



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 36 OF 2016

ASHOK L DOSHI.....1ST PLAINTIFF

AMIT A DOSHI.....2ND PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA.....1ST DEFENDANT

IMPERIAL BANK LIMITED.....2ND DEFENDANT

RULING

1. Rather than seek to have the plaintiff's application dated 19.4.2016 heard on the merits having filed grounds of opposition and replying affidavit, the parties opted to urge the preliminary objection filed by the 2nd defendant and dated the 12.5.2016. The notice of that Preliminary objection reads:-

"TAKE NOTICE that at the hearing of the Plaintiff / Applicant's Notice of Motion dated the 19th April 2016, the 2nd defendant/Respondent will raise the following Preliminary Objection:

1.This suit and the application for injunctive orders are filed contra statute; without the sanction of this honorable court, as prescribed under Section 47 of the Banking Act Cap 488 of the Laws of Kenya, and Sections 46 and 56 (2) of the Kenya Deposit Insurance Act, Cap 487C of the Laws of Kenya, and therefore a nullity.

2. In the absence of an application seeking, and an order of the court granting the requisite sanction, this honorable court lacks jurisdiction, and cannot therefore entertain the instant application and suit."

2. In its words the preliminary objection impugns the suit for having been filed contrary to the statutory provisions requiring leave prior to filing suit and secondly that the suit ought to have been filed in Nairobi and not Mombasa. For those two reasons the defendants contend that the court has no jurisdiction to entertain the suit. The notice itself does not say what the objection seeks to achieve but on oral submissions the defendants asked the court to strike out the suit.

3. Having considered the pleadings filed, the submissions offered and authority cited, I have come to the view that the following issues present themselves for determination by the court.

a) Is the court's jurisdiction ousted by the statutes quoted?

b) Should the suit be struck out?

Analysis and Determination.

4. The analysis of the points of law invoked in the preliminary objection may not be properly made and put in context without reproducing the cited provisions of a law. Section 47 of the Banking Act on its side provides:-

"(1) the high court, on application made ex- parte by the Minister or, where a manager or liquidator has been appointed by the Central Bank, may, if it considers it to be in the interest of the depositors of an institution, make an order:-

(a) prohibiting the institution from carrying on business; or

(b) staying the commencement or continuance of any actions or proceedings against the institution in regard to any business for a specified period of time on such terms and conditions as it considers reasonable, and may from time to time extend the specified period up to a total of six months from the beginning of the stay.

(2) so long as an order under paragraph (a) of subsection (1) remain in force, the license granted to the institution under this Act shall be deemed to be suspended. "

Section 56 Kenya Depositors Insurance Act provides:

56. stay of proceedings

(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.

(3) No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue

Does the court have jurisdiction to entertain this matter:

5. It is now trite that the jurisdiction of this court is underpinned by the Constitution itself. That jurisdiction is unlimited save for the limitation provided by the Constitution under Article 165 (5). From the onset, it is evident that there is nothing in Section 47 of the Banking Act that can be feigned to support the preliminary objection. My view is that what that section does is to reserve the supervisory jurisdiction of the High Court as the court vested with jurisdiction to determine company disputes to supervise the operations of a bank or financial institution which has been placed under liquidation or management including control of its trading activities extending to commencement, continuance and staying of any proceedings against the institution on terms considered reasonable. The intention is not very difficult to discern. The words of the statute are evident that all is done for the protection of the institution and its depositors. The foregoing lead me to the conclusion that section 47 of the Banking Act puts no fetter on the jurisdiction granted and bestowed upon this court by the constitution.

6. On section 56 of the Kenya Deposit Insurance Act, I note that the Section cited and relied upon is to be found at part VI of the Act headed *RECEIVERSHIP LIQUIDATION AND WINDING UP*". A reading of the Act reveals that Sections 43 to 53 govern and deal with receivership while section 54-59 concern themselves with liquidation. The documents filed in the file and the pleadings are unanimous that the 2nd defendant was on the 13.10.2015 placed under the receivership by the Kenya Deposit Insurance Corporation (KDIC) for a period not exceeding 12 months.

7. There is no evidence at all, save for the insinuations in the submissions that the institution has been placed under liquidation to justify the invocation of its provisions of section 56 of the Kenya Deposit Insurance Act.

8. It is apparent to me that the preliminary objection was conceived and prosecuted on the understanding that the said defendant has been placed under liquidation. Were that to be the case it would be an open and shut case to invoke the provisions of section 56(2) and the decisions in **Bisai & Another Vs Kenya Commercial Bank Limited & Others [2002] 2 EA 346, Kwanza Estates Limited VS Dubai Bank Of Kenya Limited[2015]eKLR and Ruth Wanjiku Kagiri Vs Reliance Bank Limited [2012] EKLR.** For this matter, the second defendant being merely under receivership, those decisions were all cited out of context as much as the same concerned liquidation positions and not receivership.

9. A casual reading of the statute would reveal that it is only Section 46 of the Act which legislates some limited right to sue but the limitation is only to protect the corporation or the appointed receiver from being restrained from assumption of control of the institution and no more. In fact the provision expressly allows any person who suffers any losses from actions of the corporation or the appointed person to institute an action for damages for the losses suffered by that person. I find and hold that nothing in the statutes relied on before me suggest that the appointment of a receiver divests the institution of its corporate stature and capacities in as much as there is nothing in those provisions that insulate it from being sued. If I was wrong on the findings then the provisions of section 45(5) is of good guidance. It provides:

"(5) 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, business 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. "

10. It is evident to the court that section 56 is the successor to section 288 of the companies Act (Now repealed) which also concerned itself with only situations where winding-up order had been made and or an interim liquidator appointed and never for a receiver manager.

11. Consequently I find that the decisions relied upon by both defendants in support of the preliminary objection were, as much as the statutory provision, relied upon out of misapprehension of what they stand for.

12. This objection therefore is a *classicus* of what **sir Charles Newbold, P, in Mukisa Biscuits manufacturing co Ltd -vs- westend Distributors Ltd[1969]EA 696,** had in mind when the judge said:-

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion. The improper raising of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice must stop." (emphasis provided)

13. Put in the context of the matter before me, it is difficult to fathom why it was decided to be desirable that the objection could not have been argued as an position of the application as envisaged under Order 51 rule 14 (1).The consequence, as prophesied by sir Charles Newbold, is that this suit, and the application, have bought for themselves undue and unmerited delay measurable as the period between the 25.5.2016 when the objection was argued and today when we have delivered this decision . To this court the amount of time employed to canvass the objection was enough if employed for the

determination of the application for injunction. The time spent on the objection which is evidently unsuitable as a preliminary objection is regrettably disproportionate.

14. The foregoing findings having disposed the first issue equally determines the second issue. It follows that if the suit is properly instituted and the question of it being struck out does not arise. To the contrary it is the preliminary objection that lacks merit and I order it dismissed with costs payable by the second defendant to the plaintiffs.

15. I have pointed out that the parties, particularly the respondents have filed responses to the application dated 19.04 2016. I take notice that this matter even though is disclosed to be pending between the two plaintiffs and the two defendants, the effect of the order in force may have effects further and beyond the said disclosed parties taking into account the fact that the 2nd defendant was prior to being placed under receivership a deposit taker. For that reason and for the sake of case management the application dated 19.04.2016 is hereby fixed for hearing on the 15.08.2016

16. It is so ordered.

Dated and delivered this 15th day of July 2016.

In the presence of:

Ms Rajab for the Plaintiff/Applicant.

Mr Murgor for the 2nd Defendant /Respondent.

Mr Chege for the 1st defendant/respondent.

P.J.OTIENO

JUDGE