



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 553 OF 2017

JAMES OMARI MEREMO.....CLAIMANT

VERSUS

CHASE BANK LIMITED (IN LIQUIDATION).....RESPONDENT

RULING

The Respondent, Chase Bank Limited (In Liquidation) filed Notice of Preliminary Objection dated 3rd August 2021 on the grounds that:

- a) The Claimant never sought leave of Court to commence this Claim against the Respondent then under receivership thereby rendering all proceedings taken against the Respondent a nullity ab initio.*
- b) Even if leave to commence the suit was sought and granted, the suit against the Respondent cannot continue without leave of Court as the Respondent transitioned from receivership and is currently under liquidation.*

Parties addressed the objections by way of written submissions.

The Respondent submitted that the Claim dated 17th March 2017 is fatally defective for failure by the Claimant to seek leave of court following the placement of the Respondent under receivership and subsequently in liquidation. That Vide Gazette Notice No. 2320 of 7th April 2016, the Kenya Deposit Insurance Corporation (KD1C) was appointed as the official receiver of the Respondent pursuant to section 43(1) (2) and 53 (1) of the Kenya Deposit Insurance Act effective from 7th April 2016 for a period of 12 months. Subsequently, vide Gazette Notice No. 3651 of 16th April 2021 the Respondent was put in liquidation and the Kenya Deposit Insurance Corporation was appointed as liquidator pursuant to section 53(2)(b) and 54(1)(a) of the Kenya Deposit Insurance Act.

The respondent submitted that under Section 56 of the Kenya Deposit Insurance Act, 2012 provides that no cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator and that no 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.

While the suit was filed before the Respondent was put under receivership but section 56 of the Kenya Deposit Insurance Act, 2012 prohibits both commencement and continuation of suits against an institution under receivership or liquidation without sanction of court. The failure to seek the sanction of this Court was a fatal misstep that cannot be dismissed as mere technicality curable under the overriding objectives as held in the case of **Bougainville Estate Limited v Kenya Deposit Insurance Corporation (sued in their capacity as Receiver Managers of Imperial Bank Limited (In Receivership) & 3 others F20191 eKLR** the court held that;

...Thus suits cannot be commenced suo moto without the Court's leave and/or sanction. That will create anarchy. I hold that, for a company under receivership, a party suing it must seek the Court's leave before commencing a suit against it. Therefore, institution of any proceedings will require the sanction of the Court....Arising from the foregoing and noting that the Plaintiff concedes that no leave of the Court was sought prior to the filing of this suit, I am persuaded that the Preliminary Objection has merit and is hereby allowed.

In the case of **Kuza Farms and Allied Limited v Dubai Bank Kenya Limited (In Liquidation) [20171eKLR** where the court allowed a Preliminary objection to a claim where the Plaintiff had not applied for leave before filing the suit and that the instant Claim should therefore be struck out with costs to the Respondent.

The Claimant through his counsel on record submits that the Respondent upon being served with the instant claim failed to file any Defence to the memorandum of claim but filed a Preliminary Objection dated 20th July 2017 and another Notice of Preliminary Objection dated 3rd November 2021 seeking that the claim by the Claimant be struck out with costs. Further that it is not in dispute that the Respondent was placed under receivership by the Central Bank of Kenya vide Gazette notice no. 2320 of 7th April 2016 and subsequently placed under receivership on the 16th of April 2021.

The claimant submitted that the wording of section 56 of the Kenya Deposit Insurance Act, 2012 does not prohibit the commencement of suits against an institution under receivership. That the instant suit was commenced at a time the Respondent was under receivership but before it was put in liquidation and in the case of **Thomas & Piron Grands Lacs Ltd v Lighthouse Property Company Ltd v Chase Bank Kenya Ltd (In receivership) and another (Interested Party) (2019) eKLR** where the court held that; *...Perhaps I need to add that while proceedings against an institution under receivership can be commenced or continued without the necessity of court sanction, a decree holder will not be able to reach the assets of the institution if it is shielded by a moratorium under the provisions of Section 50(2).*

I have to come to the conclusion that the provisions of Section 56 of the KPI Act do not apply to institutions placed under receivership and the preliminary objection is misplaced.

The Notice of Preliminary Objection is incompetent for the reason that the Respondent failed to file a defence to the claim and raise the said preliminary objection in the said defence as held in the case of **Coast Haulers Limited v Imperial Bank Limited (In Receivership) [2021] eKLR** that the Defendant got it wrong when it raised a Preliminary Objection before filing its statement of defence.

Counsel submits that the Notice of Preliminary Objection is Premature as this claim is yet to be set down for hearing and therefore an objection is premature until the same is set down for hearing. That the issue of leave for continuation of the suit can only be brought at hearing of the claim. Counsel prays that the preliminary objection be dismissed with costs and the suit be heard on merit.

Determination

From the foregoing appreciation of the Preliminary Objection, the submissions and decisions relied on; the single issue that arises for determination is whether the issue for determination is whether the instant claim should be struck out for failure to comply with Section 56 (2) of the Kenya Deposit Insurance Act.

On one hand, the Respondent argues that the instant Claim is fatally defective for failure by the Claimant to seek leave of court to continue this suit following the placement of the Respondent under receivership and subsequently in liquidation. The Claimant, on the other hand advances the argument that the wording of section 56 of the Kenya Deposit Insurance Act, 2012 does not prohibit the commencement of suits against an institution under receivership but prohibits commencement of suits against institutions in liquidation.

The undisputed facts of this case are this suit was filed on 30th March 2017 while the Respondent was placed under receivership on 7th April 2016 and subsequently placed under liquidation on 16th April 2021.

Section 56 of the Kenya Deposit Insurance Act, 2012 provide that;

(1) No cause of action which subsisted against the Stay of 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.

Section 432 (2) of the Insolvency Act provides that when a Liquidation Order has been issued or a provisional liquidator has been appointed, legal proceedings against the company may be commenced or continued only with the approval of the court and subject to such conditions the court considers appropriate.

The courts have had a chance to make a determination on the issue at hand. In **David Ndiritu Gathungu & another v Chase Bank (Kenya) Limited (In Receivership) & 2 others [2018] eKLR** the court found a suit which had been filed without leave of court against a company under receivership to be incurably defective and incompetent and it was struck out with costs. Emphasis was given to the provisions of section 43(1) and (2), 53(1) and 56(2) of the Kenya Deposit Insurance Act 2012.

In the case of **Charity Wangui Ngumo v Chase Bank Limited (In Receivership) & Antique Action Agencies (2018) eKLR**, the court

held that leave of court was mandatory and found the suit to be incompetent *ab initio*. Similar orders were issued in the case of **George Mureithi and others v Kenatco Taxis Limited (In Receivership) [2016] eKLR** where the court held that the suit as a non-starter and was struck out for want of obtaining leave of Court before filing suit.

In the United States the courts apply what is commonly referred to as the Barton Doctrine. This doctrine emanated from the land mark case of ***Barton v Barbour, 104 U.S 126,127(1881)***. The Court in this case held that it lacked subject matter jurisdiction over a suit filed against a receiver if the Plaintiff did not first obtaining leave of court.

Both parties have made different submissions on the issue of receivership.

In **David Ndiritu Gathungu & another v Chase Bank (Kenya) Limited (In Receivership) & 2 others [2018] eKLR** the court adopted the definition as follows;-

Receivership in legal terms entails an order or directive where all the property and affairs of the institution are placed in the dominion and control of an independent person known as a Receiver. It is a preservation process put in place to protect the assets, liabilities and business affairs of an institution, with the aim of protecting the interests of its depositors, creditors and members of the public. In this case of a bank, to preserve the bank's liquidity, assets, and to find the best way to return into normal business.

In employment and labour relations disputes, the provisions of section 43(1) and (2), 53(1) and 56(2) of the Kenya Deposit Insurance Act 2012 and the provisions of Section 432 (2) of the Insolvency Act are given meaning by the provisions of section 69 of the Employment Act, 2007 which defines insolvency to mean;

67. An employer is insolvent for the purposes of this Part—

(a) if the employer is a person who—

(i) has been adjudged bankrupt or has made a composition or arrangement with his creditors; or

(ii) has died and his estate is to be administered in accordance with the Law of Succession Act;

(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

In such circumstances, where an employee is owed employment dues or employment is terminated due to insolvency, the employee is directed to file an application with the Minister as defined under the Employment Act, 2007 and Minister is allowed to pay such an employee out of the National Security Fund the amount which in the opinion of the Minister the employee is entitled in respect of the debt.

The Employment Act, 2007 therefore under Section 17 (8) exempts an employer undergoing insolvency from paying the entire amount of wages payable to an employee. Similarly, section 40(2) exempts an employer undergoing insolvency from the strict compliance with the conditions set under Section 40 (1) upon a declaration of redundancy.

Therefore, the court must be satisfied that the employee owed terminal dues by an insolvent employer is in strict adherence of section 66 of the Employment Act, 2007 so as to invoke its powers pursuant to section 71 of the Act. A claim should only be filed with the court after an employee has made application with the Minister and who is shown to have failed to make payment as required or that the payment made is less than the amount which should have been paid.

Therefore leave required before a party can file suit against an insolvent party has its purpose under the provisions of the Employment Act, 2007. The leave of the court herein was imperative before the claimant filed the instant suit.

71. Complaint to Employment and Labour Relations Court

(1) A person who has applied for a payment under section 66 may present a complaint to the Employment and Labour Relations Court—

(a) that the Minister has failed to make the payment; or

(b) that the payment made by the Minister is less than the amount which should have been paid.

(2) The Employment and Labour Relations Court shall not consider a complaint under subsection (1) unless it is presented—

(a) before the end of the period of three months beginning with the date which the decision of the Minister on the application was communicated to the applicant; or

(b) within such further period as the Employment and Labour Relations Court considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where the Employment and Labour Relations Court finds that the Minister should have made a payment under section 66, the Employment and Labour Relations Court shall—

(a) make an award to that effect; and

(b) declare the amount of any payment which it finds the Minister ought to make.

From the foregoing, it is clear that the intention of the drafters of the law meant to avoid adding unnecessary financial burdens to an institution undergoing insolvency.

In employment and labour relations, the exemptions and the requirement for leave is to ensure that the Minister is able to intervene and ensure an employee properly owed in terminal dues is paid and that a company undergoing financial crisis and in insolvency is not subjected to a multiplicity of suits which would be expensive, time consuming and at times unnecessary. Such actions may negate the attempts by the receiver to utilize the limited funds and attempt to return the company into normal business. It also ensures that all the creditors are treated equally.

It is however imperative to add that these provisions do not act as a bar to institution of suits against companies undergoing insolvency. It only allows the courts to act pursuant to the law and grant leave on good cause.

The upshot is that the Court finds that the Preliminary Objection dated 3rd August 2021 is merited and the same is allowed. The Suit against the Respondent is struck out with costs to the Respondent. Time stopped running on 30th March, 2017 when the claimant filed suit to secure his rights.

DELIVERED IN COURT AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

In the presence of: