



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 355 OF 2017

NORTHWEST (K) LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION (OFFICIAL

RECEIVER FOR CHASE BANK LTD).....1st DEFENDANT/RESPONDENT

KEYSIAN AUCTIONEERS.....2nd DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 29th March 2017 and filed on the 11th April 2017 under Order 30 Rules 1, order 41 and order 51 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law where the Plaintiff/Applicants' seeks orders that:-

i. Spent

ii. Spent

iii. That pending the hearing and determination of the suit, the 2nd Respondent, its servants, agents and/or employees acting on the instructions of the 1st Defendant/Respondent be restrained by order of injunction from selling by way of public auction property known as L.R No. Nyandarua /Ndemi/7183.

iv. That costs of this Application be provided for.

2. The said application was supported by the grounds on its face and an Affidavit, sworn by George Ruitiyu Mukabi the Director of the Plaintiff/Applicant herein.

3. On the 11th April 2017 the court gave ex-parte orders of injunction and thereafter directed that the application be served for inter-partes hearing.

4. That when the matter was called out for inter-partes hearing, on the 3rd May 2017, the 1st Respondent was not ready to proceed as Counsel had just been instructed and sought for time to file their response to the application. There was no appearance by the 2nd Respondent. The court adjourned the matter with an extension of the interim orders.

5. That pending the hearing of the application dated the 29th March 2017 inter- partes, the Respondents

herein filed a notice of Preliminary Objection dated 27th June 2017 to both the Plaintiff's suit and application, seeking that both be struck out and/or dismissed with costs on the grounds that:

i. The Plaintiff/Applicant had not sought leave of the court to commence or continue with the suit herein against the Chase Bank Ltd which is under receivership.

ii. That the suit and all proceedings taken against the Defendant/Respondents therefore is a nullity ab initio.

iii. That Plaintiff/Applicant's application is therefore incurably defective, bad in law and ought to be struck out.

6. On 29th June 2017, the court directed that parties dispose of the application on the Preliminary Objection first by way of written submissions and thereafter highlight their submissions.

7. The Defendant/Respondents filed their submissions in support of their Preliminary Objection on 30th October 2017 whereas the Plaintiff/Applicant also filed his submissions on the same date.

8. The gist of the Defendant/Respondent's submissions in support of the Preliminary Objection was grounded on section 56(2) of the Kenya Deposit Insurance Act which required that leave ought to be sought before an injunction application or civil suit could be brought against an institution on receivership.

9. That in the present case leave was a mandatory precondition and the failure by the Plaintiff/Applicant to seek for leave before filing of the suit rendered it incurably defective.

10. That the 1st Defendant was appointed as the official receiver for Chase Bank (In receivership) by the Governor of Central bank vide Gazette Notice No. 2320 of 7th April 2016 in pursuant to section 43(1) (2) and 53 (1) of the Kenya Deposit Insurance Act effective from 7th April 2016 for a period of 1 year. That the Receivership was later extended to 6 months from the 7th April 2017.

11. The plaintiff filed the present suit on the 11th April 2017 against the Kenya Deposit Insurance Corporation when Chase Bank was still under receivership in contravention of Section 56(2) of the Kenya Deposit Insurance Act which is instructive as to commencement of proceedings against an institution in receivership as follows;

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.

12. This section, submitted the Defendant, was mandatory to the effect that leave of the court had to be sought before a suit could be instituted on an institution in receivership and thus failure to seek leave rendered the suit incurably defective.

13. That the essence of the leave was so as to ensure that a plaintiff has a valid claim over an institution and thus when Chase bank was placed under receivership, a moratorium was declared on the bank's business and thus suits could not be commenced without leave of the court.

14. That the orders issued on the 11th April 2017 ought to therefore to be recalled, cancelled and/or vacated.

15. The Respondents relied on the case of **Andrew Gikuni Muchai vs Chase Bank Ltd & Another (High Court Civil Suit No 241 of 2016)** (unreported) to buttress their submission.

16. The Defendants also relied on the case of **Speaker of The National Assembly vs. James Njenga Karume [1992] eKLR** where the court held that:

‘...where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.’

17. In the present case therefore, the failure by the Plaintiff/Applicant to seek for leave to file suit against the Defendant/Respondent rendered the suit fatally defective and thus it ought to be struck out and/ or dismissed as these provisions were mandatory.

18. The Application was opposed by the Plaintiff/Applicant who submitted that the Preliminary objection was premised on the provisions of section 56 (2) of the Kenya Deposit Insurance Act which clearly stipulated that a party ought to seek leave before instituting a suit against an institution (read Chase Bank herein)

19. The plaintiff/applicant was categorical that they had not brought the suit against the institution (read Chase Bank herein) but against the Co-operation (read Kenya Deposit Insurance co-corporation) as defined in the Act and described in the plaint.

20. That the law did not require leave before a suit could be instituted against a Co-operation and that the Defendant/Respondents assumption that the suit was against the Chase Bank Limited was therefore misconceived and should not see the light before the honorable court.

