



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

PETITION NO. 06 OF 2019

IN THE MATTER OF ARTICLES 1,2,3,10,19,20,21,22,23,24,35,37,41,47 AND 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF SECTION 15 OF THE KENYA DEPOSIT INSURANCE ACT

AND

**IN THE MATTER OF THE LEGALITY AND PROPERTY OF THE SEPARATION AND DISPOSAL AGREEMENT
NEGOTIATED AND ENTERED INTO BETWEEN THE RESPONDENTS**

BETWEEN

CHASE BANK (KENYA) LIMITED

EMPLOYEE OWNERSHIP PLAN.....1ST PETITIONER

SIDNEY LOUIS SHILAKO.....2ND PETITIONER

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION.....1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

CABINET SECRETARY NATIONAL TREASURY.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

SBM HOLDINGS LIMITED.....5TH RESPONDENT

JUDGMENT

1. **CHASE BANK (KENYA) LIMITED (IN RECEIVERSHIP)** (hereafter the Bank), before being placed under receivership operated as a commercial bank and had 62 branches. The **CENTRAL BANK OF KENYA** (hereafter CBK) placed the Bank under receivership on 7th April 2016. By a public notice dated 30th March 2017 CBK set out the circumstances that led to the Bank being placed under receivership as:

- a. *The existence of unsafe, unsound conditions to transact business that threatened the interest of Chase Bank, its depositors and creditors;*
- b. *Chase Bank likelihood of failure to meet its financial obligations;*
- c. *Violation of certain provisions of the law and/or regulations; and*

d. The existence of substantial in sufficient capital in Chase Bank.

2. On 5th January 2018 CBK and **KENYA DEPOSIT INSURANCE CORPORATION** (hereafter KDIC) announced the receipt and acceptance of binding offer with **SBM HOLDINGS LIMITED** (hereafter SBM) with respect to the Bank. By that announcement the public was informed that SBM had offered to acquire certain assets and matched liabilities of the bank. That transaction was to, inter alia, transfer, to SBM 75% of the value of deposits, transfer of staff and branches of the Bank.

3. By public announcement dated 17th April 2018 CBK and KDIC informed the public that they had signed an agreement with SBM. That agreement was in terms of the previous announcement of 5th January 2018.

4. This petition is filed by **CHASE BANK (KENYA) LIMITED EMPLOYEE OWNERSHIP PLAN**, as the 1st petitioner and **SIDNEY LOIS SHILAKO**, the 2nd petitioner. The 2nd petitioner deponed, in the affidavit in support of the petition that, he is a member of the 1st petitioner association. Further that he had authority of the 1st petitioner to swear the affidavit.

5. The 2nd petitioner gave the background of this petition, which is not disputed by the respondents. He stated that in 2006 the Bank established an **EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)** as an employee benefit scheme, for senior employees. That scheme was registered with the **Capital Market Authority**. A Trust Deed in relation to the Bank's employees was signed between the Bank and **Ian Kingára, Anne Mungai, Ken Obimbo and James Mwaura** (the Trustees) on 15th December 2006. The Bank's employees who were eligible to be ESOP unit holders were given an opportunity to access the shares of the Bank through forfeiture of their bonuses and mortgage with the Bank. In 2014 ESOP obtained a loan from a Micro finance entity, known as Letshego Kenya Limited. The loans was for allotted shares that were not covered by bonus forfeiture. The 2nd petitioner deponed that by the time the Bank was placed under receivership, by CBK, ESOP owned approximately 7.3% of the Bank.

6. The 2nd petitioner further deponed that in the various press releases, which culminated with the announcement of binding agreement between CBK, KDIC and SBM, the fate of the Bank's employees was not disclosed. Because of that non-disclosure the 1st petitioner made inquiries from CBK, KDIC, and **CABINET SECRETARY NATIONAL TREASURY** (the 3rd respondent) seeking particular of the sale to SBM, as follows:

“(a) The value of the assets of the Bank inclusive of case (sic) [cash], government securities, interest-earning loans, letters of credit and inter-bank loans:

(b) The consideration for the sale, and the value of the transaction;

(c) How the benefits, interest and investment of the petitioner members have been treated; and

(d) The reason, if any, why our members were not (substantially) involved or at least informed of the sale and its particular.”

7. The petitioners by this petition allege denial of information by the respondents. They pray for orders for:

“(a) A declaration that the separation and disposal agreement between the respondents herein is a product of violation of Articles 10,41,47, it is prejudicial to third party employee interest and is invalid.

(b) In the alternative to (b) (sic) above, a declaration that the 1st petitioner members, including the 2nd petitioner are entitled to 7.3% equity acquired by the 5th respondent (SBM); and

(c) An order that Section 15 of the Kenya Deposit Insurance Act is unconstitutional and in contravention with Article 10 read with 35 of the Constitution.”

8. The petition is opposed by the respondents on several grounds. The respondents argue that the petitioners have no locus standi to institute this petition; that KDC being an agent of the Bank ought not to have been sued; that KDIC is empowered by law to conclude the separation and disposal agreement; and that the right to information under Article 35 of the Constitution is not absolute.

ANALYSIS AND DETERMINATION

9. One of the respondents' opposition to the petitioners' claim is that the petitioners, both of them, lack locus standi. This opposition is based on the ground that the 1st petitioner is not an incorporated body as required under Section 3(1) and (3) of the **Trustee (Perpetual Succession) Act**. That Section provides for a procedure of incorporation of trustees. This is what the Section provides:

3. (1) Trustees who have been appointed by any body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose, or the trustees of a pension fund or provident fund may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body.

(2).....

(3) The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.

10. In the case **PETER OMANI OBIRIA -V- HUDSON OKEMWA & 3 others (2017) eKLR** the court discussed the ramification of that Section thus:

“9. It is apparent from the above that an elaborate procedure for the registration of trustees and for the issue of an incorporation certificate under the Act exists. It has not been demonstrated to the court that such procedure was followed or that indeed there is a certificate of incorporation in existence. The court cannot act on presumptions and/or in a vacuum. The plaintiff who claims the Trustees of the 3rd defendant are registered under the Trustees (Perpetual Succession) Act has not produced any evidence to that effect.”

11. In respect to the 2nd petitioner the respondents argued that he failed to adduce evidence of his membership to the 1st petitioner. This is because he did not produce a register of members to ESOP with his name therein and that nor did he produce certificate of entitlement of number of units he owns in ESOP. That is what the Regulation 115 of the **Capital Market Act (Collective Investment Scheme) Regulation, 2001** provides. That Regulation is in the following terms:

“115. Certificate of entitlement to holders

The trustees shall issue to every employee entitled to the units under the ESOP a certificate of entitlement representing the number of units owned by the employee in the ESOP Unit Trust within thirty days of receiving the company’s certificate of entitlement against which such units were issued and maintain a register of all unit holders.”

12. It is worth noting that the respondents raised the issue of petitioner’s lack of locus as far back as November and December 2019. The petitioners rebutted that argument by saying nothing more than stating that the respondents were raising a technicality which is addressed by Article 159 (1) and (2) of the constitution. The Article provides:

“Justice shall be administered without undue regard to procedural technicalities.”

13. The issue raised by the respondents can hardly be said to be a technicality. It is an issue which relates to the petitioners’ standing in this cause-that is whether or not they had a right to bring this case at all. In my view Article 159 (1) and (2) is intended to ensure that adherence to strict rules of procedure do not lead to miscarriage of justice-see the case of **Abdul Aziz Juma -v- Nikisuhi Investment & 2 others (2013) eKLR**. The Supreme court in the case **Moses Mwicigi & 14 others -v- Independent Electoral and Boundaries Commission & 5 others Supreme Court Petition NO 1 of 2015**, stated:

“This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

14. The Supreme court also had this to say in the case **Zacharia Okoth Obado -v- Edward Akongó Oyugi & 2 others (2014) eKLR**:

[37]Service of a notice of appeal is crucial. Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

15. The lack of standing of the petitioners is not a technicality. It is the certificate envisaged in the Trustee Act that clothes a body, such as the 1st petitioner with the authority to sue or be sued. I dare say that without the certificate the 1st petitioner had no power to bring this action and on that basis the case of the 1st petitioner fails. The case of the 2nd petitioner’s case also fails for failure to prove he is entitled to the unit under ESOP. He failed to produce a certificate of entitlement representing the number of units he owns-see Regulation 115 of the Capital Market Act (Collective Investment Scheme) Regulation, 2001. For all the court knows the 2nd petitioner may not be a member of the 1st petitioner.

16. This judgment could end there, with that finding that the petitioners' case fails because of lack of locus standi, but I wish to deal with the other issues that arose in the matter and which issues touch on the prayers in the petition.

17. In the prayer (a), of the petition, the petitioners sought a declaration that the agreement between CBK, KDIC and SBM was a product of violation of Articles 10, 41, and 47 of the Constitution.

18. The petitioners failed to set out, with particularity, how the respondents violated article 10. I will there proceed to assume that prayer as it concerns that Article is abandoned. Similarly, that prayer, in respect Article 41 was not set out and will be assumed to be abandoned. Article 41, which relates to labour relation, is also inapplicable in view of the fact, as I understood the petitioners' case to be is, that the petitioners bring this action as shareholders and not as employees.

19. It follows that under prayer (a) in the petition I will proceed to consider Article 47 alone.

20. The petitioners submitted that CBK and KDIC violated article 47 because they failed to exercise fair administrative action with regard to the sale of assets and some deposits of the Bank, to SBM. In that regard the petitioners referred to the request made by the petitioners by their letter dated 3rd May 2018, partly reproduced above. Those inquiries relate to request for disclosure of the value of the sale to SBM, to how interest of the petitioners was treated and why the petitioners were not involved in the sale. The petitioners also argue that failure to respond to their inquiries was contrary to section 5(b) and (c) of the Fair Administrative Action Act.

21. CBK in response drew the attention of the court to Section 5(1) of **The Kenya Deposit Insurance Act NO. 10 of 2012** (hereinafter the KDIC Act). This is the Section that sets out the object and functions of KDIC. The object is stated to be:

5. (1) The object and purpose for which the Corporation is established is to provide a deposit insurance scheme for customers of member institutions and to receive, liquidate and wind up any institution in respect of which the Corporation is appointed receiver or liquidator in accordance with this Act.

22. Further KDIC submitted that it is empowered to enter into an agreement in furtherance to its objects by Section 6 of the KDIC Act. In entering into such agreement that it is empowered to sell and dispose of assets by Section 50 of KDIC Act. KDIC therefore surmised that the sale agreement was concluded in its lawful exercise of statutory power.

23. I have considered those submissions. Although CBK and KDIC argue that they were wrongly sued because, in the case as KDIC it acted as an agent of the institution under the receivership, and in the case of CBK its governor is prohibited to divulged information obtained in performance of his duties, I wish to dissuade them of that argument. The fact KDIC acts as an agent does not exonerate its officers from responding to inquiries made on the manner, he is performing his duties. Similarly, the Governor of CBK is forbidden under Section 17 of The Central Bank of Kenya Act from making personal disclosure of information he obtains in the performance of his duties. He is however is not shielded by that Section from responding to inquiry made in his official capacity.

24. However what finds favour with me is the argument of the respondents that the particular agreement with SBM had a confidential clause which forbade its disclosure to other parties not party to the agreement. It needs to be recalled that CBK and KDIC from time to time made publications, to the public, of the steps being undertaken in respect to the receivership of the Bank. That information was also available in their website. It would also seem apart from those publications they also engaged the public in meetings. The press releases did in my view give sufficient information to any party involved with the Bank- such as the petitioners.

25. The request for any further information, as sought by the petitioners, would also seem to be caught by the limitation to the right to access to information as set out in Section 6 of the **Access to Information Act NO. 31 of 2016**. That section provides:

6. Limitation of right of access to information

(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

(a);

(b);

(c);

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g);

(h); or

(i)

26. That Section 6, reproduced above, is relevant to the facts of this case because the agreement whose details/disclosure the petitioners sought had a confidential clause forbidding disclosure of its content to third parties. Its disclosure as sought by the petitioners would no doubt be an invasion of SBM's privacy and would have prejudice the commercial interests of the Bank. The fact that SBM's agreement had a confidential clause protected it from public disclosure and which is in tandem with section 6(d), and (e) above.

27. It is for the above reasons that prayer (a) of the petition fails.

28. In prayer (b) of the petition the Petitioners seek, in alternative to prayers (a), a declaration that the 1st petitioner's members are entitled to a stake equivalent to 7.3% equity acquired by SBM. The petitioners submitted they held 7.3% shareholding in the Bank before the Bank went under receivership.

29. The claim of 7.3% shareholding is akin to a claim in special damages. In other words, the petitioners needed to specifically to prove their claim to that shareholding. There was no document presented before court proving entitlement to 7.3% shareholding.

30. The petitioners claim is that much more defeated by the fact that SBM purchased 75% of the Bank's assets and deposits. SBM did not purchase the entity known as Chase Bank (Kenya) Limited (In Receivership). The petitioners did not produce evidence of what become of the entity of Chase Bank. If indeed the petitioners had a valid claim their claim was against the Bank.

31. My finding is that prayer (b) fails for failure of proof and because the petitioners' claim, if any, does not lie with SBM.

32. By prayer (c) of the petition the petitioners seek an order of declaration that Section 15 of KDIC Act is unconstitutional and contravenes Article 10 as read with Article 35 of the Constitution.

33. Article 10 sets out the national values and principles of governance such as patriotism, national unity, human dignity, equity, social justice and good governance amongst others. Article 35 is the article under which the right to access to information is recognized. Section 15 of KDIC Act relates to confidentiality by directors, officers, employees or agents of KDIC in regard to any record, document, material or information relating to business and affairs of KDIC.

34. My understanding of Section 15 is that it forbids employees or directors divulging information which comes to them by virtue of their employment at KDIC. The section does not stop information being released officially. What that Section forbids is personal disclosure as opposed to official disclosure. It follows that section 15 is not contrary to Articles 10 or 35 of the Constitution. Indeed, I think it upholds those Articles because it forbids disclosure other than official disclosure. It is because of that finding that I decline to grant prayer (c) of the petition.

35. The Petition for the reasons set out above fails and is dismissed. In my view costs must follow the event because this petition cannot be said to have been in the public interest. It was of personal interest to the petitioners.

36. In the end the petition is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this 5th day of **May, 2020**.

MARY KASANGO

JUDGE