



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 212 OF 2016**

**BOUGAINVILLE ESTATE LIMITED.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA DEPOSIT INSURANCE CORPORATION (sued in their capacity as Receiver Managers of**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....1<sup>ST</sup> RESPONDENT**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....2<sup>ND</sup> RESPONDENT**

**ARIANA FAVARETTO.....3<sup>RD</sup> RESPONDENT**

**WALTER USSAI.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Complaint dated 25<sup>th</sup> July 2016 as filed herein on 12<sup>th</sup> August 2016, Bougainville Estate Ltd (the Plaintiff) seeks various declaratory and injunctive orders against some four Defendants. The Kenya Deposit Insurance Corporation (the 1<sup>st</sup> Defendant) is sued in its capacity as the Receiver Managers of Imperial Bank Ltd (in Receivership) while the 2<sup>nd</sup> Defendant is the Imperial Bank Ltd itself.

2. Subsequently by a Notice of Preliminary Objection dated 20<sup>th</sup> November 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants object to the hearing of the Plaintiff's suit on the grounds that:-

- i. At the time of the institution of this suit, the 2<sup>nd</sup> Defendant was already placed under receivership;**
- ii. As per the requirements of Section 56(2) of the Kenya Deposit Insurance Act( Act No. 10 of 2012), leave of Court to institute proceedings against an institution under receivership is a condition precedent and mandatory;**
- iii. The Plaintiff, contrary to the above provisions has instituted proceedings against the 2<sup>nd</sup> Defendant without obtaining leave of Court; and**
- iv. As such, the suit is fatally defective and ought to be struck out with costs.**

3. In their Submissions before the Court, the Plaintiff does not deny that the 2<sup>nd</sup> Defendant herein is in receivership. It is however their case that the provisions cited by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do not apply herein as the suit has not been instituted solely against the 2<sup>nd</sup> Respondent but also against the 1<sup>st</sup> Defendant who are the Receiver managers of the 2<sup>nd</sup> Defendant.

4. Section 56(2) of the Kenya Deposit Insurance Act(No. 10 of 2012) provides as follows:-

**“No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the Court.”**

5. Explaining the import of the said provision in *Andrew G. Muchai –vs- Chase Bank Ltd(2016) eKLR*, Nzioka J observed and I concur as follows:-

“...In my opinion to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. Thus receivership is a preservation process put in place to protect the assets, liabilities and business affairs of a bank with the aim of protecting the interests of its depositors, creditors and members of the public. In this case to preserve the bank’s liquidity, assets, and to find the best way to return it into normal business.”

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. The main aim is thus to create orderliness, decency and avoid a floodgate of actions, which may involve some of the matters placed under supervision. This is informed by the fact that when Chase Bank Kenya (in receivership) was placed under receivership, the Kenya Deposit Insurance Corporation declared a moratorium to the Bank’s business to be undertaken by all stakeholders of the bank; including limiting the Bank’s services. A moratorium is a temporary delay or suspension of an activity. The same prohibits a Bank from inter alia, receiving deposits and making payments, unless it is partially or fully lifted by the Kenya Deposit Insurance Corporation. Thus suits cannot be commenced *suo moto* without the Court’s leave and/or sanction. That will create anarchy. I hold that, for a company under receivership, a party suing it must seek the Court’s leave before commencing a suit against it. Therefore, institution of any proceedings will require the sanction of the Court.....

6. Arising from the foregoing and noting that the Plaintiff concedes that no leave of the Court was sought prior to the filing of this suit, I am persuaded that the Preliminary Objection has merit.

7. Accordingly I hereby uphold the Objection and strike out the suit as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with costs.

Dated, signed and delivered at Malindi this 5<sup>th</sup> day of December, 2019.

J.O. OLOLA

JUDGE