



**Chi Motors Limited v SBM Bank (K) Limited; Kenya Deposit Insurance Corporation (Third party) (Civil Appeal 341 of 2012) [2024] KEHC 6349 (KLR) (Civ) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6349 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 341 OF 2012**

**AN ONGERI, J**

**MAY 31, 2024**

**BETWEEN**

**CHI MOTORS LIMITED ..... APPELLANT**

**AND**

**SBM BANK (K) LIMITED ..... RESPONDENT**

**AND**

**KENYA DEPOSIT INSURANCE CORPORATION ..... THIRD PARTY**

**RULING**

1. For determination is the preliminary objection dated 23/10/2023 filed by the Third Party (Kenya Deposit Insurance Corporation). However, it would be appropriate to set out the pertinent events leading hereto. The Appellant (Chi Motor Limited) filed the instant appeal on 09/07/2012 challenging the decision of the trial Court in Nairobi CMCC No. 626 of 2010 (lower court suit), which judgment was delivered on 23/02/2018, essentially setting aside the decision of the trial Court and substituting it with an order entering judgment in favour of the Appellant in the tune of Kshs. 250,000/- in general damage for breach of contract; interest at the Court rates from date of judgment; and costs of the appeal and the suit before the trial Court. The Appellant thereafter filed a Party and Party Bill of Costs on 27/10/2021 which was subsequently taxed on 16/06/2022 to the tune of Kshs. 77,016.00/-.



2. The Respondent (SBM Bank (K) Ltd) thereafter filed the application dated 24/4/2023 brought inter alia pursuant to Section 1A, 1B & 3A of the Civil Procedure Act and Order 1 Rule 15 of the Civil Procedure Rules 2010 seeking the following prayers;
  - i. That the honourable court be pleased to grant leave to the respondent/applicant to file a third Party Notice upon Kenya Deposit Insurance Corporation (hereinafter “the Intended Third Party”).
  - ii. That the said Third Party be at liberty to enter appearance within 15 days of service of the notice.
  - iii. That if prayer one hereinabove is granted, this honourable court deems the Third Party Notice annexed herein as duly filed.
  - iv. That the costs of the application to be in the cause.
3. And on grounds as captured hereunder and amplified in the supporting affidavit of even date deposed by Kevin Kimani;
  - i. That it is necessary to join the Intended Third Party to the suit to enable the honourable court conclusively determine the subject Bill of Costs.
  - ii. That the respondent/applicant claims against the third Party for the following reliefs and remedies;

SUBPARA a.

Indemnity and/or contribution in full or to such an extent as the court may decide in respect of the Bill of Costs herein for;

SUBPARA b.

Such further or other relief as this honourable court shall deem fit and just to grant.
  - iii. That the Bill of Costs herein arises from orders issued by the Honorable Justice J.K. Sergon setting aside the judgment by the trial court and substituting with an .....
  - iv. That the party sought to be joined is a proper and necessary party in the suit herein.
  - v. That it is only fair and just that the Intended Party be joined as a Third Party in this suit.
4. The application was not opposed by the Appellant whereafter this Court issued directions on service of the same alongside the Third-Party Notice upon the Third Party.
5. On 19/10/2023, the Third Party entered appearance and later filed a preliminary objection dated 23/10/2023, in respect of the Third-Party Notice, on grounds that; -
  - i. The Third Party is improperly joined in the suit contrary to Section 45(5), 50(5) and 55(1)(o) of the Kenya Deposit Insurance Act No. 10 of 2012 and the honorable Court ought to struck out its name in these proceedings in accordance with Order 1 Rule 10(2) of the Civil Procedure Rules.



- ii. The Third-Party Notice lacks merit as no cause of action which subsisted against Chase Bank Ltd (IL) prior to its liquidation can be maintained against Kenya Deposit Insurance Corporation under Section 56(1) of the [Kenya Deposit Insurance Act](#) No. 10 of 2012.
  - iii. No execution can ensue against the Third Party or Chase Bank (IL) once the liquidation process commences under Section 73 of the [Kenya Deposit Insurance Act](#) No. 10 of 2012. Therefore, the entire proceedings against the Third Party are an abuse of the Court process and ought to be struck out.
6. The preliminary objection was disposed of by way of written submissions.
7. Counsel for the Third Party began her submissions by restating the events leading hereto meanwhile condensed her submissions into two (2) cogent issues for this Court's consideration. On whether the Third Party as liquidator is liable for the obligations and liabilities of the institution in liquidation, counsel anchored her submissions on the provisions of Section 4, 45(5), 50(5) and 54 of the [Kenya Deposit Insurance Act](#), Gazette Notice No. 3651 Vol. CXXVIII No. 76 of 16/04/2021, the decisions in Andrew Muma and Charles Kanjama Trading as Muma & Kanjama Advocates & Others v Deloitte & Touche East Africa & 5 Others [2020] eKLR, Atul R. Shah & Another v Imperial Bank Limited & Another [2021] eKLR and Daniel Kipruto Metto v Chase Bank (Kenya) Limited [2018] eKLR to submit that the Third Party being the liquidator of the Respondent reserves the powers under the Act to undertake the management and control of the affairs of the Bank in accordance with the Act whereas the Third-Party proceedings is intended to facilitate execution against the Third Party as the liquidator of Chase Bank (IL) which is contrary to the express provisions of the [Kenya Deposit Insurance Act](#). It was further contended that the provisions of the latter statute are couched in mandatory terms that the Third Party cannot be held liable for liabilities and obligations of any institution in liquidation therefore it cannot be held responsible for actions, omissions and liabilities by Chase Bank (IL) whether before or after being placed under liquidation.
8. Concerning whether an institution in liquidation can bear liabilities prior to liquidation, counsel relied on the provisions of Section 56(1) & (2) and 73 of the [Kenya Deposit Insurance Act](#) to summarily submit that no cause of action subsisted against Chase Bank Ltd (IL) prior to its liquidation can be maintained against the Third Party whereas no execution can ensue against the Third Party or Chase Bank (IL) once liquidation commences. That the foregoing provisions are meant to protect liquidators during the liquidation process to ensure that the process is undertaken in the interest of the depositors of the institution in liquidation. In conclusion, this Court was urged to find that Third-Party Notice lacks merit, ought to be struck out as such the preliminary objection be sustained with the attendant costs.
9. On the part of the Respondent, counsel equally confined her submissions on two (2) salient issues meanwhile maintained that at all material times Chase Bank Ltd (IL) was the Respondent whereas vide Gazette Notice No. 3651, the Central Bank of Kenya (CBK) appointed the Third party as the liquidator of the Chase Bank Ltd (IL). Addressing the Court on whether the Third Party has been properly enjoined to the instant proceedings, counsel argued that notwithstanding the provisions of the [Kenya Deposit Insurance Act](#), the same were not designed as an umbrella, shielding against all pre-liquidation liabilities. That by granting a blanket immunity, the same would thwart the Act's primary objective - protection of depositors and creditors. While placing reliance on the provisions of Order 1 Rule 15 of the Civil Procedure Rules (CPR), the decisions in Hass Petroleum (K) Ltd Limited v Iota Engineering and Construction Limited (formerly Iota Excavations and Rentals Ltd); White Lotus Projects Limited (Intended 3<sup>rd</sup> Party) [2021] eKLR, Yafesi Walusimbi v Attorney General of Uganda



(1959) EA 223 as cited in *Interactive Advertising Limited & Another v Equity Bank Limited & 2 Others* [2016] eKLR and *Oceanfreight (EA) Ltd v Techomatic Ltd & Another* [2010] eKLR, counsel posited that the Court’s endorsement of the Third-Party’s joinder is not confined to contractual intricacies rather it extends to a broader spectrum accommodating various causes of action as long as a palpable basis of liability between the Third Party and the defendant is discernible.

10. It was further submitted that the Third Party’s reliance on Section 56(1) and 73 of the *Kenya Deposit Insurance Act* is misconceived, if harmoniously read with the procedural guidelines of the CPR, of which do not preclude its joinder to the instant proceedings. That the said provisions do not grant absolute immunity but establishes a structured process for debt settlement during liquidation therefore failure to maintain the Third Party in the instant proceedings would be of great injustice. Concerning who bears liability of the taxed costs, counsel emphasized that by dint the Gazette Notice published on 16/04/2021 liability attaches wholly upon the Third Party. Counsel implored upon the Court to sustain the Third-Party Notice and dismiss the preliminary objection to ensure a just and orderly resolution of the instant matter.
11. The Appellant through its counsel’s submissions equally waded into the preliminary objection by summarily contending that the Third Party has no role in these proceedings having been appointed as a receiver for the Respondent, as such its role was simply limited to being an agent of the Respondent whereas it did not assume any liability for the Respondent. Equally, citing Section 50(5), 56(1) & 73 of the *Kenya Deposit Insurance Act*, the decisions in *Andrew G. Muchai v Chase Bank Ltd* [2016] eKLR and *Coast Hauliers Limited v Imperial Bank Limited (In receivership)* Civil Suit No.16 of 202, counsel maintained that the Third-Party’s role as a receiver was simply to preserve and protect the assets, liabilities and business affairs of the Respondent-Bank, to ensure the business fortunes of the Respondent are turned around for the better. Further calling to aid the decisions in *Chase Bank (K) Limited v Peter Karuga Kariuki*, Civil Appeal No. 209 of 2017 and *Thomas & Piron Grands Lacs Limited v Lighthouse Property Company Limited & Chase Bank Limited (In receivership) & Anor* Civil Suit No. 300 of 2016 it was argued that the Respondent cannot escape its liabilities on the grounds of having been placed in receivership and neither can it claim that its liabilities in so far as they existed before the receivership are liabilities that can be assigned to the Third Party. That in any event, the Third Party’s liabilities as a receiver can only be restricted to damages suffered by any party as a result of its own action during receivership and not as contemplated by the Respondent. The decision in *Atul R. Shah (supra)* was called to aid in this regard. In conclusion, it was argued that the subject-matter before the trial Court and on appeal pertains damages that existed prior to the receivership as such the Third Party cannot be held liable for the same.
12. The Court has considered the entire record herein by attempting to set out the brief overview of the dispute, the submissions and authorities cited in order to place this matter into perspective. The Third Party’s preliminary objection is fundamentally premised on the provisions of Section 45(5), 50(5), 56(1) and 73 of the *Kenya Deposit Insurance Act* as read together with Order 1 Rule 10(2) of the CPR. That said, this Court must first determine whether in the circumstances of this case, the preliminary objection raised by the Third Party raises a pure point of law and secondly whether it is well grounded.
13. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law J. A. stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of



limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

See Also;- Oraro v Mbaja [2005] KLR 141

14. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR where the latter court emphasized that: -

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).”

15. Therefore, taking due guidance from the fore-captioned dicta, a perfunctory review of Third Party’s preliminary objection dated 23/10/2023, this Court is convinced that the same meets the test as to what constitutes a preliminary objection on accord of the provisions of statute it is premised upon.
16. However, before addressing whether the same is well grounded, it would be remiss not to set out certain facts that have piqued this Court’s attention. As earlier noted, the lower Court suit was instituted by the Appellant as against Chase Bank (K) Ltd on 09.02.2010. Further, this Court takes judicial notice of the fact that on 07/04/2016, vide Gazette Notices 2320 and 2321 Vol. CXVIII No. 34, Chase Bank (K) Ltd was placed under receivership with a declaration of moratorium being issued in respect of the said bank. Later, vide Gazette Notice 6833 Vol. CXX No. 79 issued on 06/07/2018, the Respondent herein by endorsement of the Cabinet Secretary of the National Treasury and Planning ..... “approved the transfer of certain assets and assumptions of certain liabilities of Chase Bank (Kenya) Limited (In Receivership) to SBM Bank (Kenya) Limited”.
17. Meanwhile, a review of the record before this Court, it can be gathered that judgment in the instant matter having been delivered on 23/02/2018 and the resultant Bill of Costs taxed on 16/06/2022, the Respondent moved this Court through the third-party application. However, it would be imperative to note that at all material times the Appellant’s case was as against Chase Bank Ltd however a perusal of the record and Case Tracking System (CTS), no requisite motion was placed before this Court to effect the change of circumstance to reflect that the Chase Bank Ltd was substituted by SBM Bank Ltd as indicated in the respective parties’ current pleadings. Therefore, the Court is at a loss how SBM Bank (K) Limited became the Respondent with the requisite process and procedure of substitution of regularization of parties having not being undertaken. That said, it appears the Respondent unilaterally through its pleadings, moved to reflect the obtaining position in respect of Chase Bank Limited by dint of Gazette Notice No. 3651 Vol. CXXVIII No. 76 of 16/04/2021 which in essence stated as follows;-

“Following the irrevocable transfer of certain assets and liabilities of Chase Bank Limited (In Receivership) to SBM Bank Kenya Limited as provided by section 50 (6) of the *Kenya Deposit Insurance Act*, 2012 and section 9 (1) and (5) of the *Banking Act*, Chapter 488 and,



In Exercise of the powers conferred by sections 53 (2)(b) and 54 (1)(a) of the *Kenya Deposit Insurance Act*, 2012, the Central Bank of Kenya appoints the Kenya Deposit Insurance Corporation as Liquidator for Chase Bank Limited (In Receivership) for the residual assets and liabilities of Chase Bank Limited (In Receivership).

Any claims and matters relating to Chase Bank Limited (In Receivership) shall be directed to the Liquidator at UAP Old Mutual Towers, 23rd Floor, Upper Hill Road, P.O. Box 45983-00100, Nairobi, Tel.: +254 20 667000/0709 043000; ..... (sic)

18. Thus, to address whether the preliminary objection is well grounded? ..... it is undisputed that on account of the resultant judgment and taxation proceedings, a decision was made as against Chase Bank Limited who at all material times was the Defendant before the trial Court and the Respondent in the instant appeal. Nevertheless, for reasons earlier highlighted SBM Bank (K) Ltd appears to have been un-procedurally introduced to the instant proceedings, as the Respondent.
19. Earlier in this ruling, this Court observed that the Third Party's preliminary contestation is saliently premised on the provisions of Section 45(5), 50(5), 56(1) and 73 of the *Kenya Deposit Insurance Act*. However, it would be of importance to note that the Third Party is established by dint of Section 4 of the said Act with its objects and functions being provided for under Section 5 of the same Act which is to ..... "provide a deposit insurance scheme for customers of member institutions and to receive, liquidate and wind up any institution in respect of which the Corporation is appointed receiver or liquidator in accordance with this Act".
20. Meanwhile, Section 45(5), on submissions by the institution, provides that;-  
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.
21. Section 50(5) on Receivership Powers states that; -  
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.
22. Section 56(1) on Stay of proceedings provides that; -  
No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.
23. And Section 73 on exemptions on from levy and attachment states that; -
  - (1) The Corporation on its own or acting as receiver or liquidator of an institution shall be exempt from levy, attachment, garnishment, lien, foreclosure or sale.
  - (2) The exemptions set out in subsection (1) shall apply mutatis mutandis to institutions in liquidation.



24. With the foregoing provisions in reserve, the power of the Court to enjoin or strike out a party from proceedings is donated by Order 1 Rule 10 (2) of the CPR which provides that: -

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added..”

25. Thus, in respect of the provisions relied on by the Third Party, it appears to assert that the Respondent’s Third-Party Claim cannot be sustained as is. That said, germane to forestated, the Third-Party proceedings were instituted post judgment whereas although Order 1 Rule 10 of the CPR generally provides for the striking out of parties, the provisions of Order 1 Rule 9 that ordinarily addresses misjoinder or non-joinder of any party during subsistence of a suit would not apply in the circumstance.

26. Nevertheless, by dint of the respective Gazette Notices earlier cited, the Third Party was appointed as receiver and subsequently as liquidator of Chase Bank (K) Ltd. Reading of Section 5 alongside Section 56(1) of the *Kenya Deposit Insurance Act*, the Third Party proceedings as instituted by the Respondent cannot be sustained. The latter is informed by the fact that firstly, Order 1 Rule 15 of the CPR contemplates Third Party Proceedings being instituted during the subsistence of a suit and not post judgment. The foregoing is obviously informed by the Third-Party’s constitutional right to be heard in countenance of the party’s case that seeks joinder of the Third party. By consequently enjoining the Third party at this stage of proceedings with the intention that it settles the decreed amount and resultant taxation costs, premised on a Gazette Notice would be an assault on the age-old rule of natural justice, that party ought not to be condemned unheard.

27. Secondly, Section 5 is express as to the functions of the Third Party, being limited to receiving, liquidating and wind up any institution in respect of which it is appointed as receiver or liquidator within the confines of the *Kenya Deposit Insurance Act*. And thirdly, this Court concurs with the dicta of Mabeya, J. in *Atul R. Shah & another v Imperial Bank Limited & another* [2021] eKLR wherein he succinctly addressed himself to the role of Kenya Deposit Insurance Corporation once appointed as receiver financial institution. He stated that;-

The upshot of the foregoing is that, when the 2<sup>nd</sup> 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 1<sup>st</sup> defendant and should not extend to the 2<sup>nd</sup> defendant. This is so because it relates to the release of part of the deposit to the insured depositors of the 1<sup>st</sup> defendant. Although the 2<sup>nd</sup> defendant may be exercising its powers as a receiver of the 1<sup>st</sup> defendant, it is not to be held liable for its carrying out that mandate.

28. Herein, the Appellant’s suit before the trial Court was founded on breach of contract as against Chase Bank (K) Ltd. The Appellant’s claim eventually succeeded on appeal on 23/02/2018 when this Court



entered judgment in its favour. By this time Chase Bank (K) Ltd has been placed under receivership on 07/04/2016 and later under liquidation on 16/04/2021. This Court thus agrees with Third Party that proceedings as against it cannot be maintained whereas the requisite provisions in the [Kenya Deposit Insurance Act](#) are meant to protect liquidators during the liquidation process to ensure that the process is undertaken in the interest of the depositors of the institution in liquidation. Meanwhile, the wording in Gazette Notice No. 3651 Vol. CXXVIII No. 76 of 16/04/2021 that ... “Any claims and matters relating to Chase Bank Limited (In Receivership) shall be directed to the Liquidator” equally does not provide succor to the Respondent’s argument on the issue in light of this Court’s earlier deduction.

29. Consequently, it is this Court’s reasoned conclusion that the preliminary objection is well founded and the same be and is hereby allowed with costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

..... for the Third Party

