



Voi Estate Limited v Imperial Bank Limited (In Receivership) (Civil Suit E012 of 2021) [2025] KEHC 4057 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 4057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E012 OF 2021
F WANGARI, J
FEBRUARY 27, 2025**

BETWEEN

THE VOI ESTATE LIMITED PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN RECEIVERSHIP) DEFENDANT

JUDGMENT

1. The Plaintiff's claim is found in the amended plaint dated 18th October, 2023 wherein it sought for judgement against the Defendant for the following reliefs:
 - a. The sum of Kshs. 101,528,899.40/= together with interest at court rates from the date when the same became due until payment in full;
 - b. General damages for breach of contract and duty of care;
 - c. Costs of this suit;
 - d. Interest on (a) and (b) above at court rates; and
 - e. Such other or further relief as this Honourable Court may deem fit.
2. Together with the Amended Plaint, the Plaintiff filed the accompanying documents as required under Order 3 Rule 2 of the Civil Procedure Rules, 2010. Upon service of the pleadings upon the Defendant, it entered appearance and filed its amended defence dated 18th January, 2024. It equally filed the requisite documents in terms of Order 7 Rule 5 of the Civil Procedure Rules, 2010.
3. In a nutshell, the Plaintiff averred that at all material times, it was the Defendant's customer operating three (3) current accounts, account numbers [particulars withheld] all domiciled at the Defendant's Kizingo Branch. In the course of operating the aforementioned accounts, the Plaintiff also placed monies in several separate fixed deposit accounts which it was entitled and indeed earned interest from



- them. The Plaintiff averred that it was an implied term of the contract between it and the Defendant that the Plaintiff would upon demand be availed the funds for its disposal as it deemed fit.
4. The Plaintiff stated that on 13th October, 2015, the Defendant was placed under statutory management by the Central Bank of Kenya (CBK) on grounds of unsafe and unsound business conditions which were not attributable to the Plaintiff. On the same date, Kenya Depositors Insurance Corporation (KDIC) was appointed as the receiver and it proceeded to declare a moratorium to apply equally and without discrimination to the liabilities of the Defendant in terms that no deposits or any types of accounts operated by the Defendant shall be paid to the depositors during the subsistence of the moratorium.
 5. As at the time the Defendant was placed under receivership, the Plaintiff's deposits in the fixed account was Kshs. 132,287,963/= while the current account had Kshs. 1,286,566/= totaling to Kshs. 133,574,530/=. Due to the moratorium, the Plaintiff could not access the funds for its use. The Plaintiff averred that on 8th December, 2021, CBK revoked the Defendant's licence and appointed KDIC as its liquidator to whom all claims and matters relating to the Defendant were to be directed to.
 6. The Plaintiff pleaded that the Defendant's actions leading to its placement under receivership and its licence being later revoked and being placed in liquidation was a breach of contract and a direct breach of duty of care it was owed by the Defendant. It enumerated the particulars of breach of contract and breach of duty of care. Because of its inability to access its funds, the Plaintiff averred that it suffered loss which loss it particularized. The Plaintiff averred that through periodic release of funds, it has managed to receive a sum of Kshs. 32,045,630.60/=. It thus prayed for judgement in its favour.
 7. In its defence, the Defendant made admission to several paragraphs among them paragraphs 6,7 and 9. However, it stated that it was placed in liquidation by CBK and that the Plaintiff was under a misconception since it did not hold any of the Plaintiff's funds. The funds if any were being held by KDIC which was not a party to the suit. The Defendant further averred that the suit is contra statute and ought to be struck out in limine. Lastly, it averred that the Plaintiff was not entitled to the prayers sought in the amended plaint since it was incapable of making any payments if at all in its current status.
 8. Both parties called one (1) witness each. For the Plaintiff, Shakil Mohamed Hussein Visram adopted his witness statement dated 30th November, 2023 and filed in court on 4th December, 2023. He equally produced the initial documents filed on 8th February, 2021 as well as the supplementary documents filed on 4th December, 2023. He confirmed that they received payment for years one and two and not years 3 and 4.
 9. In cross examination, he confirmed that he was aware that the Defendant was now in liquidation and no longer under receivership. He stated that there were fraudulent transactions by the Defendant's directors leading to KDIC being appointed as receiver and liquidator. He confirmed that they had been paid about Kshs. 32,000,000/= and they had approximately Kshs. 133,000,000/= in deposits. The Kshs. 32,000,000/= was paid by Kenya Commercial Bank (KCB) to their Diamond Trust Bank (DTB) account. He could not confirm what happened to years two and three but no money was paid. It is KCB that never paid.
 10. He confirmed that he was aware that the receiver was pursuing the debtors and that they ought to have received the money by now. He stated that the Defendant was placed under receivership in 2015 and that approximately Kshs. 101,500,000/= is still outstanding. The amount was inclusive of tax.
 11. In re-exam, he confirmed that Kshs. 32,045,650.35/= had been paid against a deposit of Kshs. 133,574,530/=. Accordingly, a sum of Kshs. 101,528,899.40/= was outstanding. That marked the close of the Plaintiff's case.



12. Andrew Rutto testified on behalf of the Defendant. He adopted his statement dated 15th April, 2024 as his evidence in chief and also produced documents in support of the defence case of even date. He stated that pre-liquidation, the Defendant was placed under receivership in 2015 and thereafter in liquidation in 2021. He confirmed that as at the time the Defendant was placed in receivership, the Plaintiff had deposits of Kshs. 133,574,530/= and that they had made payments amounting to Kshs. 36,414,707.25/= therefore leaving a balance of Kshs. 97,159,821.97/=.
13. He stated that the Defendant is unable to pay the money and that calculation of pending payments or loans is ongoing. He further stated that payment of insured deposits is ongoing. In cross examination, he confirmed that he was the appointed liquidation agent and the appointing authority was KDIC and not the Defendant. He confirmed that about Kshs. 2.7 billion was misappropriated by the Defendant. He added that there is a pending suit in court where the Defendant has sued its directors. He confirmed that the misappropriated funds were from the Defendant's customers. He stated that pre-receivership, the Defendant had a duty towards its customers.
14. He confirmed that he was aware of a consent between the Defendant and one Ashok Doshi. The amount was to be determined by the court and right of appeal by the Defendant was payable to the depositors. Referred to page 47 of the Plaintiff's documents, the witness stated that he could not confirm that the Plaintiff received the subject amount from KCB. Referred to its exhibit 7 at page 9, he stated he did not prepare the document but he only printed the statement.
15. In re-exam, he confirmed that he had access to documents from the Defendant. On page 47, he stated that payments of Kshs. 1,000,000/= was to be paid. That marked the close of the Defendant's case.
16. Both parties opted to file submissions. Parties filed detailed submissions and cited various decided cases in support in support of their rival positions. The Plaintiff's submissions are dated 17th July, 2024. It isolated five (5) issues for determination among them whether there was a breach of contract and duty of care by the Defendant and whether in light of the breach, the Plaintiff was entitled to the sum of Kshs. 101,528,899.40/= plus interest at court rates being the total refundable deposit amount. There was also the issue of costs.
17. In buttressing its position, the Plaintiff cited several decided cases among them the case of Deborah Ngugi Karanja v Family Bank Limited & AMP; Another (Commercial Case E274 of 2020) [2023] KEHC 2215 (KLR), Jackline Njeri Kariuki v Moses Njung'e Njau [2021] eKLR, Hydro Water Well (K) Limited v Sechere & 2 Others (Sued in their Representative Capacity as Officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) among others. Accordingly, it was the Plaintiff's position that it had proved its case to the required standards and was thus entitled to the prayers sought in the amended plaint.
18. The Defendant's submissions are dated 19th November, 2024. The Defendant framed three (3) issues for determination being; whether the Plaintiff's claim for Kshs. 101,528,599.40/= together with interest is payable, whether the Plaintiff is entitled to general damages for alleged breach of contract and duty of care and who is entitled to costs. The Defendant relied on several provisions of the [Kenya Deposit Insurance Act](#) and section 108 of the [Evidence Act](#).
19. Further reliance was placed on several decided cases among them Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR, Kirtesh Premchand Shah v Trust Bank Limited, Kenya Deposit Insurance Corporation v Richardson & David Limited & Another [2017] eKLR among others. It was the Defendant's contention that first, the Defendant having been placed in liquidation lost its capacity to make any payments and further, that there can be no payment of general damages for breach of contract.



Analysis and Determination

20. I have carefully considered the parties' respective pleadings, the evidence tendered, submissions filed together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -
- a. Whether the Plaintiff's suit against the Defendant was competent;
 - b. If the answer in (a) above is in the affirmative, whether the Plaintiff made out a case for the grant of the orders sought; and
 - c. Who bears the costs?
21. On the first issue, it is not in dispute that the Defendant was placed in liquidation in December, 2021. What was the effect of this placement? It rendered the Defendant incapacitated in terms of making any payments or honoring any other obligations whatsoever. This is because liquidation is concerned with collecting the company's assets with a view of selling off in order to pay off the creditors from the resultant proceeds.
22. In the present case, though the Plaintiff was granted leave to amend its pleadings, it did not seek to join Kenya Deposit Insurance Corporation which was duly appointed as the liquidator in December, 2021 as a party to the suit. In its amended plaint, it is without a doubt that the Plaintiff was clearly aware of whom their claim ought to have been directed to after liquidation. Paragraph 9A therefore was pleaded as follows: -
- (9A) On 08 December, 2021, the Central Bank of Kenya vide a Gazette notice revoked the Defendant's licence and appointed the Kenya Deposit Insurance Corporation as the Defendant's Liquidator to whom all claims and matters relating to the Defendant shall be directed to. (Emphasis added)
23. Even if this court was to render judgement in favour of the Plaintiff, who was it going to execute as against? It is trite that an order can only be enforced against parties named therein. It is also a settled principle of law that parties are bound by their own pleadings. In *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR, the Supreme Court express itself thus: -
- “...In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”
24. Further, in *Gandy v Caspair* [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record. Section 4 (2) (a) of the *Kenya Deposit Insurance Act* recognizes the corporation as a body corporate with the capacity to sue and being sued.
25. Therefore, in answering the first issue, the court comes to the inescapable conclusion that despite having a valid claim, the Plaintiff did not join a necessary party to the suit despite being given a chance



to do so and also being aware of whom it was seeking a remedy as against. This is an adversarial system and it is not the court's duty to fashion pleadings for the parties.

26. Further to the foregoing, I am alive to the provisions of section 28 of the *Kenya Deposit Insurance Act*. This section sets out the amount payable as protected deposit. The Plaintiff through its witness confirmed that so far it has received more than Kshs. 32,000,000/= and since there is no evidence that the process of payment has ended, I do not see the prejudice being suffered by the Plaintiff. I take judicial notice that there are several other depositors who ought to be paid pro rata.
27. Lastly on this issue, I note that section 33 provides for the process of lodging and payment of claims. There is no evidence by the Plaintiff that it has considered the elaborate procedure set out in that section without success. I therefore find that having not joined a necessary party, any judgement herein would be more of paper judgement since it cannot be executed against a non-party. I thus return a finding that the suit herein after liquidation is incompetent.
28. Having found as above, I need not consider the second issue as the same would be superfluous.
29. Lastly, on costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a Plaintiff/Defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”
30. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
31. Exercising its discretion, this court directs that each party shall bear own costs.
32. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The suit is hereby struck out;
 - b. Each party to bear own costs.



Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF FEBRUARY, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Kings Advocate h/b for Karega Advocate for the Plaintiff

Mr. Waweru Advocate h/b for Mr. Chege Advocate for the Defendant

M/S Salwa, Court Assistant