21. In seeking that the Respondent’s Preliminary Objection to be dismissed, the Plaintiff/Applicant relied on the case of **Ashok L Doshi and Another vs. Central Bank of Kenya and Another [2016]eKLR** where the court held as follows:

*‘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 Estaes 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’*

22. The Matters for determination are:

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the said Preliminary Objection has merit and should be upheld.

23. I have considered the said application, the Affidavit in reply as well as the Notice of Preliminary Objection. I have also studied in detail the submissions and authorities placed before me by the learned counsel for the parties herein. Having considered and reviewed the pleadings and submissions by the parties, it is clear and not in dispute that the 1st Defendant was appointed as the official receiver for Chase Bank (In receivership) by the Governor of Central bank vide Gazette Notice No. 2320 of 7th April 2016 in pursuant to section 43(1) (2) and 53 (1) of the Kenya Deposit Insurance Act.

24. It is also not in dispute from the plaint herein filed, that the Plaintiff/ Applicant was a customer of the Bank (Institution) in receivership where it had secured bank overdrafts from therein for over a long period of time.

25. That when they failed to repay the same, they took a loan facility with the Bank (under receivership) and registered a charge over suit land L.R No. Nyandarua /Ndemi/7183 as security.

26. That is was upon failure to service the said loan, that the 1st Respondent instructed the 2nd Respondent to sell the charged property by public auction to recover the loan arrears.

27. The Plaintiff/Applicant subsequently filed an application seeking for an order of injunction to restrain the 2nd Defendant/Respondent from selling land parcel No L.R No. Nyandarua /Ndemi/7183 by public auction.

28. Thus it is based on this application that the Defendant/Respondents herein raised a preliminary objection raising issues to the effect that the Plaintiff/Applicant was in contravention of the provisions of section 56 (2) of the Kenya Deposit Insurance Act.

29. On the first issue raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** where Sir Charles Newbold, P. held that:

‘.....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 judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

30. The summation of the Defendant/Respondents’ Preliminary Objection is that leave was not sought by the Plaintiff/Applicant to institute suit against an institution (read Chase Bank Ltd) that was under receivership in contravention of the provisions of section 56 (2) of the Kenya Deposit Insurance Act and that failure to do so rendered the whole suit an application incurably defective.

31. On the other hand the Applicant/Plaintiff’s contention was that that they had not instituted the suit against the Institution (read Chase Bank herein) which was the company in receivership, but against the Co-operation (read Kenya Deposit Insurance Co-corporation) as defined under Section 4 of the Act and described in the plaint, thus it was not necessary for them to seek leave of the court to institute suit against the Co-operation.

32. According to the Plaintiff/Applicant, the Act only bars suits against Institutions under receivership and not where the institutions are sued through their receivers therefore the suit was properly before this Court.

33. The Kenya Deposit Insurance Act, enacted in 2012 established a deposit insurance system and for the receivership and liquidation of deposit-taking institutions such as banks, other financial institutions, and mortgage finance companies, restricts enforcement of orders against any company under liquidation. Section 56 of the said Act provides as follows:-

(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.

33. I have agonized over the import of the provisions of section 56 (2) of the Kenya Deposit Insurance Act which in effect stipulates that *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.*

34. Section 2 of the Act defines an institution to mean:

A bank, financial institution or mortgage finance company as defined in the Banking Act (Cap. 488), or a microfinance bank as defined in the Microfinance Act, 2006 (Cap. 493D), or any other

deposit taking entity licensed by the Central Bank.

35. I find like the Plaintiff/Applicant that this provision relates to actions brought against Institutions (read Chase Bank) that are under receivership and/or Liquidation and not against the Co-operation whose establishment is defined under Section 4 of the Act.

36. Secondly the provisions of section 56 (2) *are to the effect that the injunction or any other action or civil proceeding may not be commenced in respect of the institution's assets without the sanction of the Court.*

37. *I have underlined the term institution's assets to emphasize the fact that the Plaintiff/Applicant herein has sued the Co-operation for orders of injunction against disposing off the subject suit herein which is land parcel No. L.R Nyandarua /Ndemi/7183 which suit land is not an asset of the Institution as is stipulated under section 56(2) of the Act. Based on these two aspects, leave need not be sought by the Plaintiff/Applicant to institute the present suit.*

38. 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.

39. I find that the suit is properly instituted and the question of it being struck out does not arise. The Preliminary Objection raised is unsustainable, has no merit and is hereby dismissed with costs to the Plaintiff/Applicant.

40. I note that the Defendant/Respondents have not filed their responses to the application dated 29th March 2017, for this reason leave is granted to the Defendant/Respondents to file and serve their response within 21 days of the delivery of this ruling. The application dated 29th March 2017 is hereby fixed for hearing on the 24th May 2017.

41. It is so ordered.

Dated and delivered at Nyahururu this 13th day of March 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE