



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 44 OF 2013

KWANZA ESTATES LIMITED.....PLAINTIFF

VERSUS

DUBAI BANK OF KENYA LIMITED.....DEFENDANTS.

RULING

1. This matter was listed before me today for purposes of the parties, to it, highlighting their respective submissions as ordered by court on the 23/7/2015.
2. The plaintiff did file written submissions on the 7/8/2015 being the 15th day after the 23/7/2015 contrary to the court order compelling it to file and serve within 14 days from 23/7/2015.
3. The Counsel to the parties in the Notice to show cause however had not filed any submissions by the time the file was placed before me.
4. When the matter was called out, Mr. Buti, for the plaintiff, informed the court that he had complied and pleaded with the court to proceed and make a determination on the N.T.S.C. based on his submissions and the proceedings taken on the 23/2/2015. At the prompting by Mr. Mwenesi for the defendant, he also informed the court that he had indeed filed an application this morning which application had been served upon Mr. Mwenesi but had not been put on the court file. He however handed over to the Court a copy for the records.
5. Mr. Mwenesi on his side, sought the courts indulgence to keep the determination on the N.T.S.C in abeyance for, he said, developments has occurred after the 23/7/2015 which had made the furtherance of the court orders of 23/7/2015 seeking to be relooked at.
6. He said and did hand over to the court and Mr. Buti copies of correspondence attaching the following documents:-
 - Gazette notice dated 27/8/2015 appointing a liquidation agent.
 - Newspaper advert dated notifying the public of the appointment of the Kenya Deposit Insurance Corporation (henceforth KDIC) as a receiver manager of the Defendant, Dubai Bank of Kenya Ltd, by the Central Bank of Kenya.
 - A Press Release dated 25/8/2015 by Central Bank of Kenya notifying the general public of appointment of the Kenya Deposit Insurance Corporation as the liquidator of the bank and, among other, directing persons with claims or questions to communicate with the KDIC on

the addresses provided in the press release.

7. He therefore urged the Court to put the determination on the notice to show cause in abeyance pending the outcome of the Notice of Motion dated 2/9/2015 and filed in court on the same day seeking:-

i. The courts leave to proceed with the suit against Dubai Bank of Kenya Ltd from where it had reached and expressed to be brought pursuant to the provisions of Section 50(4) and 56(2) of the Kenya Deposit Insurance Corporation Act (No. 10 of 2012).

ii. The injunctive order granted by the court on 2/8/2013 against Dubai Bank of Kenya Ltd to continue in force.

iii. The liquidator (Kenya Deposit Insurance Corporation) be enjoined (sic joined) in these proceedings as a party thereto in the position of the defendant for purposes of continuity of this suit.

iv. Costs of the application be provided for

8. In essence the two Counsels are not in agreement on the effect of the defendant being put under liquidation on the further progress in this suit. Mr. Buti contends that by operation of the KDIC Act Section 56(1) the N.T.S.C. Being against the individuals as opposed to the constitution is severable and ought to proceed as the same cannot be taken against the liquidator. Mr. Mwenesi on his part holds the view that there being only one defendant, DUBAI BANK OF KENYA LTD, against whom an order has been made in these proceedings, and its N.T.S.C. having been issued against the two individuals in their capacities and on account of their offices with the said defendant, it was section 56(2) and not 56(1) that was applicable.

9. I am called upon to determine whether the Notice to show cause issued against HASSAN ZUBED & BINY KUMAR DUTTA in their capacities as officers of the defendant is an independent order severable from the proceedings against the defendant. To help me make my determination I have been referred, by Mr Buti, to the statute, Kenya Deposit Insurance Corporation Act, No.10 of 2012.

10. On my part I am of the learning that under the Banking Act, Sections 3,4,5 & 6, the regulation of banking sector in Kenya is the mandate of Central Bank of Kenya whose mandate is to, among other; license, certify, Supervise, gazette, and where need be revoke a license issued.

11. I am equally aware that in its mandate, the Central Bank Of Kenya licenses legal persons registered under various statutes to operate banking business. My reading of the Banking Act, the Central Bank of Kenya Act and the Kenya Deposit Insurance Corporation Act reveal that there is always reference to institutions rather than individuals for purposes of license to undertake banking business.

12. The view that commends itself to me on the character of a banking institution is that it ought to have a legal personality in order to be considered for license in the first place and for the continuity in the business once licensed.

13. This position leads me to ask whether a company incorporated under the Companies Act, and licensed to operate under the banking act, when placed under liquidation can legally be divorced from the dictates and operations of the Parent Act? I am also minded to question the purpose and need to have the provisions of Section 56(1) of the KDIC Act.

14. It is, noteworthy that the plaintiff is aware that the defendant it sued has been placed under liquidation hence the need for leave of the court to allow the matter proceed as against the liquidation agent. It has demonstrated its appreciation of the position by filing the application already alluded to above. In that application it is clear that the plaintiff takes cognisance of the fact that once a liquidation agent is appointed the leave of the court for the matter to proceed is mandatory. It however contends that the N.T.S.C. is a separate proceedings against individual and

not the institution sued as the defendant.

15. The court posed to Mr. Buti the question whether there is an order as against these two individuals as individuals and not as Chairman and Director of the defendant. His answer was that there exists a Notice To Show Cause.
16. My reading of the record reveals to me that the order sought to be enforced against the individuals was indeed an order issued against the bank which can only be complied with by the said defendant through the natural persons against whom the notice to show cause was issued.
17. I am unable to separate the two individuals from their positions as officials of the bank and to order that as the matter against the bank is put in abeyance the N.T.S.C. against them, as officials of the defendant, may proceed.
18. To do that, in my view, would make the individuals substantive parties in the suit when they are not.
19. As said above, the N.T.S.C. against the individual is for the enforcement of the court order of 27/11/2013 where the court said:-

“I am of the view that leave to seek for the committal of the Respondents is merited. I therefore grant the leave sought in prayer number 1 of the Notice of Motion dated 20/9/2013. Although the applicant has invited me to exercise my discretion to order the Respondents immediate arrest, I am of the view that the right to liberty is so high that a party's right to liberty is so high that a party's right to liberty can only be interfered with when such party is given opportunity to be heard.

It is for that reason that I order, HASSAN ZUBEDI and BINAY DUTTA do appear before court on 9th December 2013 to show cause why the court should not commit them to prison for disobeying the orders of 8th August 2013.”

20. What were the orders of 8th August 2013? I ask.

I have read the extracted order of 8/8/2013 and order no. 3 was worded as follows:-

“That a mandatory injunction be and is hereby granted Compiling the Respondent to deposit in court a sum of kshs. 167,000,000 together with interest thereon, in total, kshs. 197,801,205/48 as at 31/3/2013 being the applicant's deposit, within 45 days from today's date”

21. If the foregoing be the state of the court record then I find that the order sought to be enforced was an order against the defendant now under liquidation. To me no other order exists as against the individuals in their personal capacities.
22. That being the position I find that to proceed with the proceedings on the Notice to show cause will be to seek enforce the order against the defendant while under liquidation. That to me would run affront the provisions of sections 56(3) of the Kenya Deposit Insurance Corporation Act (No. 10 of 2012), which provides:-

“(3) No attachment execution or other method of enforcement of a Judgment or order against the institution or its assets may take place or continue.”

23. I am convinced that the arrest and detentions sought of the two individuals is a method of enforcement of the Order of 8/8/2013 against the defendant. The law says it is impermissible.

Conclusion;

- i. Pursuant to the actions and decision of the Central Bank of Kenya to appoint a liquidation agent, against the defendant, this matter by operation of section 56(2) of the Kenya Deposit Insurance Corporation Act, cannot proceed prior for the plaintiffs application dated 2/9/2015 being heard and

granted.

- ii. No orders now existing in the file as against the defendant may be enforced in whatever manner by operation of section 56(3) of the KDIC Act prior to compliance with section 56(2) as aforesaid.
- iii. The application by the plaintiff dated 2/9/2015 need be dealt with expeditiously to move this matter forward and in the spirit of Article 159 of the Constitution of Kenya 2010. To Achieve this purpose, I direct that the Application shall be mentioned before court on 28/10/2015 to confirm if the liquidation agent shall have file responses thereto, and if it shall not have so acted, the liquidation agent, Mr Adam Mohamed Boru, shall attend court to answer to the application in person.

Today's costs are ordered to be costs in the cause.

Dated signed and delivered in the presence of

1. Mr.Buti for the plaintiff.
2. Mr.Mwenesi for the defendant.

This 3rd day of September, 2015.

P.J.O.OTIENO

JUDGE

Mr.Buti: I seek leave to appeal against the decision reached in finality on the application of Section 56(3) of the Act No. 10 of 2012.

Mr.Mwenesi; He is entitled to leave.

Court: Leave granted to the plaintiff to appeal against the portion and the ruling regarding section 56(e) of the Act no. 10 of 2012.

Dated, signed and delivered at Mombasa this 3rd day of September 2015.

P.J.O.OTIENO

JUDGE