



REPUBLIC OF KENYA



KENYA LAW
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**Nderitu v Chase Bank (K) Limited (In Receivership) (Cause
365 of 2017) [2022] KEELRC 1191 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1191 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 365 OF 2017**

JK GAKERI, J

JULY 7, 2022

BETWEEN

JOSEPH GITHUI NDERITU CLAIMANT

AND

CHASE BANK (K) LIMITED (IN RECEIVERSHIP) RESPONDENT

RULING

1. Before the Court for determination is a Preliminary Objection dated 21st April 2017 filed by the Respondent on 16th March 2017.
2. The Preliminary Objection is premised on the grounds that:
 - (i) The Claimant has not sought leave of the Court to commence or continue the suit therein against the 2nd Respondent which is under receivership.
 - (ii) The suit and all proceedings taken against the 2nd Respondent are therefore nullity ab initio.
 - (iii) The Claimant's suit is therefore incurably defective bad in law and ought to be struck out.
3. The preliminary objection is expressed under Section 56(2), 43(1) and (2) of the *Kenya Deposit Insurance Act*, 2012 and all other enabling provisions of law.
3. When the matter came up for mention on 25th May 2022 to confirm the filing of submissions in respect of the preliminary objection by the Respondent, the Claimant has received the Respondent's submissions but has not filed and prayed for seven days to do so and a ruling date was given. The Claimant was accorded seven days to file its submissions.



Respondent's Submissions

5. The gravamen of the Respondent's preliminary objection and submissions is that the Claimant herein is purporting to continue with the proceedings herein after the Respondent was placed under receivership in 2016 and subsequently in liquidation in 2020, without leave of the Court.
6. That the Kenya Deposit Insurance Corporation (KDIC) was appointed official Receiver of the Respondent from 7th April 2016 for 12 months and by Gazette Notice No. 365 of 16th April 2021. The Respondent was placed in liquidation by the Central Bank of Kenya under the KDIC as liquidator pursuant to Section 53 (2)(b) and 54(I) of the [Kenya Deposit Insurance Act](#).
7. The Respondent relies on the Provisions of Section 56 of the [Kenya Deposit Insurance Act](#), 2012 to urge that commencement and continuation of suits against an institution under receivership or liquidation is disallowed without leave of the Court.
8. That failure to seek and obtain leave of the Court was a fatal step and cannot be wished away as a mere technicality under the overriding Objective of Article 159(2)(d) of the [Constitution](#) of Kenya, 2010.
9. Reliance is made on the decision in [Bougainville Estate Limited v Kenya Deposit Insurance Corporation \(sued in their capacity as Receiver Managers of Imperial Bank Limited \(In Receivership\) & 3 others](#) [2019] eKLR where the Court cited with approval the decision in [Andrew Gikuni Muchai v Chase Bank \(Kenya\) Limited](#) [2016] eKLR where a Preliminary Objection similar to the one in the instant case was upheld and the suit against the 1st and 2nd Respondents struck out.
10. It is submitted that since the Courts leave to file proceedings in respect of assets of an institution under receivership is a condition precedent and mandatory, the suit herein is fatally defective and deserving of being struck out with costs to the

Respondents.

11. The decision of [Mwangi Njoroge J. in Kuza Farms & Allied Ltd v Dubai Bank Kenya Ltd \(In Liquidation\)](#) [2017] eKLR is also relied upon to buttress the submission.
12. Finally, the Respondent relies on the decision in [James Omari Meremo v Chase Bank Limited \(In Liquidation\)](#) [2021] eKLR where Monica Mbaru J. dealt with a similar issue and looped in the Provisions of the [Employment Act](#) in the determination of the suit.

Claimant's Submissions

13. By 15th June, 2022 when the court retired to prepare this judgement, the Claimant had neither filed grounds of opposition to the Preliminary Objectives nor submissions.

Analysis and Determination

14. The issues for determination are:
 - (i) Whether a competent Preliminary Objection is before the Court;
 - (ii) Whether the Preliminary Objection is merited.



15. As regards the first issue, the Court is guided by the locus classicus pronouncement of the Court of Appeal of Eastern Africa in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where Law JA expressed himself as follows:

“So far as I am aware, a preliminary objection consists of a pure point of law which had been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are objection on the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. Newbold P. had this to say

“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 of the facts has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and on occasion, confuse issued. This improper practice should stop.”

17. Other notable decisions are *Nitin Properties Ltd v Jagjit S. Kalsi & another* [1995] eKLR as well as *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* [2014] eKLR.

18. Because a preliminary objection raises a threshold question and may lead to disposal of the entire suit if it is allowed, it must be determined at the earliest possible instance to determine the next cause of action.

19. The Respondent urges that since the claim herein was instituted against a company in receivership and no leave of the Court was obtained, the suit is fatally defective and should be struck out as against the 1st Respondent.

20. The Respondent relies on Section 56(2) of the *Kenya Deposit Insurance Act*, 2012 which provide:

“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 sanction of the Court.”

21. For the above reasons, the Court is satisfied that the Preliminary Objection herein meets the threshold formulated in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (*supra*).

22. As to whether the preliminary objection is merited, the starting point is the statutory and judicial authorities applicable.

Section 56 of the *Kenya Deposit Insurance Act*, 2012 provides:

- (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.



23. From the documentation on record, it is event that the 1st Respondent (Chase Bank Limited) was put under receivership on 7th April 2016 and the Kenya Deposit Insurance Corporation was appointed the Official Receiver vide Gazette Notice No. 2320 dated 7th April 2016 and was appointed liquidator vide Gazette Notice No. 3651 dated 16th April 2021. The Kenya Deposit Insurance Corporation was appointed liquidator for the residual assets and liabilities of Chase Bank Limited (in Receivership).
24. The import of 56 of the [Kenya Deposit Insurance Act](#) is that no action or suit may be filed or continued against the liquidator without leave of the Court.
25. There is no evidence on record that the Claimant obtained leave to file or continue with the proceedings herein.
26. Faced with a relatively similar matter in [Bougainville Estate Limited v Kenya Deposit Insurance Corporation](#) (*supra*), the Court invoked the provisions of the Section 67 for the meaning of insolvency in the context of the [Employment Act](#) as expounded herein as follows:
An employer is insolvent for purposes of this part:
- (a) ...
 - (b) If the employer is a company –
 - (i) a winding-up order or an administration order has been made, or a resolution for voluntary winding-up has been passed, with respect to the company; or
 - (ii) a receiver or a manager of the company’s undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.
27. Relatedly, the Court on a reference to the applicability of Section 66 of the [Employment Act](#), 2009 in payment of monies by the Minister on application by an employee, the Court correctly states that this provision applies to an employee who is owed dues or employment is terminated due to insolvency, in which case, dues have already crystallized. This provision would in the Court’s view appear inapplicable where the amount or sums claimed by a former employee have not crystallized by way of a Court order as is the situation in the instant case.
28. As Courts have observed in several decisions, the purpose of the requirement to seek leave is to imbue order in the process and ensure validity of the claim against the receiver or liquidator. In [Bougainville Estate Limited v Kenya Deposit Insurance Corporation](#) (*supra*) Olola J. stated as follows:
“ ... 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...”
29. Similar sentiments were expressed by Mbaru J. in [James Omari Meremo v Chase Bank Limited](#) (*supra*). Noteworthy, in the instant case, the Claimant sought leave of the Court to continue these proceedings against the Receiver of Chase Bank Limited (now liquidation) by an application dated 4th May, 2017 and the court granted the same on 12th October, 2017. Intriguingly however, the Claimant has not bothered to object to the instant preliminary objection which is therefore unopposed and has not filed submissions. However, court records provide good evidence on what transpired.



30. In the words of Mwangi Njoroge J. in *Kuza Farms & Allied Ltd v Dubai Bank Kenya Ltd* (*supra*) –

“I find section 56(2) to be in very clear terms that even before an injunction, or that action or civil proceeding is commenced, or (where it had already commenced, it is continued sanction of the Court must be sought in advance...”

31. From the records, it is evident that the 1st Respondent was in receivership at the time and is now in liquidation and the second Respondent is the liquidator.

32. As adverted to elsewhere, the Claimant sought leave to continue and/or commence proceedings as against the 2nd respondent and the court granted the same in October, 2017.

33. The 2nd respondent is now the Liquidator and no further leave is necessary in this instance.

34. In the interest of justice, the suit should be set down for hearing.

35. Hearing date to be fixed by the Registry.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF JULY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this+ Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

