IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 64 OF 2007

GUARDIAN BANK LIMITED.....APPLICANT/2ND RESPONDENT

AND

THE DEPOSIT PROTECTION FUND BOARD

THE LIQUIDATION OF THE EURO BANK LIMITED

(IN LIQUIDATION) .....1ST RESPONDENT/APPELLANT

ROSALINE NJERI MACHARIA .....2ND RESPONDENT/RESPONDENT

(Application to strike out the notice of appeal and the record of appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Ochieng, J.) dated 16th January, 2006

in

H.C.C.C. NO. 399 OF 2005)

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RULING OF THE COURT

This is an application under **Rule 80** of the Court of Appeal Rules for an order that the notice of appeal and the record of appeal in *Civil Appeal No. 64 of 2003* be struck out on the ground that an appeal by the **Deposit Protection Fund Board** (Board) does not lie as the *Board* was not a party to the proceedings in the High Court.

The appeal arises from a ruling of the superior court (Ochieng, J.) dated 16th January, 2006 allowing two separate applications filed by the respective respondents for striking out the suit. The suit was filed by **THE DEPOSIT PROTECTION FUND,** the liquidator of **EURO BANK LIMITED** (In Liquidation). In paragraph 1 of the plaint, the plaintiff described itself as the *"Deposit Protection Fund, a body corporate under **Section 36** of the **Banking Act**"*. It also described itself as having been appointed on 21st February, 2002 as liquidator for Euro Bank Limited (in liquidation).

By the plaint, the plaintiff claimed Shs.804,199,888.40 as at 30th June, 2005, from **Rosaline Njeri Macharia** (1st defendant) being the total indebtedness to Euro Bank Ltd. The plaintiff also claimed various reliefs from the 2nd defendant allegedly arising from breach of contract/negligence in failing to perfect and register a second charge over L.R. No. 209/11293/1 in favour of **Euro Bank Ltd**.

The applications to strike out the suit were based on **Order VI Rule 13 (1) (a)** of *Civil Procedure Rules*.

The application of the first defendant was based on four grounds, viz; that the Deposit Protection Fund is not a body corporate capable of bringing court proceedings; that the appointment of either the plaintiff or Deposit Protection Fund Board as liquidator does not confer any right to bring the suit on behalf of Euro Bank Ltd. and that there is no cause of action vested in the plaintiff or Deposit Protection Fund Board and lastly, that all matters pleaded in the plaint were time barred. It is not necessary to refer to the grounds of the application of the 2nd defendant.

The main ground of the application in the superior court was that the suit was incompetent having been brought by the Deposit Protection Fund which was not a body corporate.

It was further submitted on behalf of the 1st defendant at the hearing of the application in the superior court that the suit was also incompetent as it was not brought in the name of Euro Bank Ltd. in contravention of **Section 241 (1)** of the *Companies Act*.

At the hearing of the application, Mr. Gatonye, learned counsel for the plaintiff conceded in the superior court that the suit should have been brought by the *Deposit Protection Fund Board* but submitted that there was an omission to complete the name of the plaintiff. He made an oral application for leave to amend the name of the plaintiff by adding the word **"Board"**. On the contention that the suit should have been instituted in the name of the Bank, Mr. Gatonye submitted, *inter alia*, that **Section241** of the *Companies Act* deals with a situation where there is a winding up by the court and further that the plaint made it clear that the suit was brought on behalf of the Bank. Again, he asked the court to allow him to amend the plaint in the event that the court was of the view that the suit should have been instituted in the name of the Bank.

The superior court held that the suit having been filed by the *Deposit Protection Fund* and not by the *"Board"*, an non-existent person, it was incompetent and could not be brought to life by an amendment; that the suit was also incompetent as it was not brought in the name of the Euro Bank Ltd. Lastly, the court held that the claim against the second defendant was time barred.

The plaintiff being dissatisfied with the decision filed a notice of appeal indicating that **"THE DEPOSIT PROTECTION FUND BOARD"** intended to appeal against the decision. The appeal was ultimately filed by **"THE DEPOSIT PROTECTION FUND BOARD – THE LIQUIDATOR OF EURO BANK LIMITED (IN LIQUIDATION)"**.

There are ten grounds of appeal but for purpose of this application, it is sufficient to quote just the first four:

"(a) THAT the learned judge erred in law and in fact in making a finding that the appellant's suit was incompetent for having been brought by a person other than the body corporate.

(b) THAT the learned judge erred in fact and in law in rejecting the plaintiff's submission that the name of the plaintiff was not wrong but only incomplete and could be cured by amendment.

(c) THAT the learned judge erred in fact and in law in rejecting the plaintiff's submission that the name in the title was incomplete due to an error.

(d) THAT the learned judge erred in fact and law in upholding the argument that even if the

plaintiff had the capacity to sue the suit should have been brought in the name of the company as opposed to the liquidator thereof".

