REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO E052 OF 2019

ANDREW MUMA AND CHARLES KANJAMA

TRADING AS MUMA& KANJAMA ADVOCATE.....1ST PLAINTIFF/RESPONDENT

1. BISHOP REV. JOSEPH MEMBA SYUMA

2. THOMAS MWANGANGI

3. PHILIP MALONZA

4. BISHOP DR. RAPHAEL NZUKI KITUVA

5. REVEREND BONIFACE MBWANGA

6. DR. WILSON MAILLU

(Suing on behalf of, as members and as

Registered Trustees of GOOD NEWS CHURCH

OF AFRICA and THE GOSPEL FURTHERING

BIBLE CHURCH TRUST.....2ND PLAINTIFFS/RESPONDENT

GOSPEL FURTHERING BIBLE CHURCH TRUST

REGISTERED TRUSTEES.....3RD PLAINTIFFS/RESPONDENT

(Suing on their own behalf and on behalf of all depositors and account

holders of Chase Bank Kenya Limited as at 7th April 2016)

VERSUS

DELOITTE & TOUCHE EAST AFRICA.....1ST DEFENDANT/RESPONDENT

DELOITTE & TOUCH TOHMATSU LIMITED.....2ND DEFENDANT/RESPONDENT

MOHAMMED ZAFRULLAH KHAN.....3RD DEFENDANT/RESPONDENT

DUNCAN KABUI.....4TH DEFENDANT/RESPONDNET

THE CENTRAL BANK OF KENYA.....5TH DEFENDANT/RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION....6TH DEFENDANT/RESPONDENT

RULING

1. This ruling relates to three notices of motions applications. The application dated 4th April 2019 (herein "the 1st application") filed by the Plaintiffs, the application dated 11th June 2019 (herein "the 2nd application") filed by the 6th Defendant and the application dated 27th September 2019 (herein "the 3rd application"), filed by the 2nd Defendant.

2. The 1st Application is brought under the provisions of; Article 165 of the Constitution of Kenya, Order 1 Rule 8 of the Civil Procedure Rules and Section 56 of the Kenya Deposit Insurance Act, No. 10 of 2020 and other enabling provisions of the law.

3. The Applicants are seeking for orders:

a) That leave be and is hereby granted to the plaintiffs to enjoin Chase Bank (Kenya) Limited (In Receivership) as the 7th Defendant, in the suit instituted by way of plaint dated 28th March 2019 and filed in court on 29th March 2019;

b) That pursuant to order (a) above summons to the intended 7th defendant, through the 6th defendant, be processed on an urgent and priority basis by the Court Registry;

c)That leave be and is hereby granted to the plaintiffs to continue the suit instituted by way of plaint dated 28th March 2019 and filed in court on 29th March 2019 as class action suit on behalf of the plaintiffs herein and on behalf of other interested depositors of; Chase Bank (Kenya) Limited as at 7th April 2016, as against the defendants and as against Chase Bank (Kenya) Limited (In Receivership) pursuant to order (a) above;

d) That leave be and is hereby granted to the plaintiffs to issue a notice to all depositors of; Chase Bank (Kenya) Limited as at 7th April 2016, interested to join the suit as plaintiffs within the timeline to be specified in the said notice, by way of one daily newspaper advertisement of nationwide coverage.;

e) That the costs of this application be in the suit.

4. The 2nd Application is brought under the provisions of; Order 2 Rule 15 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of: the law.

5. The Applicant is seeking for order that: -

a) The plaintiffs suit herein dated 28th March 2019, as well as the plaintiffs' application dated 4th April 2019, be struck out;

b) In the alternative to prayer (a) above, the Kenya Deposit Insurance Corporation, the 6th Defendant herein be struck off from the suit herein;

c) The costs of the application be borne by the plaintiffs.

6. The 3rd Application is brought under the provisions of; Order 1 Rule 10(2) and Order 2 Rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules. The Applicant is seeking for orders that; it be struck out as a party from the plaint in this matter and as a party to the proceeding and the costs for the application be provided for.

7. Having considered the prayers in these applications, l shall first deal with the application seeking for the suit to be struck out. The application is supported by grounds on the face of it and the affidavit of the applicant's General Manager-Resolution dated 11th June 2019, sworn by David Irungu. It is opposed vide a replying affidavit dated 1st July 2019, sworn by Andrew Muma, a Senior Partner in the 1st Plaintiffs Law firm.

8. In that regard the provisions that govern the striking out of pleadings are provided for under Order 2 Rule 15 of the Civil Procedure Rules, which states as follows: -

15 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

9. I have considered arguments and submissions on the subject application and I note that, although the Applicant seeks for striking out of the suit, the grounds and affidavit in support of the application support mainly the alternative prayer that, the Applicant be struck from the suit.

10. Be that as it were, the Applicant has invoked the provisions of; Order 2 Rule 15 of the Civil Procedure Rules, 2010, without indicating the sub rule relied on. It suffices to note that; Order 2 Rule 15(2) of the Civil Procedure Rules, provides that, n*o evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.*

11. *The sub*-rule (1)(a) deals with an application seeking to strike out a pleading on the ground that, it discloses no reasonable cause of action or defence in law. Therefore, where an application is based on the provisions of; Rule 15(1)(a) aforesaid, no evidence is admissible and where a party swears an affidavit in support of an application founded thereon, the court will not hesitate in striking out such an affidavit (*Melika vs. Mbuvi [2001] 1EA 124)*. On the ground that the application does not state the sub rule relied on, the application cannot stand.

12. Be that as it may, the principles that govern striking out of pleadings is settled and are well captured in the case of; *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General), 2015 BCCA 163 (CanLII),* where Madam Justice Garson reviewed the test generally to strike a pleading on the basis it fails to disclose a reasonable cause of action and stated:

> *"(16) The test to strike a pleading on the basis that the claim fails to disclose a reasonable cause of action was described in Hunt v. Carey Canada Inc., (1990) 2 S.C.R. 959. Madam Justice Wilson, writing for the Court, emphasized that, in an application to strike pleadings, "(n)either the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case": Hunt at 980.*
>
> *Claims should only be struck out if it is; plain and obvious, they will fail or the case is "beyond reasonable doubt": Hunt at 980. She said, "when a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed".*

13. In *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000* the court stated that: -

> *"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial…"*

14. Finally, in the case of; *D.T Dobie &Company (Kenya) Limited vs Muchina Civil Appeal No. 37 of 1978*, it was held that the power to strike out pleadings should be used sparingly and cautiously. In obiter remarks Madan J, stated that the court should aim at sustaining the suit rather than terminating it.

15. I have considered the pleadings and I find that the 6th Defendant, is sued jointly and severally with the other Defendants for alleged breach of professional or statutory duty of care. It is therefore not correct to aver that; no specific allegations or reliefs have been sought against it. Indeed, the Applicant has referred to the allegations against it in the plaint, in ground 2 in support of the application. The Applicant then answers to those allegations, by relying on various statutory provisions under, the Kenya Deposit Insurance Act. Therefore, all these allegations will require proof at the hearing of the cause. Even then, the suit cannot be struck out, as the Applicant is sued jointly with other Defendants, who have not sought for its dismissal.

16. I further note that the issue of; sub judice has been raised. However, that issue cannot be canvassed through an affidavit. It is a substantive issue that, will require a formal application. But even if the court were to consider it, the pleadings relating to the suit HCCC No. 159 of 2017, *Chase Bank Kenta Ltd (In Receivership) vs Zalfrullah Khan &Others* have not been produced. Further, the 6th Defendant is not even a party to that other suit. I therefore do find no merit in the prayer for an order to strike out the suit and I dismiss it.

17. I shall now consider, the prayers seeking for striking out the 2nd Defendant and the 6th Defendant from the suit and/or proceedings. The 2nd Defendant relies on the affidavit dated 25th September 2019, sworn by Susan Yasher; an Attorney by profession and General Counsel of the 2nd Defendant. She avers that, the 2nd Defendant, is a private company limited by guarantee and domiciled in the United Kingdom.

18. That, the Deloitte network is made up of; separate and independent firms that have come together to practice under a common brand. Those entities are members in; Deloitte Global and together form the *"Deloitte"* network of firms. The member firm partners are generally the sole owners of their respective member firms, primarily organised on an individual country or regional basis and each operates within the legal and regulatory framework of its particular jurisdiction(s). The member firms are thus not subsidies or branch of Deloitte Global or any global parent, save that they have agreed to abide by common standards.

19. Further, in exchange thereof, the firms are permitted to use Deloitte's brand and intellectual property, receive the benefit of the network's market recognition and reputation, and gain the ability to consult with other firms in the Deloitte network. Therefore, Deloitte Global itself does not provide services to external clients

20. It was observed that, the Plaintiffs have raised various allegations in this suit against Deloitte Global inter alia that: (a) Deloitte Global is allegedly vicarious liable for the professional services offered by the first Defendant, Deloitte & Touche East Africa (herein "Deloitte East Africa) and (b) Deloitte East Africa is a subsidiary of Deloitte Global. However, the 2nd Defendant averred that, as aforesaid, while Deloitte East Africa is part of the Deloitte network, it is neither an agent of nor a subsidiary of Deloitte Global.

21. Deloitte East Africa is a separate and distinct legal entity from Deloitte Global and Deloitte Global does not have any functional control over Deloitte East Africa. Further, Deloitte Global does not have any influence over Deloitte East Africa regarding its provision of professional services of any particular client and therefore vicarious liability cannot lie against Deloitte Global in relation to actions by Deloitte East Africa.

22. That, Deloitte Global has never provided any financial or audit services to Chase Bank Limited (In Receivership) and/or the Plaintiffs; nor has it ever prepared any financial statements or audit reports for, of, and/or concerning; Chase Bank Limited (In Receivership). Therefore, the Plaintiffs are not known to Deloitte Global and neither does Deloitte Global have any knowledge of, and was not a party to, the acts complained of by the Plaintiffs in the plaint.

23. That a plain reading of the plaint makes it clear that no cause of action lies against Deloitte Global with respect to the matters set out in the plaint and none has been made out. Therefore, the suit is an abuse of the court process, and vexatious against Deloitte Global and that it should be struck out or otherwise it be removed as a Defendant therefrom.

24. However, the Plaintiffs opposed the application vide a replying affidavit dated 18th November 2019, sworn by Bishop Dr. Raphael Njuki Kituva who averred that; Deloitte Global is responsible for the authorization of the use of; the Deloitte and Touche brand by all member firms in its global network. That, Deloitte & Touche East Africa was engaged to conduct the audit of Chase Bank Limited (In receivership), for the reason that it enjoys the reputation and association with Deloitte Global and although the Applicant avers that, Deloitte Global is distinct in its operations with its member firms, its own publications speak otherwise.

25. That, the 2015 Global Report identifies Deloitte brand as a global network comprising of Deloitte Global, Deloitte member firms and affiliates. According to the Report, the Deloitte brand has a governance and management structure at both the global and member firm levels. The report further identifies the Deloitte Global Executive with a composition of; 26 Senior leaders from Deloitte Global and certain member firms as one of the governing bodies of the Deloitte network of firms. This organ performs various roles including; ensuring that Deloitte member firms including Deloitte & Touche E.A, offer high quality services to Deloitte clients globally.

26. Further, Deloitte Global Executive also provides guidance to Deloitte member firms on how they are to run their operations so as to uphold the high reputation associated with the Deloitte brand. In fact, the 2015 Global report provides that, Deloitte member firms are required to align their national plans, strategies and operations with those of Deloitte Global. Further member firms are required to adhere to the professional standards, shared purpose, methodologies, governance and system of quality control and risk set by Deloitte Global.

27. That the 2015 Global Report, also points out that, Deloitte Global Board of Directors is the highest governance organ of the Deloitte Network. Further, as per the report, the Board is required to address the Deloitte member firms' global strategies and major transactions. The Board's membership is drawn from the leaders of Deloitte member firms. Further, the Deloitte Global structure provides for a review and supervision mechanism within its network where firms under the Deloitte & Touche brand review each other's professional assignment.

28. The 2015 Global Report acknowledges that, the member firms have access to other members within the Deloitte network. That, where there is co-operation between Deloitte member firms on a particular assignment, the member firms are required to notify Deloitte Global. Accordingly, Deloitte Global is a central party to the present dispute.

29. Further to the foregoing, the Plaintiffs' Advocates on record issued a notice to requiring Deloitte Global to produce various documents which Deloitte Global has objected to. The said documents relate to the offering of audit services to Chase Bank (Kenya) Limited (In Receivership) at the centre of the Plaintiffs' claim.

30. The Plaintiff argues that, the liability of the Auditors in respect of claims of professional negligence is in a state of flux, accordingly, to determine the assumption of responsibility by any the Defendant herein, including Deloitte Global, would call for a full hearing with all the parties as sued. Finally, the Plaintiffs argue that there exists a triable issue as to whether the 2nd Defendant has assumed responsibility by allowing; Deloitte East Africa association with its brand name Deloitte.

31. However, the 2nd Defendant in response filed a further affidavit dated 25th November 2019, sworn by Susan Yasher reiterating the averments in the affidavit in support of the application and maintained that, the 2nd Defendant was not a party to the engagement between the 1st Defendant and Chase Bank (Kenya) Limited (In Receivership) and has no knowledge of the reasons for which the Plaintiffs engaged the 1st Defendant to conduct the subject audit.

32. That Deloitte Global report is published every year and provides an overview of the Deloitte Network, including highlighting the strategic vision of the network, discussing developments arising within member firm geographies and globally within a specific financial year and summarizing general trends across the Deloitte network of firms. Each member firm also publishes an annual impact report that provide the same information specifically relevant to their geography.

33. Further, Deloitte Executive team comprises of; certain leaders from member firms as this is the means by which the constituent Deloitte member firms are able to, among other things, address issues that arise across the network and also deal with alignment of standards, sharing of knowledge on emerging issues and trends, and general brand protections across the network.

34. That, representation of the member firms within the Board of the 2nd Defendants ensures that, the Deloitte Board is leveraging on the considerable talents and experience of senior member firm leaders who possess a deep understanding of the Deloitte network and ensures that, there is alignment in terms of strategic vision between Deloitte Global and the member firms.

35. The 2nd Defendant conceded that; Deloitte Global sets out standards in relation to management, governance, IT, branding, and quality of professional services, and that the Deloitte member firms agree to comply with those standards voluntarily in exchange for the privilege of

using the Deloitte name and brand.

36. That the review process alluded to by the Plaintiffs is for concluded assignments and not ongoing assignments. The purpose of the review is for the member firm to inter alia, assess the quality of professional services that the firm is providing to its clients. That, as the 2nd Defendant did not participate in the audit of the bank, it does not have any documentation related to that audit.

37. The voluntary agreement to adhere to a common level of quality in the services the members provide and commonality in branding cannot be a basis of alleging that the 2nd Defendant is liable for the actions of the 1st Defendant. Further, the 1st Defendant has in its defence filed herein confirmed inter alia that, the 2nd Defendant neither had control nor has direct involvement in the execution of its work and did not control the manner in which the 1st Defendant did the audit of the bank. That the 2nd Defendant does not own any interest in the 1st Defendant.

38. Therefore, it is not correct to hold that, the liability of auditors in respect of claims of professional negligence is in a state of flux as claimed. The laws in Kenya on professional negligence vis a vis auditor is not a relevant consideration as it relates to the 2nd Defendant for the reasons that; the 2nd Defendant did not perform any professional services in Kenya and therefore is not vicarious liable for the acts of the 1st Defendant.

39. It is noteworthy that; the provisions of; Order 10 Rule 1(2) of the Civil Procedure Rules provides that, the court may at any stage of the proceedings on its own motion or on the application of either party to the suit and on such terms as may appear to the court to be just order that, the name of any party improperly joined as Plaintiff or Defendant be struck out.

40. I have considered the arguments advanced by the parties and I find that, the main issue to resolve is whether; the 2nd Defendant was engaged by; Chase Bank (K) Limited (In Receivership) and/or is variously liable for the action of the 1st Defendant. The Plaintiffs have relied heavily on the Deloitte 2015 Global Report and the doctrine of vicarious liability.

41. Vicarious liability is a situation in which one party is held partly responsible for the unlawful actions of a third party. The third party also carries his or her own share of the liability. Vicarious liability can arise in situations where one party is supposed to be responsible for (and have control over) a third party and is negligent in carrying out that responsibility and exercising that control. The key word here is “control”.

42. The 2nd Defendant on its part, argues it has no control over the 1st Defendant. The court has been referred to several decisions inter alia; the case of;*Theo Bullmore v Ernst & Young Cayman Islands. 2006 WL 4682212(Sup. Ct. N. Cty. Apr. 12.2006), aff’d as modified, 45 A.D.3d 461 (1st Dep’t)* where the court stated that; “in the absence of a contractual relationship between the accountant and the party claiming injury, the potential for accountant liability is carefully circumscribed”.

43. Further, in the case of; *Firefighters’ Retirement Systems Et Al., vs Citco Group Limited ET Al., Civil Appeal No.13-373-SDD-EWD*, the court observed that, whereas, “GTIL has implemented certain polices and procedures, developed an audit planning tool, and periodically conducts review of its member firms to aid its members in providing consistent quality services, GTIL does not exercise complete authority over the general polices and day to day operations of GT-Cayman”

44. Similarly, in the case of; *Gutierrez v Cayman Islands Firm of Deloitte & Touche, 100 S.W. 3d 261 (Tex. Ct. App.2002) 2007),* the court held that, apart from maintaining a website and lending its name to multiple accounting firms, DTT had no relationship to the transactions in the case. It performed none of the work, had no interaction with the InverWorld, and did not provide any services to DT-Texas or to DT-Cayman in connection with the InverWorld, audit.

45. Finally, in the case of; *McBride v KPMG Int’l No 650632/09, 2014 WL 3707977 (Sup. Ct. N. Y. Cty Ju.l. 25, 2014) aff’d, 135 A.D 3d 576 (1st Dep’t 2016),* the Plaintiff raised similar arguments as raised by the Plaintiffs herein and the court held that; the Plaintiffs had failed to explain how operating a “single cohesive unit” evidences KMPG International’s control. That, the Plaintiff therein failed to identify any legal authority that would support a finding of “substantial control” over KPMG International’s member’s firms based on the facts adduced. The Plaintiffs allegations of substantial control was based on bare legal conclusions and therefore insufficient to support their claims.

46. However, the Plaintiffs herein on their part referred the court to several articles inter alia; W.V.H. Rodgers Winfield and Jolowich on Tort (London; Sweet and Maxwell, 1998, 15 ed), Paul L Davies, Sara Worthington, Gower’s Principles on Company Law, (London; Sweet and Maxwell, 1998, 16 ed), Uncertainty Legality of Bank Charges -Audit Obligations and Potential Liability: by Charles Kanjama, which deal inter alia with; the duty of care which the auditors and/or accountants owe in the execution of their professional duty.

47. Further reference was made to the cases of; *Siddell & Anor vs Smith Cooper & Partners (1999), PNLR 511 (CA)*, where the auditors were held liable to the directors of the company in providing advice about financial responsibility for the statements. Further reference was made to the case of; *Coulthard & others vs Nevill Rusell (1998), 1BCLC 143,(CA),* where the court observed that, the law on auditors liability was in a state of flux and it was possible the directors’ action against the auditors could succeed.

48. The Plaintiffs also cited the case of; *Andrew & Others vs Kounnis Freeman (199902 BCLC 641 (CA),* where it was held that, the law on auditor’s liability was in a state of transition and was developing pragmatically and incrementally, hence the legal results would depend upon the facts of the case after the full trial.

49. Finally, the case of; *Electra Private Equity Partners vs KPMG Pest Marwick & Others (2001) 1 BCLC 589 (CA),* where the court held that, there was triable issue as to whether the company’s auditors assumed liability for the company’s accounts.

50. Having considered the arguments and submissions together with the authorities referred to above, I find that, there is no evidence

adduced to show that, the 2nd Defendant was engaged by the 1st Defendant to offer any services to it. All the evidence and pleadings reveal that, the party that offered the services, in issue was the 1st Defendant; which has admitted it expressly in its defence, which supports the 2nd Defendants' position that, the 2nd Defendant did not offer any services to; Chase Bank (Kenya) Limited (in Receivership). Therefore, there is no express contractual relationship between the 1st and 2nd Defendant.

51. It suffices to note that, as aforesaid, the doctrine of privity of contract; provides that, a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. The premise is that, only parties to contracts should be able to sue to enforce their rights or claim damages as such. It therefore follows that, only the parties to the contract of provisions of the subject services, can sue and be sued on it.

52. In that regard, it is noteworthy that, this doctrine has proven problematic because of its implications for contracts made for the benefit of third parties who are unable to enforce the obligations of the contracting parties. Be that as it may, the Plaintiffs have not proved a contractual relationship between them and the 2nd Defendant, and/or with the 1st Defendant.

53. However, I concur with the Plaintiff's submission that auditors are liable for professional negligence both in civil and criminal claims; like other professionals such as; physicians, lawyers and architects. Thus, an auditor can be found liable either; under the common law or a statutory law. Common law liability arises from negligence, breach of contract, and fraud. Statutory law liability; is the obligation that comes from a certain statute or a law which is applied to society. The scope of both common law liability and statutory liability has been expanded to include certain third parties, mainly the foreseen or foreseeable users of audited financial statements.

54. It therefore follows that; an auditor is in a contractual relationship with a client. If the auditor does not perform his or her side of the bargain according to contract terms, the client can sue for breach of contract. A client may seek remedies for breach of contract: (1) specific performance; (2) general monetary damages for losses incurred as a result of the breach; and (3) consequential damages that occur indirectly as a result of the breach.

55. However, the claiming party must prove "privity of contract" between the parties. The legal authorities cited by the 2nd Defendant establish the legal principle that; for the auditor or accountant to be held liable in negligence, the underlying relationship between the parties must be one of "contract"; (*Ossining Union Free School Dist vs Anderson La Rocca Anderson 73 NY2d 417, (1989)*

56. In the instant case, as aforesaid, there is no evidence that, Chase Bank (K) Limited retained the 2nd Defendant to offer it any audit services. Further there is no evidence that, by virtue of use of a brand name "Deloitte" the 2nd Defendant had "substantial control" of the 1st Defendant, or constitutes consent to act for the 1st Defendant.

57. Further, other than the report referred to herein the Plaintiffs did not identify any legal authority that, supports its allegations that, the 2nd Defendant had substantial control over the 1st Defendant. I fully associate with the legal principles in those cases cited by the 2nd Defendant, that the 2nd Defendant is not vicarious liable over the actions of the 1st Defendant.

58. I therefore allow the 2nd Defendant's application dated 27th September 2019, and order that the 2nd Defendant be and is hereby be struck out of the suit and/or proceeding herein. The Plaintiffs will not suffer any prejudice as the 1st Defendant is still a party to the suit. I award the costs to the Applicant.

59. I shall now consider the 6th Defendant's application filed on the 11th June 2019; where it seeks to be struck out of the suit, on the grounds that:

> *a) There has been a misjoinder of the 6th defendant/applicant to the suit in view of the fact that no specific allegations or reliefs have been made and/or sought against the 6th defendant in the suit;*
>
> *b) Section 46(1)(a) of the Kenya Deposit Act No 10 of 2012 (the KDI Act) expressly prohibits the institution of civil proceedings against the 6th Defendant;*
>
> *c) The plaintiffs do not have a valid cause of action against the 6th defendant.*

60. The 6th Defendant relies on the affidavit of its the General Manager- Resolution; David Irungu sworn on 11th June 2019. He deposed that, upon receipt of the audit review of; Chase Bank (Kenya) Limited (in Receivership), the 5th Defendant placed the Chase Bank (Kenya) Limited; in Receivership and on 7th April 2016, appointed the 6th Defendant as a Receiver for, Chase Bank (Kenya) Limited for a period of twelve (12) months.

61. That, the 6th Defendant took control of the bank and appointed Kenya Commercial Bank (herein "KCB") as manager in accordance with section 44 (b)(iii) of the Kenya Deposit Insurance Act. Pursuant to its powers, the 6th Defendant proceeded to take steps in order to safeguard the interests of the depositors and other stakeholders.

62. The 6th Defendant argued that, the Plaintiffs have failed to show or demonstrate that, the 6th Defendant has acted beyond its powers, when exercising its powers as a Receiver; pursuant to section 50 (1) of the KDI Act. That any acts taken by the 6th Defendant were lawful and valid and undertaken in accordance with the provisions of the Act.

63. The 6th Defendant argued that, the Plaintiffs have not shown any valid cause of action against the 6th Defendant and the Plaintiffs cannot found its suit on the basis of; alleged failure by 6th Defendant to consult or consider submission or proposals of the Plaintiffs, in respect of the decision to declare a moratorium or in respect of the decision to undertake an exclusion and transfer process or disclosure information to the Plaintiffs relating to the affairs of Chase Bank (Kenya) Limited (In Receivership).

64. However, the Plaintiffs opposed the application through a replying the affidavit of; Andrew Muma Senior Partner at Muma & Kanjama Advocates dated 1st July 2019. He deposed that, the plaint under paragraphs 24 to 29; clearly outlines the claims as against the 6th Defendant, that, it operated in secrecy and failed to take into account the interests of the depositors and thus contributed to the negligence in the collapse of; Chase Bank Ltd.

65. I have considered the application and the arguments advanced together with the submissions tendered and I find that, section 46 of the Kenya Deposit Insurance Act No.10 of 2012, states that:

> *"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.*

65. It is clear that, the aforesaid provisions expressly prohibit institution of a suit against the Corporation, save for a person claiming that; they have sustained losses as a result of the action of the Corporation. However, the Corporation acts as an agent of the Chase Bank Limited in Receivership. It suffices to note that, the Plaintiffs are seeking for leave to enjoin Chase Bank Limited (in Receivership), as a party to the suit. Therefore, the Bank in Receivership and the Corporation cannot both be parties in the suit.

66. In view of the aforesaid statutory provisions and the other reasons given and in view of the fact that, it is the Bank that contracted for the services in issue, I allow the prayer for leave to join the Chase Bank Limited (In Receivership), as a party to these provisions and the 6th Defendant's prayer to be struck out of the proceedings. I make no orders for costs in favour of the 6th Defendant that will remain in the suit representing the Bank in Receivership.

67. I now turn to the application dated 4th April 2019, based on the affidavit sworn by Bishop Rev. Joseph Memba Syuma. The Applicants avers that, in the month of December 2015, the 2nd and 3rd Plaintiffs entrusted the 1st Defendant with trust funds in the sum of; Kshs 194,882,865.45, for an ongoing transaction. The sum was banked with Chase Bank (Kenya) Limited; (In Receivership).

68. On 7th April 2016, the Bank went into Receivership and was subsequently acquired by SBM Kenya Limited. However, only 75% stake of the total sum was transferred to the acquirer, and 25% got lost alongside the interest as stated in the plaint herein. The Plaintiffs avers that, there are many other former depositors of, Chase Bank (Kenya) Limited (In Receivership"), who have the same claim or interest as the Plaintiffs herein against the Defendants, and who may be willing to be joined in these proceedings as Plaintiffs against the Defendants.

69. The Plaintiffs argue that these people will be catered for if the court granted the Plaintiffs leave to continue this suit as a class action and such joinder will go a long way to prevent multiplicity of suit involving the Plaintiffs as against the Defendants over the same cause of action. That upon grant of leave as sought and due to the impossibility of the Applicants effecting service upon all these other persons, the Applicants be granted leave to effect service by way of one daily newspaper advertisement of national wide coverage.

70. However, the application was opposed by the Defendants who filed their grounds of opposition. The 1st Defendant filed their grounds dated 8th May 2019, the 2nd Defendant dated 1st November 2019, the 3rd Defendant dated 12th July 2019, the 5th Defendant dated 13th May 2019 and the 6th Defendant dated 14th May 2019 and 17th July 2019.

71. Analysis of the grounds reveal that; the Defendants argue that the relationship between the Plaintiffs and Chase Bank (Kenya), Limited (In Receivership) or proposed 7th Defendant is contractual in nature and creates rights and obligations as between the parties to that contract and therefore each depositor is separate and distinct and has a different interest in their contract with the proposed 7th Defendant and their respective claims cannot be a basis of class action.

72. Further the Plaintiffs have failed to demonstrate the existence of a common grievance to be advanced by the unidentified proposed Plaintiffs. There is no commonality of issues. The claims as framed raise different causes of action against each Defendant calling for distinct defence and responses from the Defendants that is likely to be the case with other parties. That, having a class action will cause delay which goes against the overriding objectives.

73. That the application does not meet the requisite tests of a class action as set out under; Order 1 Rule 10 of the Civil Procedure Rules, as the Plaintiffs have not shown nexus between themselves and the class they wish to represent and which class is not ascertainable from the Plaintiffs application. In addition, special damages are specific to each Plaintiff and cannot be applied to the class. That, each depositor will be required to individually prove their own case for the 25% of the unrecoverable deposits

74. It was also averred that, to grant leave for this suit to continue as a class action would place the Plaintiffs and the intended depositors in a preferential position over the other creditors of Chase Bank (Kenya) Limited (In receivership).

75. I have considered the arguments advanced by the parties on the subject issue and I note that, Article 22 (2) (b) of the Constitution of Kenya 2010, empowers any person to bring an action on behalf of a certain class or a group of persons. It is states that: -

> "*In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by – (b) a person acting as a member of, or in the interest of, a group or class of persons.*"

76. Similarly, Order 1 Rule 8 of the Civil Procedure Rules, 2010, provides that: -

> *a) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more of them as of all in same representing all or as representing all except one or more of them;*
>
> *b) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct;*
>
> *c) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.*

77. In the case of; *Trustees for the Time Being of Children's Resource Centre Trust and others V Pioneer Food (Pty) Ltd and others (050/2012) [2012] Zasca 182* the court stated: -

> "*The class action serves to bring a number of separate claims together in one proceeding. In other words, it permits the aggregation of claims. However, that is not its only function. Of equal or greater importance, as Professor Silver points out, is the fact that the class action is 'a representational device'. It is: "…a procedural device that expands a court's jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case"*.

78. From all the legal provisions cited, it is evident that, for the court to allow a class action, the Applicants must prove inter alia that; there are numerous parties to the suit and they have significant or sufficient "same interest", or "common interest" against the same person(s). There should be "community of interest", whether it arises from the same transaction or not.

79. In the instant matter, it is not in dispute that, each intended party entered into an individual contractual bank customer relationship with the intended and/or proposed 7th Defendant: Chase Bank (Kenya) Limited (In Receivership). In that regard, the common thread is the fact that they are the bank's customers. The other common link is that, they may all be interested in recovering the 25% of their funds that have not been recovered.

80. However, as can be deduced from the nature of a bank customer relationship, each party contracted with the bank on different dates and held different types of accounts, unique to individual account holders and operated under different mandates and/or guided by different terms of engagement with the bank. Therefore, even if the class action is allowed, each individual account holder will have to file a separate suit against not all the Defendants but the specific bank and adduce evidence to support the specific amount claimed.

81. Further the 4th Defendant submitted that, the Plaintiffs have not disclosed the number of intended parties to be enjoined to meet the criteria of numerous. However, the 5th Defendant in its submissions, alluded to a figure of 50,000 plus. If that figure is anything to go by then, then it may satisfy the numerous numbers but then, one cannot under estimate the voluminous documents that will be produced. This may therefore delay the hearing of the suit and/or defeat the main purpose of joining parties to a suit, which is to enable the court to deal with matters brought before it expeditiously as envisaged under section 1A and 1B of the Civil Procedure Act.

82. Further, as submitted by the 5th Defendant some of the alleged sums to be recovered may be a subject of encumbrance under contractual rights inter alia; of set off; appropriation, combination or consolidation of accounts and/or security for advances made. Therefore, not all

depositors may have an automatic right to recovery of the subject sum.

83. In addition, some of these claims may be statute barred and as submitted by the Defendants to allow the class action may defeat, the Defendant's intended defence of limitation of actions under section 4 of the Limitation of Actions Act.

84. All in all, I find that, the Plaintiffs have not satisfied the criteria for grant of leave to continue this suit as a class action. I am also live to the fact that, the 6th Defendant has filed other suits to recover the sums that are sought for by the Plaintiffs and therefore failure to grant leave will not prejudice the Plaintiffs and even then, the Plaintiffs can still pursue its suit as it is. I decline to grant the leave.

85. In summation, the notice of motion application dated 4th April, 2019 is only allowed in so far as leave to join Chase Bank (Kenya) Limited (In Receivership) is concerned. All other prayers are not allowed. No orders are made as to costs at this stage to await the outcome of the suit.

86. Those then are the orders of the court.

Dated and delivered virtually on this 6th day of July 2020.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr. Simiyu holding brief for Mr. Kanjam for the plaintiff

Mr. Owiti for the 1st Defendant

Ms. Mwango for the 2nd Defendant

Mr. Wachira for the 3rd Defendant

Mr. Owiti holding brief for Mr. Mogire for the 4th Defendant

Ms. Kavagi for the 5th Defendant

Ms. Aisha for Chege for the 6th Defendant

Robert---------- Court Assistant