**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, G.B.M. KARIUKI & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 64 OF 2007**

**BETWEEN**

**THE DEPOSIT PROTECTION FUND BOARD IN LIQUIDATION OF EURO BANK LIMITED (IN LIQUIDATION).....APPELLANT**

**AND**

**ROSALINE NJERI MACHARIA.....1ST RESPONDENT**

**GUARDIAN BANK LIMITED.....2ND RESPONDENT**

*(An appeal from the Ruling & Order of the High Court of Kenya at Nairobi – (Milimani Commercial Courts) (**Ochieng', J.**) dated the 16th day of January, 2006 in H.* C. C. C. No. 399 of 2005)

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**JUDGMENT OF THE COURT**

[**1**] This appeal exemplifies how costly mistakes can be in pleadings. It also lends credence to the epitaph that the law is an ass. A word can make all the difference between a properly instituted suit and an incompetent suit! Sample these facts.

The appellant, the **Deposit Protection Fund,** as the Liquidator of Euro Bank Limited (in liquidation) lodged this appeal on 13th April 2007 against the decision of the High Court (**Ochieng', J**) which struck out the appellant's plaint, and hence the suit No. 3999 of 2005 in the High Court (at Milimani Law Courts) in which the appellant sought against **Roseline Njeri Macharia** and **Guardian Bank Limited,** (the **1st** and **2nd respondents,** respectively), an injunction to stop the transfer or sale or alienation of Land Reference No. 209/11293/1, Nairobi, until the appellant's debt is paid in full or is fully secured or until the final determination of the suit.

[**2**] After filing their defences to the suit, each of the respondents, applied under Order V rule 13 (1) (a) of the Civil Procedure Rules for striking out of the plaint on the ground that it disclosed no reasonable cause of action. The applications were contested and each party was represented by counsel.

[**3**] In his ruling delivered on 16th January 2006, the learned judge (Ochieng', J) found that the suit by the Deposit Protection Fund was instituted by a non-person as the Deposit Protection Fund did not have legal personality. He observed that the suit should have been instituted by the Deposit Protection Fund Board which, under the law, has legal personality. He therefore struck out the plaint.

[**4**] The struck out suit was instituted by the appellant, Deposit Protection Fund (the liquidator of Euro Bank Limited, in liquidation) on 19th July 2005, in the High Court claiming against Roseline Njeri Macharia and Guardian Bank Limited, the 1st and 2ndrespondents, an injunction as aforesaid. It was indebtedness stood at shs.804,199,888.40 as at 30th attract interest at the rate of 15% per annum. alleged by the appellant that the June 2005, and that it continued to

[**5**] In arriving at his decision to strike out the plaint the learned judge delivered himself as follows: -

> ***"In my considered opinion, it could be possible to amend the Plaint so as to better spell out the claim against the 1st defendant.***
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> ***But, as I have already held, the suit ought to have been instituted by the Deposit Protection Fund Board. Although in the submissions of the plaintiff's advocate, he said that the omission of the word Board was a mistake, it had insisted, in its Grounds of Opposition that the plaintiff was indeed a body corporate, capable of instituting court proceedings. Clearly, the submissions made in court are at variance with the plaintiff's written word. Therefore, I believe that the submissions in court, alleging that there was a mistake, was an afterthought. To my mind, the advocate resorted to the said line of reasoning in an attempt to get a lease of life for the plaintiff. But, I am afraid that he did not persuade me to give the plaintiff the much needed opportunity. Why was I not persuaded?***
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> ***As the Plaint was filed by a "person" not duly incorporated, I hold the view that it was incompetent. Indeed, the question which the plaintiff should be grappling with is who it is that was now opposing the defendant's application. I say so because for a body corporate, it only has such life as may be donated to it by law. The Fund has been given no such life, and therefore, it was incapable of suing or being sued.***
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> ***To my mind, that which was purportedly instituted by a "non-existent" person cannot thereafter be brought to life, or have its life sustained by replacing the said "non-existent" person with the proper plaintiff. It is on that basis that I allow the defendants application.***
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> ***Indeed, had the suit been instituted by the Board (as opposed to the Fund), I could have held that the plaintiff could have been given an opportunity to substitute itself with the company, as liquidators ought to bring in the names of the company."***

[**6**] Aggrieved by the decision of the learned judge, the appellant lodged this appeal and proffered ten grounds of appeal in paragraphs (a) to (j). The appellant took the view that the suit was not incompetent although not brought by a body corporate; that the name of the appellant was not wrong but only incomplete and that it could be cured by amendment; that the learned judge was wrong in his finding that even if the suit was brought by the appellant in its corporate name, still the suit would have been improper as the name of the company in liquidation, namely Euro Bank Limited, as opposed to that of the liquidator, should have been used as plaintiff; that the judge misconstrued section 241 of the Companies Act; that the learned judge failed to adequately evaluate the submissions of the parties before striking out the plaint and that he erred in his finding that the cause of action against the 2nd respondent was founded on a breach of agreement and was barred by limitation under section 4(1) of the Limitations of Actions Act.

[**7**] **Mr. Waweru Gatonye** appeared for the appellant and learned Counsel **Ms Leah Mwangi** appeared for the 1st respondent while learned Senior Counsel **Mr. Fraser** appeared for the 2nd respondent.

[**8**] Mr. Fraser filed on 2nd March 2015 a notice of preliminary objection to the effect that both the Deposit Protection Fund and the Deposit Protection Fund Board have ceased to exist following amendment to the Banking Act, and urged that the preliminary objection be heard in the appeal. All the counsel appearing agreed to have the appeal determined and judgment given on the basis of written submissions.

[**9**] The appellant filed its written submission on 17th March 2015 and a reply to the respondent's submission on 21st April 2015.

[**10**] The 1st respondent filed his written submissions on 1st April 2015 and the 2nd respondent filed her written submission on 7th April 2015.

[**11**] It is not in dispute that the High Court Suit No. 399 of 2005 was instituted by Deposit Protection Fund and not by Deposit Protection Fund Board. The learned judge found that while **"Deposit Protection Fund**" was not a legal person, the suit should have been instituted in the name of Euro Bank Limited as mandated by section 241(1)(a) of the Companies Act, Cap 486; and that the cause of action against the 2nd respondent being a breach of contract was time barred.

[**12**] In its written submissions, the appellant contends that the amendment to the Banking Act should not have affected this litigation. Counsel for the appellant cited the decision in **PANAFRICA BUILDERS & CONTRACTORS LIMITED V SINGH** ***[1984] KLR 121, 133*** to buttress that proposition. The decision in **VINCENT ONDIEKI ORIAO vs R** ***[2012] eKLR*** was also cited to support the contention that section 23(3) of Interpretation and General Provisions Act protects ongoing legal proceedings in the event of repeal of the statute under which the proceedings are instituted. Counsel for the appellant also referred to a decision of the High Court in **MUTONGI v AMALEMBA & ANOTHER** ***[2002] 2KLR 383, 385*** which is not binding on us in which the High Court held, correctly in our view, that the proceedings instituted under the repealed Adoption Act (Cap 143) would proceed under the new Children's Act by virtue of section 23 of the Interpretation and General Provision Act. In counsel's view, the Deposit Protection Fund Board still has the mandate to proceed with the pending cases to conclusion and that there was no merit in the preliminary objection by the 2nd respondent.

[**13**] Our attention was drawn by the appellant's counsel to **Halsbury's Laws of England 4th Edition Vol 44(1) pg 771 para 1294** in support of the proposition that where an amending statute does not have transitional provision, the court is under a duty to infer that transitional arrangements were intended. Learned counsel for the appellant indicated the appellant's name in his submissions to be "**Deposit Protection Fund Board"** instead of what was pleaded, namely "**Deposit Protection Fund**". That was improper as the plaint had not been amended. His assertion that section 76(7) of the Kenya Deposit Insurance Act vested the obligation of the Deposit Protection Fund Board to the Kenya Deposit Insurance Corporation therefore seems misplaced.

[**14**] The argument by the appellant's counsel as to whether the suit would have survived if it had been instituted by the Board instead of the Fund in view of the amendment to the Banking Act, is, in our view, academic as that was not the position obtaining.

[**15**] Counsel for the appellant contended that no pleading ought to be dismissed if the defect can be cured by way of an amendment. He referred us to the decisions of this Court in **D.T. Dobie & Co. (K) Ltd. v Muchina** ***[1982] KLR 1*** and to **NITIN PROPERTIES LIMITED *v* KALSI & ANOTHER** ***[1995-1988] KLR 257*** and **AUTO GARAGE *v* MOTOKOV** ***[1971] EA 514.*** It was counsel's further submission that the learned judge erred in failing to have regard to section 35(6)(b) and section 36(2) of the Banking Act. He submitted that even if the learned judge was correct in holding that by dint of section 241 of the Companies Act, the suit should have been instituted in the name of the company rather than the name of the liquidator, the court should have allowed an amendment even on its own motion to have the plaintiff substituted. He leant on Order 1 rule 10 of the Civil Procedure Rules 2006 for the submission.

[**16**] It was the appellant's counsel's submission that the learned judge did not exercise his discretion properly in striking out the plaint.

[**17**] The holding by the learned judge that the plaintiff's cause of action against the 2nd respondent was time barred by dint of section 4(1) of the Limitation of Actions Act was not spared in attack. Counsel contended that the holding was erroneous because time ran from the discovery of the breach and not from the occurrence of the breach. He cited in support of the proposition the decisions in **David Stephen**

**Gatune *v* Idealmaster, Nairobi Technical High School & Another** ***[1986] eKLR*** and **Leah Kambui Githutha *v* Attorney General [2005] eKLR**. At any rate, contended counsel, an allegation that a cause of action is time-barred ought to have gone to trial. He prayed that the appeal be allowed so that the depositors' money is not lost without a hearing on merit.

[**18**] **Mr. Atiya**, learned counsel from the firm of **Messrs Njenga Mbugua & Nyanjua, Advocates** submitted in his written submissions that there were only three issues for determination in this appeal. **First,** he said, was the question **whether** Deposit Protection Fund which is not a body corporate could sue and **secondly**, **whether** the suit is time-barred under the Limitation of Actions Act. **Thirdly**, **whether** the Deposit Protection Fund and Deposit Protection Fund Board had ceased to exist following the amendment of the Banking Act.

[**19**] Mr. Atiya submitted that Deposit Protection Fund did not have legal personality and had no capacity to sue. He pointed out that section 36 of the Banking Act created as a body corporate the Deposit Protection Fund Board, but did not give Deposit Protection Fund corporate status and therefore, the suit by the Deposit Protection Fund was by a non-legal entity and was therefore incompetent.

[**20**] On the issue of limitation, counsel for the 1st respondent submitted that the cause of action was stated in the plaint to be 27th January 1999 when the breach occured and consequently, as the suit was filed in 2007, the contractual period of six years under section 4(1)(a) of the Limitation of Actions Act had elapsed before the institution of the suit in 2007. Counsel referred us to the decision in **GEORGE MUSYOKI *v* SAROVA HOTELS (Industrial Court Cause No. 67 of 2013**). He also referred to the obiter dictum in **Gathoni *v* Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981)** where **Potter JA** observed:

> ***"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."***

[**21**] On the issue of the amendment to the Banking Act, counsel for the 1st respondent contended that sections 34(2)(a), 34(3), 34(4), (5) & (), 35, 36, 37, 38 to 42 of the Banking Act were repealed by the Kenya Deposit Insurance Act No. 10 of 2012 in its section 75(1). He stressed that the Act did not make transitional provisions to cater for pending cases by or against the Deposit Protection Fund Board to be continued or taken over by any other body. Counsel urged us to dismiss the appeal.

[**22**] Counsel for the second respondent took up three issues in his submissions. First, he submitted on his preliminary objection in which he contended that Deposit Protection Fund and Deposit Protection Fund Board ceased to exist following the repeal of sections 36 and 37 of the Banking Act by section 75(1) of the Kenya Deposit Insurance Act No. 10 of 2012 which came into force on 1st July 2014 when the suit from which the appeal arises was pending in the High Court and that no provision was made in the Act for pending court cases by or against the Deposit Protection Fund or the Deposit Protection Fund Board to be continued by any other body. Counsel emphasised that both the Deposit Protection Fund and Deposit Protection Fund Board have ceased to exist and there is no statutory provision for the proceedings to be continued. He contended that the suit as a legal proceeding is not an asset that can be taken over and that there was need for specific statutory provision to preserve the existing court proceedings. He pointed out that a cause of action may be passed on as an asset subject to limitation, but not court proceedings. Counsel contended that neither the Deposit Protection Fund nor the Deposit Protection Fund Board can continue to litigate after they have ceased to exist so that even if the Deposit Protection Fund had capacity to sue, there would still be a handicap by dint of the fact that the plaintiff does not exist.For that reason, counsel for the second respondent urged that the appeal be struck out.

[**23**] On the issue of limitation, counsel contended that the 2nd respondent was roped into the litigation by dint of the fact that in paragraphs 10 to 18 of the plaint, an agreement was pleaded involving Euro Bank and the 1st and 2nd respondents in relation to payment by Euro Bank to the 2nd respondent of Shs. 5 million and the registration of a second charge in favour of Euro Bank. Counsel contended that the cause

of action in contract flows from the breach, not from the time the plaintiff becomes aware of the breach. Under section 4(1)

> (a) of the Limitation of Actions Act, any claim in contract became time barred six years after the alleged contractual breach, contended counsel, who pointed out that the plaint was not filed until seven years after the cause of action had accrued.

[**24**] In reply, it was the appellant's submission that (with regard to the question whether the litigation survives after the repeal of sections 36 and 37 of the Banking Act) ***"an oversight on the part of the legislation drafters not to include a transitional clause"*** to facilitate continuance of suits by or against the Deposit Protection Fund or Deposit Protection Fund Board will lead to a miscarriage of justice. In effect, he blamed the drafters of the law. But does such blame change the legal position? Counsel for the appellant conceded in his reply that the omission of the word "**Board"** from "**Deposit Protection Fund**" was a mistake on the part of the appellant's firm and that "*the appellants made an oral application to the court requesting for leave to amend the same which application was ignored during the court's determination of the application to dismiss the suit*". We have been unable to discern from the record of appeal such application. At any rate, if the appellant's application to amend was rejected, the appellant had recourse to appeal. Ostensibly, no such appeal was pursued. The matter rested there. Counsel for the appellant urged the Court to allow the appeal, and set aside the order of the High Court striking out the plaint.

[**25**] We have carefully perused the record of appeal and the written submissions and have duly considered the oral submissions and authorities listed by counsel for the parties. The issues are few and the facts are straight forward. The issues are:

1. **Whether the suit was competent or not on account of the fact that it was instituted by the Deposit Protection Fund and not by the Deposit Protection Fund Board and whether the learned judge of the High Court was wrong in striking out the plaint as he did on the ground that Deposit Protection Fund had no corporate status.**

2. **If the suit was competent as instituted, whether it survived after the repeal of sections 36 and 37 of the Banking Act in absence of transitional provisions.**

3. **Whether the suit was statute barred under the Limitation of Actions Act.**

[**26**] On the first issue, there is no dispute that the suit in the High Court was instituted by the Deposit Protection Fund and not by the Deposit Protection Fund Board. Before its repeal by Act No. 10 of 2012, sections 36 and 37 of the Banking Act made clear stipulations on establishment and legal status of Deposit Protection Fund Board (DPFB). Section 36(1), (2) & (3) (now repealed) made it clear that the DPFB was established as a body corporate with perpetual succession and a common seal, with power to acquire, own, possess and dispose of property, to contract and to sue and be sued in its own name. The DPF, on the other hand, as clearly stipulated by section 37 (now repealed), was a Fund in an account with the Central Bank of Kenya containing moneys to protect the interests of depositors and was made up by contributions under section 38 of the Banking Act. Nowhere in the Banking Act or in any other statute was the Fund given legal status. It had no legal personality. The suit struck out by the High Court was instituted in the name of Deposit Protection Fund. It was clearly instituted by a non-legal body.

[**27**] **Mr. Waweru Gatonye**, counsel for the appellant, conceded in his written submission that his firm made the mistake of omitting the word "**Board"** after the word "**Fund"** which resulted in the plaintiff in the suit being Deposit Protection Fund instead of Deposit Protection Fund Board. What was the legal effect of this error? First, a plaintiff is defined in Black's Law Dictionary, Ninth Edn as "***the party who brings a civil suit in a court of law"***. The "**plaintiff"** in the struck out suit, not being a legal body, there was clearly no plaintiff in law. A "**suit**" that is not instituted by a plaintiff who has no legal personality cannot be said to have a plaintiff as a party and is consequently a nullity. If a suit is a nullity, it is incapable of resuscitation. No life can be breathed into it. It is dead. It does not exist and it is therefore incapable of amendment.

[**28**] The High Court (**Lesiit, J)** was, with respect, correct in her decision in the case of

**John Gachoki Ndenge *v* Kiambu Dandora Farmers Company Limited & Another**

**(*Civil Suit No. 481 of 2006 [2008] eKLR*** when she stated:

> ***"…under that section {s.36(1)} of the Banking Act), it is the Deposit***
>
> ***Protection Fund Board which is the legal entity with corporate powers and therefore capable of suing and being sued. The Deposit Protection Fund is not a legal entity and therefore it is incapable of being sued. It was therefore materially defective and a nullity for the plaintiff to institute the suit against the Deposit Protection Fund. That defect is not curable by an amendment."***

[**29**] Clearly, a suit not by or against a person or a body corporate is incompetent. It is a

nullity. That answers the first question. If more authority was required, the philosophy in the sagacious words of **Madan, JA** as he then was in **D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another, (*Civil Appeal No. 37 of 1978*)** that "***a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal…",*** show that only there is a suit, however poorly drafted, is amendment possible to save it. Where, as here, the suit is a nullity, there is no litigation in being in law and the issue of amendment does not arise. **Madan, JA** as he then was alluded to litigation which is akin to a patient who can be treated and healed. Here, the patient is in the morgue. He is dead.

[**30**] In **D.T. Dobie's** case (supra), there was a suit in being and the issue was whether to strike it out or not. Not so in the instant case which can be distinguished on the ground that in the instant appeal, there was no suit before trial judge. In light of this, the learned judge was correct in striking out the plaint as it had no plaintiff known to law, the Deposit Protection Fund not being a body corporate.

[**31**] In answer to the question whether the "**suit"** survived after the repeal of sections 36 and 37 of the Banking Act, tshere being no suit in the first place, the question of survival of suit could not arise. But for the sake of argument, even assuming that there was a suit before the repeal of sections 36 and 37 of the Banking Act, as a result of which the Deposit Protection Fund Board ceased to exist, the repeal would not affect the suit which was a legal proceeding which could be continued by dint of section 23(3) (e) of the Interpretation of the General Provisions Act. As a general rule, in absence of express provision, a statute should not be construed so as to deprive people of rights that have accrued, and the amendments to the Banking Act did not operate retrospectively. Therefore, if there was a valid suit at the time when it was filed, the subsequent amendment removing from existence the Deposit Protection Fund and Deposit Protection Fund Board would not affect the suit.

[**32**] The practical question would appertain to who would continue to prosecute the suit

in absence of transitional provisions. But if the suit was competent and the party suing or being sued was known to law, such party could continue to prosecute or to defend the suit.

In the instant case, the "**plaintiff**" had no corporate personality and does not now exist.

[**33**] With regard to the third issue, namely whether the suit was statute barred under the Limitation of Actions Act, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the "**suit**" having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit. That answers the third issue.

[**34**] Counsel for the appellant raised the issue of public interest. He was rightly concerned about the depositors of Euro Bank (in liquidation) who would stand to gain if the suit was prosecuted and the money claimed recovered. Public interest concerns must be realized in consonance with the law. The National Values and Principles in Article 10 of the Constitution bind all State Organs, State Officers and Public Officers and all persons whenever any of them applies or interprets the Constitution or any law. The National Values and Principles of governance include the rule of law, equity and human rights. In this appeal, the law does not recognise a suit that is a nullity as it has not been instituted in accordance with the law. That answers the appellant's counsel's concern

[**35**] Concern was also expressed by counsel for the respondents that Euro Bank Limited which was in liquidation was not shown to be the party bringing the suit, but rather Deposit Protection Fund. Section 241 of the Companies Act was cited in support of the proposition. Section 241 (1) (a) stipulates that:

> ***"The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection –***
>
> ***(a) to bring or defend any action or other proceedings in the name and on behalf of the company."***

[**36**] Counsel's beef seemed to be that the Deposit Protection Fund failed to adhere to the requirement of section 241(1)(a) of the Companies Act. But Deposit Protection Fund clearly indicated that it was the liquidator of Euro Bank Limited. If the Deposit Protection Fund had corporate personality, the mishap in the failure to properly conform to section 241 (1) (a) would not have been incapable of amendment to streamline it and ensure its harmony with the said section. But having found, as we have done, that the suit was a nullity, the point is academic and we find it unnecessary to delve into it in detail.

[**37**] In the result, it is our finding that the appeal has no merit. We dismiss it and order that each party shall meet its own costs in this appeal.

**Dated and delivered at Nairobi this *5th day of February, 2016*.**

***ALNASHIR VISRAM***

**……**

***JUDGE OF APPEAL***

***G.B.M. KARIUKI SC***

**……..……**

***JUDGE OF APPEAL***

***J. MOHAMMED***

**……..……**

***JUDGE OF APPEAL***

*I certify that this is a true copy of the original.*

***DEPUTY REGISTRAR***