further order that the intended proceedings be filed and served upon the Respondents within **15** days from the date of this order. I make no orders as to costs.

Orders accordingly.

Dated, Signed and delivered via e-mail at Nairobi this **8th** day of **July** 2021

John M. Mativo

Judge

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[1] Act No. 10 of 2012.

[2] Cap 487C, Laws of Kenya.

[3] {2018} e KLR.

[4] {2016} e KLR.

[5] {2016} e KLR.