The memorandum of appeal seeks three main orders, namely that the appeal be allowed, the ruling and order striking out the suit be set aside and

"(c) That the appellant's suit be reinstated with liberty to the appellant to apply to amend the suit within sixty five (60) (sic) days of the date of the judgment of the Court".

The Applicant contends that the appeal does not lie because the appellant (Board) was not a party to the proceedings in the superior court.

The application is opposed on the grounds contained in the replying affidavit filed by Sophie Langat the liquidating agent of the appellant. She depones, among other things, that the application is premature as it raises similar grounds as those raised in the appeal; that the granting of the application would be tantamount to dismissing the appeal summarily; that suit seeks to recover a large sum of money which belongs to depositors; that it is in the interest of depositors and the general public that the appeal should be determined on merit; and that the application should be dismissed in the interest of furthering the overriding objective of civil litigation.

It is not in contention that **Section 36 (1)** of the Banking Act creates the **DEPOSIT PROTECTION FUND BOARD** as a body corporate and that one of the functions of the Board is to manage the Deposit Protection Fund – a deposit insurance scheme for depositors established under **Section 37** of the Act).

By **Section 36 (2)** of the Act:

"The Board shall have perpetual succession and a common seal and shall in its corporate name or in the name of institution under liquidation be capable of –

(a) Suing and being sued without sanction of the court or a Committee of Inspection;

(b) …….

(c) ……..

(d) ……

By **Section 35 (1)** of the *Banking Act*:

"If an institution becomes insolvent the Central Bank may appoint the Board to be the liquidator of the institution and such appointment has same effect as an appointment of a liquidator by the court under part VI of the Companies Act".

Section 35 (5) and **(6)** spell out the powers of the Board when acting as a liquidator and **Section 35 (10)** provides that in exercising those powers, the Board shall be under the supervision of the High Court.

The superior court relied on **Section 241 (1) (a)** of the *Companies Act* in making a finding that the suit should have been brought in the name of the Euro Bank Ltd. – the institution under liquidation, which provides:

"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 action or other legal proceedings in the name and on behalf of the company".

It is not in contention that the proper plaintiff in the suit in the superior court should have been the Board and not the Fund. The appellant's counsel maintained that the plaint clearly indicated that it is the body corporate already appointed as a liquidator which was suing and that this was a case where the name of the plaintiff was not complete. At the hearing he orally sought leave to amend but the superior court, without alluding to that application ultimately held that since the suit was brought in the name of non-existent person, it could not be saved.

By **Rule 10 (1)** of **Order I** *Civil Procedure Rules* (CPR), if the suit is instituted in the name of the wrong plaintiff the court has discretion to order any other person to be substituted or added as a plaintiff in terms of that rule. By **Rule 10 (2)** of **Order I** CPR, the Court can even on its own motion order the name of any party who is improperly joined as a plaintiff or defendant to be struck out and that the name of the correct party be added.

The applicant has appealed against the findings of the superior court. We are satisfied that the appeal as it relates to the issue of the name of the correct plaintiff is not frivolous.

In the event that the appeal succeeds, the suit will be reinstated and the appellant allowed to correct the name of the plaintiff.

The issue as to which entity – the *"Fund"* or the *"Board"* should have filed the notice of appeal or the appeal is intertwined with the issues raised in the appeal. If the notice of appeal and the appeal were filed by the *"Fund"* it is probable that the respondents would still have filed an application to strike out the notice and the appeal on the ground that it was incompetent having been filed by a non-existent body as found by the superior court. We would end in a vicious circle!

Even if the appeal were to be struck out on the ground that it was filed by the *Board* instead of the *Fund*, that will leave unresolved the issue of whether or not the suit should have been filed in the name of the Bank. This to us is an important issue of great public importance which is not frivolous.

It is apparent that **Section 36 (2)** of the Banking Act which authorizes the *Board* to sue or be sued in its corporate name or in the name of institution under liquidation without sanction of the court or Committee of Experts was not brought to the attention of the superior court. Prima facie the liquidation under the Banking Act is a liquidation by the Central Bank under the supervision of the court and the Board as a liquidator is a statutory liquidator with its powers spelt out by the Banking Act. The appellate court will have to construe Section 241 of the Companies Act in conjunction with **Sections 36 (2)** and **35** of the *Banking Act* and spell out their interrelationship, if any.

In the circumstances, we respectfully agree that the issues raised in the application and in the appeal relating to the name of the plaintiff and the name of the appellant are similar and it would be pre-emptory to resolve those issues at an interlocutory stage.

Furthermore, having regard to the fact that the appeal also raises other issues; that the suit is for recovery of a very large sum of money for the benefit of depositors; that the claim is brought by a public body it would serve the overriding objective of the court as spelt out in **Section 3A (1)** of the Appellate Jurisdiction Act, if the appellate court was left to hear the appeal on the merits and sort out all the contentious issues.

For those reasons, the notice of motion dated 16th May, 2007 is dismissed with the costs in the appeal.

Dated and delivered at Nairobi this 7th day of May. 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR