



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 506 OF 2017

CLEMENT MARTINEAU & 3 OTHERS.....CLAIMANT

VERSUS

THE LIGHTHOUSE PROPERTY CO. LIMITED....RESPONDENT

RULING

1. For Ruling before me is the Respondent/Applicant's Notice of Motion Application dated 24th March 2021 which seeks Orders that:

i. Spent

ii. This Honourable Court be pleased to stay the proceedings of the main suit pending the hearing and determination of this application;

iii. This Honourable Court be pleased to grant leave to the Applicant to file a Response to the Statement of Claim dated 13th December 2016 out of time;

iv. This Honourable Court be pleased to enjoin Kenya Deposit Insurance Corporation (KDIC) as a Respondent forthwith; and

v. Costs for this Application be provided for.

2. The Application is premised on the grounds that the Respondent was a Special Purpose Vehicle (SPV) of Chase Bank (Kenya) Limited which has since been taken over by SBM Bank Ltd. That on or about 6th April 2016, Chase Bank (Kenya) Limited was placed under statutory management of the Proposed Respondent and all its SPVs and assets were consequently placed under the management of the Proposed Respondent. That the Directors of Chase Bank (Kenya) Limited including its SPVs were effectively stripped of powers to run the affairs of the entities and that the Proposed Respondent is hence responsible for any conduct leading up to the alleged cause action claimed by the Claimants herein. That because a right of relief exists against the intended Respondent in respect of the matters involved in the suit, no effective decree can be passed without the presence of the intended Respondent. Further grounds are that the response raises triable issues which cannot be determined summarily hence meriting full trial and that the grant of the orders sought in this Application will operate to meet the ends of justice and shall not prejudice the Claimants herein. The Application is supported by the affidavit of the Respondent/Applicant's outgoing Director, Zafrullah Khan who swore the same with the authority and on behalf of the other four outgoing Directors of the Respondent. He avers that he was a Director of the Applicant until 16th February 2016 and he annexes a copy of the Declaration of Trust dated 15th April 2016 and Gazette Notice dated 6th July 2018 demonstrating the take-over of Chase Bank (Kenya) Limited by SBM Bank Limited. He further avers that the documents handed over to Chase Bank (Kenya) Limited during the said period included title documents to fixed assets and bank account details owned by various SPVs, identification documents and PIN Certificates of the Directors, and the Declaration of Trust for the SPVs dated 15th April 2016. That various company documents belonging to the Respondent/Applicant including Letters of Resignation of 5 Directors were also handed over. He avers that the Claimants are duly aware that the Applicant was taken over and has no control of its daily activities.

3. He further avers that the proposed Respondent assumed the Applicant's affairs way before the suit and that it is because of the grounds outlined herein above and the consequent confusion that the Applicant could not issue further instructions to the Counsel. He asserts that presence of the proposed Respondent in the suit is necessary to enable the Court effectively adjudicate upon and settle all questions in the suit.

4. The Claimants/Respondents filed a Replying Affidavit sworn on 13th April 2021 by the 1st Claimant on behalf of the Claimants. The 1st Claimant avers that the Applicant has come to the court of equity with unclean hands since it failed to comply with the order of this Court made on 18th December 2018 requiring its Directors to furnish security sufficient to satisfy the decree. Further, that the current application by

the Respondent is vexatious as a similar application was filed on 5th April 2019 on similar grounds and seeking to review and or set aside the orders made on 18th December 2018. That the Directors of the Applicant have been hiding behind legal technicalities so as to frustrate their claim and to avoid complying with a valid court order. He further avers that the Applicant has not attached any evidence to prove that it is a special purpose vehicle of Chase Bank (Kenya) Limited (In-Receivership) or SBM Bank Limited as alleged. That the exhibits produced by the Applicant do not also disclose the assets or liabilities transferred and neither do they mention the Respondent/Applicant as being under receivership. That on the contrary, the Respondent/Applicant is a distinct company from the two Banks and is active as per records at the Companies' Registry evidenced in the annexed company registration certificate (CR12) marked CM-2. That the said CR12 obtained on 5th October 2018 does not indicate Chase Bank (In Receivership) or KDIC as directors or shareholders and shows the Respondent Company as active while listing the directors mentioned in this Claim as Stephen Karumbi Ngugi, Ken Obimbo, Ali Chema, Duncun Kabui and Zarfullah Khan. That this information is contrary to the allegation that the Directors resigned on 16th April 2016 and that in any event, the deponent of the supporting affidavit would otherwise have no authority to swear the affidavit on behalf of the Applicant were he not listed as its Director. The 1st Claimant further avers that the Directors of the Respondent are better placed to identify the assets of the Respondent which are not encumbered and are available to be used as security in this suit and cannot apportion the blame to other entities who are not parties to this suit. That the Claimants/Respondents have established that some of the Directors of the Applicant are in the process of absconding the local limits of the jurisdiction of this Court and risk disposing of the assets of the Respondent/Applicant with the sole intent of obstructing/delaying execution of any order or decree that may be passed against the Respondent. That it is therefore prudent that the security be deposited to ensure that the order or decree of this Court is enforceable once obtained. He avers that their claim lies against the Respondent/Applicant as their former employer through their employment contracts and not against other entities because they are bound by privity of contract. That the law only allows the Respondent to only enjoin a co-respondent as a third party for purposes of apportionment of liability or as an Interested Party. That the Applicant has not explained the inordinate delay in filing the Defence and that the Respondent's internal issues and delay should not be visited upon the Claimants who continue to be prejudiced. That it is equitable and in the interest of justice that this Honourable Court dismisses the Respondent's application with costs to prevent an abuse of the court process by the Respondent.

5. The Respondent/Applicant submits that the Proposed Respondent's interference affected the Applicant's general performance of the employment contract in question. Further, that the said interference amounts to tortious interference and is a defence to a contracting party alleged to have breached a contract. That it is trite law that tortious interference entails a 3rd party's intentional inducement of a contracting party to breach a contract, causing damage to the relationship between the contracting parties. It is the Applicant's submission that the statutory takeover of the management of the Applicant means that the Applicant is incapacitated in the discharge of all its contractual obligations such as the one claimed by the Claimants and that the hindrance by the proposed Respondent amounts to tortious interference. It cites the case of **Joseph Ochieng & 2 Others t/a Acquiline Agencies v First National Bank of Chicago [1990] eKLR** where the Court of Appeal highlighted the essential ingredients of tortious interference in a contract as hereunder:

“The essential ingredients of the tort of inducing a breach of contract are (1) that the wrongdoer knew or acquired knowledge of the contract in question and its essential terms, (2) that he so acted or interfered whether by persuasion, inducement or procurement or other means as to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party, (3) that the breach of contract was directly attributable to such act or interference, and (4) that damage was occasioned or was likely to be occasioned to such other party.”

6. The Applicant submits that when the proposed Respondent was taking control of the Applicant's business, it knew or ought to have known that the Applicant has contracts with various persons or entities that ought to be performed as agreed. That the failure to communicate how the said contracts would be performed under its administration indicates that it intended to prevent general performance of the contracts to the detriment of the Respondent/Applicant. That it would have honoured its contractual obligations were it not for the Proposed Respondent's act of interference and that it has consequently had to defend suit(s) on breach of contractual obligation induced by the Proposed Respondent. It submits that the claim of tortious interference is a triable issue which requires full trial and need not be determined summarily and that it has detailed the said issue in its Draft Response. The Respondent submits that **Black's Law Dictionary** defines the term 'triable' as, “*subject or liable to judicial examination and trial*” and as such, a triable case is not necessarily that which would be successful after determination about just one that warrants further intervention by the Court. Likewise, the Applicant submits that tortious interference is an issue that requires the Court to further interrogate it by way of trial and that it has demonstrated in its Application how the tortious interference caused the alleged breach. It further submits that the same is in itself a *prima facie* defence against the Claimants/Respondents' Statement of Claim and thus a subject of adjudication. The Applicant submits that in **Harrison Ndungu Mwai & 500 Others v Attorney-General [2014] eKLR**, the Court held that the plaintiffs could not plead inducement of their employment contracts because the World Bank, International Monetary Fund and the Donor Agencies were not parties to the suit. The Applicant further cites the case of **Mary Wangai Gachihi & Another v Principal Magistrate, Mukuruweini Courts & 2 Others [2016] eKLR** where the Court cited the Indian case of **Benares Bank Ltd. v Bhagwandas (AIR 1947 ALL, 18** where the court laid down the two tests for determining the questions whether a particular party is a necessary party to the proceedings. The Applicant submitted that the said tests were reiterated in the case of **Deputy Commissioner of Hardoi v Rama Krishna (AIR 1953 SC 521** and are as follows:-

- i. There has to be a right of relief against such a party in respect of the matters involved in the suit; and
- ii. The court must not be in a position to pass an effective decree in the absence of such a party.

7. The Applicant further submits that the Application herein satisfies the two tests and that in respect of matters in the suit, the Claimants/Respondents can rightly claim relief against the Proposed Respondent as it is in charge of the Applicant's general affairs and being the one that induced the breach of the Employment Contracts. Secondly, the absence of the proposed Respondent would render any decree ineffective since the Applicant is restricted in the performance of the employment contract because of the statutory management of the Applicant by the Proposed Respondent. It further submits that it has demonstrated that the proposed Respondent shall be bound by the result of the Claimants' action and has to participate in the trial for the question to be effectually and completely settled. It cites the case of **Pizza Harvest Limited v Felix Midigo [2013] eKLR** where Justice Havelock faced with a similar situation took into account the case of **Amon v Raphael Tuck & Sons 1956 I All ER 273** in which Devlin J. held at p.286-287 that:

“...The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore must be a question in the action which cannot be effectually and completely settled unless he is a party”

8. The Applicant further submits that the law requires that a person or entity that tortious interference is imputed against is granted an opportunity to appear and plead justification as a defence to the said interference. The Applicant submits that the proposed Respondent is then obligated to respond to the said allegations and that this was the principle in **HP Insurance Brokers Limited v Cannon Assurance Limited [2017] eKLR** where the Court observed that the defendant is entitled to raise the defense of Justification if those elements are satisfied. It is the Respondent/Applicant's submission that therefore in advancement of a fair hearing and for the ends of justice, it is fair to enjoin the proposed Respondent in the matter and that the Application dated 24th March 2021 should be allowed as prayed.

9. As at the time of penning the Ruling, the Claimants/Respondents had neither filed submissions nor sought an extension to do so. The matter before Court is one to allow for extension of time as well as joinder of a party. Regarding the principles governing extension of time, it is settled that the power to grant an extension of time is discretionary. A party who seeks extension has the duty to satisfy the court why he did not file a defence on time and provide a reason or explanation for the delay. The Court in determining the matter will consider whether the application for extension of time has been made timeously and the likely prejudice that the respondent is likely to suffer among other considerations. The Respondent/Applicant is alleged to be a Special Purpose Vehicle whose fate was tied to the failed Chase Bank (K) Ltd. The Respondent/Applicant thus seeks the joinder of the Kenya Deposit Insurance Corporation (KDIC) as a Respondent forthwith. The Kenya Deposit Insurance Corporation is a statutory institution established under the Kenya Deposit Insurance Act, 2012. The Kenya Deposit Insurance Corporation is mandated to provide a deposit insurance scheme for customers of member institutions as well as provide incentives for sound risk management and generally promote the stability of the financial system. It seeks to protect depositors against the loss of all their deposits or bank balance in the event of a bank failure. From a reading of the Act and the provisions in relation to the Kenya Deposit Insurance Corporation, it is not contemplated that the KDIC would take the place of an employer but actually indemnifies an employer in the event of collapse of the bank. The KDIC protects the deposits of the bank's depositors. On the issue of extension of time to file a defence, the delay was inordinate and unexplained. By reasons of the above and foregoing analysis, the Respondent/Applicant's motion is therefore misplaced and entirely devoid of merit. Respondent's Notice of Motion Application is hereby dismissed with costs to the Claimants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE