



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 73 OF 2015**

**TERRY NJAGI MUIA.....CLAIMANT/APPLICANT**

**VERSUS**

**CHASE BANK (KENYA) LIMITED.....RESPONDENT**

**KENYA DEPOSIT INSURANCE CORPORATION.....2ND PROPOSED RESPONDENT**

**SBM HOLDINGS LIMITED.....3RD PROPOSED RESPONDENT**

**RULING**

**Introduction**

1. The claimant filed this suit against the respondent on 23.1.2015 seeking compensation for unfair termination of employment and terminal dues. Thereafter the respondent receivership by the Central Bank of Kenya (CBK) in April 2016. Again on 5.1.2018, the CBK announced through a press release that the 2nd proposed respondent had accepted a binding offer from the 3rd Respondent to acquire assets of the Respondent Bank.

2. As a result of the foregoing new development, the claimant filed the Notice of Motion dated 5.6.2018 seeking basically to enjoin the proposed 2nd and 3rd respondents as respondents to the suit and for leave to amend the claim to add the proposed new respondents. The application is supported by the affidavits sworn by the claimant on 6.6.2018 and 6.7.2018 which basically repeats the grounds for the application set out on the body the motion. The said grounds are that the proposed 2nd Respondent is the receiver and the manager of the respondent's affairs; that the proposed 3rd Respondent is acquiring 75% the respondents assets; that if the joinder is declined, there is reasonable probability that the claimant/Applicant may be obstructed or at the very least delayed in executing the decree of this court when granted in her favour hence defeating the interest of justice.

3. The proposed 2nd respondent opposed the application by filing grounds of opposition dated 23.7.2018 whose gist is that being a statutory Receiver, her status is that of an agent of the respondent and as such she cannot be sued as a substantive party. She therefore prayed for the application to be dismissed with costs.

4. The proposed 3rd respondent also opposed the application by filing the Replying Affidavit sworn by Mr. George Odete, Company Secretary for SBM Bank (Kenya) Limited on 14.6.2018. The gist of the affidavit is that the proposed 3rd respondent is not the one acquiring the respondent's assets but SBM Bank (Kenya) Limited as notified vide the press Release by the CBK dated 17.4.2018; that the assets being acquired are 75% only leaving 25% of the assets with the respondent; and that SBM Bank (Kenya) Limited is not assuring liabilities pertaining to employees terminated by the respondent consequently he maintained that the respondent is the right person to litigate with for all claims arising from its terminated staff including the claimant. She therefore prayed for the application to be dismissed with costs.

5. The motion was disposed off by written submission which I have carefully considered herein.

**Claimant Submission**

6. The claimant submitted that after being placed under receivership, the respondent's management and control of her affairs went to the proposed 2nd Respondent as the receiver by dint to section 45 (b) (ii) of the Kenya Deposit Insurance Corporation Act (KDIC Act) until the time when the appointment as the receiver will be revoked. She further contended that under section 45(a) of the Act (a) of the Act, the receiver acts as the agent of institution under receivership, while carrying out the business and managing the assets liabilities and affairs of the institution or in carrying out any transactions relating to the assets and affairs of the institution. She contended that the receiver's appointment has not been revoked although in her view the appointment has been over stretched. She therefore urged that failure to enjoin the proposed 2nd Respondent will potentially obstruct or delay execution of the decree of the court in this suit.

7. She further submitted that there is nothing in law that bars or ousts the jurisdiction of the Court to continue with the suit because the respondent is not under liquidation. That it is only when the institution is under liquidation when jurisdiction is ousted by section 56(1) of the KIDC Act. She relied on *Ashok L. Doshi & Another Vs CBK & Another [2016]eKLR* to fortify the submission that leave to continue with the suit does not require leave of the court because the respondent is not under liquidation but only placed under receivership.

8. As regards the joinder of the proposed 3rd Respondent, the claimant submitted that because she is acquiring 75% of the respondents' assets, she has an interest in the suit as they have acquired the employees of respondent and as such, the respondent will not be able secure the transferred staff to attend hearing in this suit.

9. She further submitted that although the proposed 3rd respondent is not the one acquiring respondent's assets, she owns 92% of the SBM Bank (Kenya) Limited. She therefore urged that if the court finds merit in the application, the proposed 3rd Respondent can be substituted with SBM Bank (Kenya) Limited which now has taken over the staff personnel files from the respondent.

#### **Proposed 2nd Respondent's Submissions**

10. The proposed 2nd Respondent submitted that as a statutory receiver of the respondent she cannot be sued as a substantive party to the suit. That under section 50(4) (f) of the KIDC Act where she assumes control of an institution under receivership, by dint of section 44(2) (b) of the Act, she has the power to sue for, defend, compromise or settle, in the name of the institution, any claim made by or against it. Section 50(4) (f) of the Act provides that:

*"50(4) where the corporation has assumed control of an institution under section 44(2) (b), the corporation shall have the power:*

*(f) to sue for, defend compromise and settle, in the name of an institution, any claim made by or*

*against it."*

11. In view of the said express provision of the law, the proposed 2nd Respondent contends that she is only an agent of the respondent and cannot therefore be sued or enjoined as a party to this suit because it concerns a claim against the respondent and not herself.

#### **Proposed 3rd Respondent's Submission**

12. The proposed 3rd Respondent submitted that she is not the one acquiring the assets of the respondent but SBM Bank (Kenya) Limited. That she is a separate and independent legal person from the said buyer of the respondents assets. She therefore urged that the nature of respondent's relationship with the SBM Bank (Kenya) Limited does not expose her to, nor render her culpable, for any liabilities that accrue against the respondent.

13. In addition, the proposed 3rd Respondent submitted that there is no privity of contract between herself and the claimant in the Employment contract dated 23.11.2010. She contended that the contract was between the claimant and the respondents and as such, it cannot confer rights or impose obligations on any other person other than the two parties to the contract. She relief on section 3(1) of the Law of contract cap 23 and *Agricultural Finance Corporation Vs Lengetia Ltd [1985]KLR 763*.

14. She further submitted that enjoining her as a party to this suit would neither aid the court nor advance the interest of justice because when is a stranger to the dispute. He urged that it will be a misjoinder to enjoin as a party to this suit because a person must only be joined in an action if complete relief cannot be afforded to the parties without his joinder or if his interest is such that grave injustice will be done without him.

#### **Analysis and Determination**

15. The issues for determination are:-

(a) Whether the proposed 2nd and 3rd Respondent should be enjoined as respondents to this suit.

(b) Whether leave should issue to the claimant to amend her statement of claim to add the proposed 2nd and 3rd Respondents to the suit.

#### **Joinder of the proposed 2nd and 3rd respondents**

16. I have carefully considered the provisions of section 50(4) (f) of the KIDC Act and I agree with the submissions by the proposed 2nd Respondent that as an agent of a disclosed principal she cannot be enjoined as a substantive party to the suit for a claim against the principal. By dint of section 50(4) (f), the Corporation is an agent of the institution it is controlling or managing under section 44(2) (b) of the Act. The said section 50(4) (f) provides that the corporation, while acting as the official Receiver of an institution, it can only sue or defend suits in the name of the institution. I therefore return that proposed 2nd respondent cannot be enjoined as a substantive party to this suit.

17. As regards the proposed 3rd respondent, the claimant admitted in her submissions that by the second press release by the CBK dated 17.4.2018, it was clarified that it is SBM Bank (Kenya) Limited and not the proposed 3rd respondent who was acquiring the respondent's assets. The application for joinder herein was filed on 7.6.2018 about 2 months after the said press release. The application did not request for SBM Bank (Kenya) Limited to be enjoined as a respondent to the suit herein. I therefore also decline to the request to enjoin the proposed

3rd respondent to this suit. However on my own motion, and in view of the fact that the SBM Bank (Kenya) Limited is the person acquiring the respondents assets, I am of the view that she is a necessary party in this case. I therefore order that SBM Bank (Kenya) Limited be enjoined to this suit as the 2nd Respondent.

**Leave to Amend Statement of claim**

18. The leave sought to amend the claim was depended on the grant of the request to enjoin the proposed 2nd and 3rd Respondents as parties to the suit. In view of the fact that the court has declined the request for the joinder of the proposed respondents, the leave to amend the claim to add the proposed respondents is also declined. Leave is however granted to amend the claim to enjoin SBM Bank (Kenya) Limited as the 2nd Respondent within 14 days of today.

**Conclusion**

19. The Notice of Motion dated 5.6.2018 lacks merits and it is dismissed with no order as to costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019**

**ONESMUS N. MAKAU**

**JUDGE**