



**Mwenje v Chase Bank Kenya Ltd (in Liquidation) & 2 others (Commercial Case E510 of 2023) [2025] KEHC 723 (KLR) (Commercial and Tax) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 723 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E510 OF 2023  
AA VISRAM, J  
JANUARY 30, 2025**

**BETWEEN**

**JAMES MWAURA MWENJE ..... APPLICANT**

**AND**

**CHASE BANK KENYA LTD (IN LIQUIDATION) ..... 1<sup>ST</sup> RESPONDENT**

**KENYA DEPOSIT INSURANCE CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**VENAP AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. I have considered the Notice of Motion application dated 23<sup>rd</sup> October, 2023, together with the affidavit sworn in support and the replying affidavit sworn on 21<sup>st</sup> November, 2023. I have also considered the Preliminary Objection filed by the 2<sup>nd</sup> Defendant and the submissions in support and in opposition to the same, and the applicable law.
2. The Applicant seeks leave to institute a suit against the 1<sup>st</sup> Defendant in accordance with Section 56(2) of the [Kenya Deposit Insurance Act](#) (the Act); and further seeks an injunction restraining the Respondents from disposing of the apartment belonging to the Applicant.
3. In opposition to the Application, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed a Preliminary Objection dated 21<sup>st</sup> November, 2023. The gravamen of the Preliminary Objection, is to the effect that an instant suit has been brought against an agent and a disclosed principal, and further to this, Section 50(5) of the [Kenya Deposit Insurance Act](#) provides that the 2<sup>nd</sup> Defendant cannot assume or incur liabilities on behalf of the 1<sup>st</sup> Defendant.
4. The issues for determination by this Court are;



- a. Whether the Preliminary Objection should be allowed?
  - b. Whether the Plaintiff/Applicant ought to be granted leave to institute the present suit?
  - c. In the event the above is affirmative, has the Applicant met the threshold for issuance of the injunctive reliefs sought?
5. As regards the first issue, Section 45(5) & 50(5) of the *Kenya Deposit Insurance Act* (KDI Act) provide for protection of the 2<sup>nd</sup> Defendant against suits brought on account of institutions that are under its control. Section 45(5) in particular, identifies the 2<sup>nd</sup> Defendant when acting as a receiver as being an agent to the institution it has assumed control over. In particular, section 45 (5) reads as follows:-

Where the Corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall—

- (a) be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, businesses and affairs, including disposal of assets; and
  - (b) not, by reason of having assumed control of the institution or any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account. (Emphasis mine)
6. Section 50 (5) of the *Act*, under the heading powers of receivers, similarly reads as follows:-

Where the Corporation, exercises one or more powers under this section, the Corporation shall not, by reason of the exercise of such powers, be held to have assumed or incurred any obligation or liability of the institution for its own account. (Emphasis mine)

7. In *Andrew Muma and Charles Kanjama Trading as Muma & Kanjama Advocate & others v Deloitte & Touche East Africa & 5 others* [2020] eKLR the court made the following observation:-

It is clear that, the aforesaid provisions expressly prohibit institution of a suit against the Corporation, save for a person claiming that; they have sustained losses as a result of the action of the Corporation. However, the Corporation acts as an agent of the Chase Bank Limited in Receivership... Therefore, the Bank in Receivership and the Corporation cannot both be parties in the suit.”(Emphasis mine)

8. In *Atul R. Shah & another v Imperial Bank Limited & another* [2021] eKLR, where Hon Justice Mabeya in addressing himself as to the effect of Sections 45(5) and 50(5) of the *KDI Act* made the following observations:-

...The upshot of the foregoing is that, when the 2nd Defendant is appointed as receiver of any entity, it acts as an agent of such entity. It assumes no liability of such entity at all. Its liability is restricted to damages suffered by any party as a result of its own actions. See *Andrew Muma And Charles Kanjama Trading as Muma & Kanjama Advocate & others v Deloitte & Touche East Africa & 5 others* [2020] eKLR.

In view of the foregoing, the Plaintiffs claim in the plaint should be directed at the 1st Defendant and should not extend to the 2nd Defendant. This is so because it relates to the release of part of the deposit to the insured depositors of the 1st Defendant. Although the



2nd Defendant may be exercising its powers as a receiver of the 1st Defendant, it is not to be held liable for its carrying out that mandate

In view of the foregoing, the Preliminary Objection dated 7/12/2020 is meritorious. The court allows the same and strikes out the 2nd Defendant from the suit. Costs are awarded to the 2nd Defendant....”(Emphasis mine)

9. In E.L.C Case No. 137 of 2015: *Daniel Kipruto Metto versus Chase Bank (K) Limited (IL)*, Hon. Justice Obaga observed as follows at paragraphs 7 - 11 as follows:-

The law is clear that once KDIC has been appointed as a receiver or liquidator of an institution, it becomes an agent of that institution. The law then protects it from assuming any obligations or liabilities of the institution for its own account....in the instant case, the Applicant is seeking to join KDIC in the proceedings for purposes of execution of a decree arising from a judgment of 17/1/2022. This cannot be allowed in view of the express provisions of KDI Act. This is clear from section 45(5) and section 50(5) of the KDI Act.... from the above analysis, it is clear that KDIC cannot assume liabilities and obligations of the Respondent....”(Emphasis mine)

10. Further to the above, Section 46 of the Act states as follows:-

Where the Corporation or the appointed person, as the case may be, has assumed control of an institution under section 44(2)(b)—

- (a) no injunction may be brought or any other action or civil proceeding commenced against the Corporation or the appointed person in respect of the assumption of control; (Emphasis mine)
- (b) no creditor has any right of set-off against the institution, which for greater certainty, does not include the consolidation of accounts maintained in the normal course for the purpose of providing clearing and settlement services or other services referred to in section 48; and... (Emphasis mine)
- (2) Subsection (1) shall not prevent any person who sustains losses from any action of the Corporation or the appointed person from instituting an action for damages for the losses suffered by such person.

11. Guided by the law above, I am of the view that the Corporation may not be held liable for the acts of the institution or entity, in the pursuance of its mandate. As an agent, no liability may attach, save for damages that may be attributed to its own actions leading to loss. Here, there is no evidence of the same, and accordingly I find that the Preliminary Objection is with merit. The same is upheld.

12. As regards the next issue, namely, the question of whether or not the Plaintiff ought to be granted leave to commence a suit against the Bank, in liquidation, the applicable law is found at Section 56 of the Act and states as follows:-

56. Stay of proceedings

- (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. (Emphasis mine)



- (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. (Emphasis mine)

13. Based on the above, the default position under the *KDI Act* is that all civil action subsisting prior to liquidation, are stayed once the Bank goes into liquidation. Further, no new civil proceedings may be brought against the Bank without leave of the court. The reason for the above is because the Bank is no longer trading. The logic behind the law is to ensure that the liquidator or receiver may carry out its mandate without disruption, and may utilize the assets realized from the process for the benefit of all depositors, and affected members of the public, in accordance with priorities set out under the Act, and in an equitable manner.
14. The Applicant did not make any submission whatsoever in respect of why he ought to be granted leave, and no basis, or explanation, was laid before this court, as to why this court ought to depart from the default position under Section 56 as stated above. Counsel however, did submit that he knew leave is required under the Act, and that is why he applied for leave. I repeat, no basis or ground for the grant of leave was laid before this court. I do not think that in scenarios such as the present one, leave is granted as a matter of formality, or automatically upon application. The Applicant bears the burden of proof of showing why leave ought to be granted on a balance of probability. This was not done, and the court may not assume, or simply infer, based on the pleadings before it.
15. In the absence of any submission as to why leave ought to be granted, I am not persuaded that this court ought to grant leave. The oversight on the part of the Applicant is fatal because an injunction may not issue where there is no suit before the court. Order 40 (1) and (2) of the *Civil Procedure Rules*, contemplates the existence of a valid suit as a precondition for the grant of an injunction. Without such leave, the jurisdiction of the court has not been engaged to grant the injunctive relief sought. Moreover, the failure on the part of the Applicant means that there is no competent suit before this court.
16. However, in the event, I am wrong on the issue of leave, I will still address the question of whether or not the Plaintiff/Applicant has met the threshold for issuance of the injunctive reliefs. The law here is clear. The court ought to address itself to the requirements that were stated in *Geilla v Cassman Brown*. That is, when granting an injunction, the court ought to consider if the suit has a prima facie case with probability of success, whether the Applicant will suffer irreparable damage; and finally, if in doubt, the court may allay such doubts based on the balance of probability.
17. As to whether the Plaintiff/Applicant has raised a prima facie case? In *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, the court in defining a prima facie case expressed itself as follows:-
- “A genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
18. Based on the affidavit evidence before this court, the Plaintiff has not denied that the facility remains in default to date. The Plaintiff's main contention, in seeking a stay of the intended statutory action, is that the amount due and owing to the 1<sup>st</sup> Defendant was different from the amount stated in the Statutory Notice, rendering the same defective.
19. The Plaintiff submitted that the amount secured by way of charge was the sum of Ksh. 6,500,000/-, while the 1<sup>st</sup> Defendant contended that the Plaintiff had at his own request amalgamated his various



- loans. I note that evidence of the same is found at page 31 of the Respondents replying affidavit, Exhibit GO2, and that secured sum sought by the Respondent is the sum of Kshs. 50,879,192.35/-.
20. Further, at Page 42 of the replying affidavit, is a letter dated 21<sup>st</sup> March, 2019, in which the 1<sup>st</sup> Defendant issued Statutory Notice pursuant to Section 90 of the Land Act. The amount indicated as outstanding and in default was similarly, the sum of Kshs. 52, 997,643/-.
  21. Additionally, at page 44 of the replying affidavit, is the letter dated 25<sup>th</sup> June, 2019, issued pursuant to Section 96 of Land Act and provides a 40 day notice period to the Plaintiff. Once again, the Notice indicates that the sum due and owing at that time was Kshs. 52,997,643.50/-. In both Statutory Notices as stated above, the Bank stated that the facilities were secured by way of a legal charge over the subject property. There is no evidence before the court to show that the applicant disputed the amount sought by the Bank at that time.
  22. Therefore, in my view, the Redemption Notice by the auctioneers pursuant to rule 15 (d) of the Auctioneers Rules, and dated 10<sup>th</sup> March, 2023, indicating the sum of Kshs. 18,500,000/- did not in any way prejudice the Plaintiff. He knew as far back as March 2019, that the sum of Kshs. 52 Million (with interest accruing) was due and owing to the Bank, and had been secured by the subject property.
  23. Based on the record, the Applicant had already received two Statutory Notices at this point, being March 2023, indicating the sum due, and was well aware of the consequences of his default. Further, the Applicant had the opportunity, but chose not to, make any payment pursuant to the redemption notice, which ironically sought an amount which was less than the amount actually due.
  24. In Elizabeth Njeri v Housing Finance Company of Kenya Ltd [2006] eKLR the court quoted with approval the decision in Habib Bank A. G. Zurich v Pop-In (Kenya) Ltd & 3 Others, where the Hon. Kwach J.A. held as follows:

“.....That clearly is an admission of default and as I understand the law, a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale.”
  25. I am in agreement with the above authority. I do not think that a dispute as to the amount due is an appropriate ground for the grant of an injunction. Further, based on the logic of the same, and based on the facts in the present matter, I do not think that the error in the amount stipulated in the Auctioneers Notice prejudiced the Applicant for the various reasons stated above.
  26. I am therefore not persuaded that the Applicant has made out a prima facie case in the terms required by in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, in so far as the Applicant has failed to demonstrate a clear and unmistakable right to be protected, which is directly threatened by an act sought to be restrained, or that its right is material and substantive, and there is an urgent necessity to prevent the irreparable damage that may result from the invasion.
  27. Having satisfied myself that the Applicant has failed to surmount the first limb, there is no need to move to the second limb of the test set out above. I therefore will not address the second or third limb. Having stated the above, that brings the matter to an end.
  28. The orders of this court are as follows:-
    - a. The application is without merit and the same is dismissed with cost.
    - b. The Preliminary Objection is upheld and the suit against the 2<sup>nd</sup> Defendant is hereby struck out with costs.



- c. The Plaintiff suit is struck out without costs.
- d. A temporary stay of execution in respect of only the order striking out the Plaintiff's suit is granted for a period of 30 days.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

**ALEEM VISRAM, FCIArb**

**JUDGE**

**In the presence of;**

- ..... Court Assistant
- ..... For the Plaintiff/Applicant
- ..... For the 1<sup>st</sup> Defendant/Respondent
- ..... For the 2<sup>nd</sup> Defendant/Respondent
- ..... For the 3<sup>rd</sup> Defendant/Respondent

