



REPUBLIC OF KENYA



**Trust Bank Limited v Immuno Laboratories Limited & another (Civil Appeal E022 of 2019)
[2025] KEHC 1402 (KLR) (Commercial and Tax) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E022 OF 2019
CJ KENDAGOR, J
JANUARY 27, 2025**

BETWEEN

TRUST BANK LIMITED APPELLANT

AND

IMMUNO LABORATORIES LIMITED 1ST RESPONDENT

DR WYCLIF BASA MWANGALE 2ND RESPONDENT

(Being an Appeal against the Judgment of Hon. G.A Mmasi (SPM) delivered on 16th October, 2019 in Chief Magistrates Court Milimani Commercial Civil Suit No. 3266 of 2007)

JUDGMENT

Introduction

1. In or about the year 1996, the Appellant advanced to the 1st Respondent a loan payable by way of instalments within three months with interest at the rate of 15%. The Appellant claims that the loan was secured by the personal written guarantee of the 2nd Respondent. The Appellant claimed that the 1st Respondent failed to repay the said sum as agreed and the 2nd Respondent failed to honour his personal guarantee.
2. According to the Appellant, the outstanding debt stood at Kshs.2,700,901.37/= as at 26th April, 2006 and continued to accrue interests. The Appellant sued the Respondents seeking judgment against them jointly and severally for Kshs.2,700,901.37/= and interest at the rate of 15% last applied till payment in full. By the time of bringing the suit, the Appellant was in liquidation by Deposit Protection Fund.
3. The Respondents filed a joint defense in which they denied the Appellant's claim.



They maintained that the 1st Respondent is not indebted to the Appellant as alleged. The Court delivered the judgment on 16th October, 2019 wherein it dismissed the Appellant's case for want of jurisdiction to institute the case. The Court held that the Appellant, being in liquidation, could not sue or be sued until the moratorium was lifted.

4. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 29th October, 2019 It listed the following Grounds of Appeal;
 - a. That the learned Magistrate erred in law and in fact in failing to consider the merits of the Appellant's case against the Respondents.
 - b. That the learned Magistrate erred in law and in fact in finding that the Appellant did not have capacity to sue the Respondents.
 - c. That the learned magistrate erred in law and in fact in finding that the role of a liquidator is limited to preservation of assets only.
5. It asked this Court to reverse and set aside the Judgment of Honourable G.A. Mmasi, dated the 16th day of October, 2019 in Nairobi CMCC No. 3233 of 2007. It also asked for costs of the Appeal.
6. The Appeal was canvassed by way of written submissions. The Appellant filed its submissions but the Respondent did not, despite being given the opportunity to file.

Appellant's Written Submissions

7. The Appellant submitted that by virtue of Section 5 (1) of The [Kenya Deposit Insurance Act](#) No. 10 of 2012, the Kenya Deposit Insurance Corporation (KDIC) is granted power to institute suit for purposes of recovery. It argued that KDIC has the requisite statutory mandate to bring actions for the recovery of money which had been lost by its member institutions. Its argument is that the proceedings herein had been brought by the Corporation, with a view to recovering the deposits which had been placed at the bank. It submitted that in this case, the recovery suit was brought by KDIC, in the name of the Bank.

Issues for Determination

8. I have considered the Grounds of Appeal and submissions by the counsel for the Appellant. I am of the view that the issue for determination is;

a). Whether the Suit was brought by KDIC in the name of the Bank.

9. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”



Whether the Suit was brought by KDIC in the name of the Bank

10. The lower Court found that the Appellant was under liquidation and interrogated the Appellant's capacity to institute the suit while in that status. It held as follows; "The issue this court has to consider are does the [Appellant] which is in liquidation have capacity to sue or be sued. The [Appellant] was placed under receivership which means the [Appellant] could not meet its financial obligation hence receivers are appointed to protect the real property. It is eve the law that an insurance company under Receivership cannot sue r be sued until the moratorium is lifted. It is my considered view that the [Appellant] lacks capacity to sue or be sued."
11. In the Written Submissions dated 30th September 2024, the Appellant admits that when a limited company is placed under [liquidation], it cannot sue or be sued, [same] as an entity which was under receivership. For this reason, it argued that the current suit was brought by KDIC, in the name of the Appellant (the Bank).
12. I have relooked at the suit documents filed at the lower Court with a view to ascertaining whether the suit was indeed brought by KDIC, in the name of the Bank. I have seen the Complaint dated 17th April 2007. It describes Trust Bank Limited as the Plaintiff in the suit. It states; "The Plaintiff is a limited liability company duly incorporated in the Republic of Kenya and having its principal place of business in Nairobi and is currently in liquidation by the Deposit Protection Fund." Clearly, this description does not insinuate or state that the suit was brought by KDIC, in the name of the Bank.
13. I have also seen the Verifying Affidavit that accompanied the Complaint. The Affidavit is dated 17th April, 2007 and was deposed by one Ruth Ngure. In the Affidavit, the Deponent does not mention about KDIC. She also states that the Appellant (Trust Bank Limited) had given her the authority to swear the affidavit on its behalf. It reads; "I am the liquidating Agent of the Plaintiff company herein and have the plaintiff's authority to swear this Affidavit on its behalf."
14. Based on the selected text of the pleadings at the lower Court, I am of the view that the suit was brought by the Bank, the Appellant. It was not brought by KDIC, in the name of the Appellant as being alleged by the Appellant. I thus find no reasons to disturb the judgment of the lower Court.
15. I note that the Appellant had disclosed in the Complaint that it was currently in liquidation by the Deposit Protection Fund. However, I do not think that the mere mention of the Deposit Protection Fund can come to the Appellant's aid. This is because, at the time the Appellant lodged the suit at the lower Court, Courts had maintained that the Deposit Protection Fund did not have legal standing to institute a suit.
16. In *John Gachoki Ndenge v Kiambu Dandora Farmers Company Limited & Another* (Civil Suit No. 481 of 2006 [2008] eKLR, the High Court held that the Deposit Protection Board was not a legal entity and therefore incapable of suing or being sued. It stated:

"...under that section {s.36(1)} of the *Banking Act*, it is the Deposit Protection Fund Board which is the legal entity with corporate powers and therefore capable of suing and being sued. The Deposit Protection Fund is not a legal entity and therefore it is incapable of being sued. It was therefore materially defective and a nullity for the plaintiff to institute the suit against the Deposit Protection Fund. That defect is not curable by an amendment."
17. The Court of Appeal gave a similar interpretation in *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & another* [2016] eKLR, where is



held that a recovery suit instituted by the Deposit Protection Fund in 2005 could not stand for want of legal standing. It held as follows;

(26) On the first issue, there is no dispute that the suit in the High Court was instituted by the Deposit Protection Fund and not by the Deposit Protection Fund Board. Before its repeal by *Act No. 10 of 2012*, sections 36 and 37 of the *Banking Act* made clear stipulations on establishment and legal status of Deposit Protection Fund Board (DPFB). Section 36(1), (2) & (3) (now repealed) made it clear that the DPFB was established as a body corporate with perpetual succession and a common seal, with power to acquire, own, possess and dispose of property, to contract and to sue and be sued in its own name. The DPF, on the other hand, as clearly stipulated by section 37 (now repealed), was a Fund in an account with the Central Bank of Kenya containing moneys to protect the interests of depositors and was made up by contributions under section 38 of the *Banking Act*. Nowhere in the *Banking Act* or in any other statute was the Fund given legal status. It had no legal personality. The suit struck out by the High Court was instituted in the name of Deposit Protection Fund. It was clearly instituted by a non-legal body.

18. The Appellant also argued that the suit was brought by KDIC on behalf of the Bank. Its argument is that KDIC has the power to institute suit for purposes of recovery by virtue of Section 5 (1) of The *Kenya Deposit Insurance Act* No. 10 of 2012. While as it is true that KDIC has the power to institute suit for purposes of recovery, this Court points out that KDIC was not in existence at the time when this suit was brought in 2007, and thus it was not possible for it to bring the suit KDIC was established in 2012 by the enactment of the *Kenya Deposit Insurance Act*, CAP. 487C, which came into force on 1st July, 2014.

Disposition

19. The Appeal is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 27TH DAY OF JANUARY, 2025.

C. KENDAGOR JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Taank Advocate for the Appellant No attendance for the Respondent

