



REPUBLIC OF KENYA



Coast Hauliers Limited v Imperial Bank Limited (In Receivership) (Civil Suit 15 of 2020) [2024] KEHC 10323 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 10323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 15 OF 2020**

F WANGARI, J

MAY 30, 2024

BETWEEN

COAST HAULIERS LIMITED PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN RECEIVERSHIP) DEFENDANT

RULING

1. The application subject of this ruling is dated 20th March, 2024. It is brought under the provisions of section 56 (2) of [Kenya Deposits Insurance Act](#), 2012. It seeks the following orders: -
 - a. The application be certified urgent and service of the same be dispensed with in the first instance;
 - b. Coast Hauliers Limited, the Plaintiff herein be and is hereby granted leave and sanction to continue this suit against Imperial Bank (now in liquidation);
 - c. Costs of this application be provided for.
2. The grounds in support of the application are that vide Gazette Notice No. 13395 dated 8th December, 2021, the Central Bank of Kenya appointed Kenya Deposit Insurance Protection as Liquidator for the Defendant. The said appointment took place when the present suit was at an advanced stage and the Plaintiff is seeking to set off its deposits as against its liabilities. Since the Defendant had now been placed in liquidation, it was imperative that the court grants the Plaintiff sanction to proceed with the suit. The Defendant would not suffer any prejudice since what the Plaintiff is seeking is simply interest irregularly charged on its accounts.
3. On the other hand, the Plaintiff is said to stand to suffer immense prejudice if the suit is not sanctioned to proceed because the Defendant will be permanently wound up through the liquidation process and the Plaintiff will not get any redress once the Defendant is wound up and buried through liquidation.



The application is further supported by an affidavit sworn by one Omar Awadh, the Plaintiff's accountant. of legal services. The averments in the supporting affidavit are simply that on or about 19th August, 2015, the Defendant availed to the Plaintiff an overdraft facility for a sum of Kshs 52,000,000/= . The same was secured through several securities among them liens over fixed deposits and personal guarantees.

4. As at the time the Defendant was placed under receivership on 13th October, 2015, the account was overdrawn by Kshs 51,485,366.22/=. The amount the Plaintiff held in the fixed deposit accounts with the Defendant stood at a total of Kshs 58,188,699.20/= and the same was said to be sufficient to clear the loan balance by way of set off.
5. On 8th March, 2016, the Plaintiff wrote to the Defendant expressly instructing it (Defendant) to apply the amount held in the Plaintiff's fixed deposit accounts to offset the loan balance that the Plaintiff had with the Defendant. The Plaintiff also informed the Defendant that no further interest ought to accrue on the accounts from the date of the said letter. On 13th June, 2016, through its then advocates, Messrs. Anjarwalla & Khanna Advocates once again wrote to the Defendant and reiterated that the amounts held in the Plaintiff's fixed deposit accounts to be used to clear the loan balances. The Defendant is said to have acted in breach of the loan contracts and deliberately failed to act on the Plaintiff's instructions.
6. From the date the Plaintiff expressly instructed the Defendant to clear the loan balances, the Defendant is said to have had no right whatsoever and was not entitled to charge any interest on the Plaintiff's loan account because the same were fully settled.
7. Through Gazette Notice No. 13395 dated 8th December, 2021, the Central Bank of Kenya appointed Kenya Deposit Insurance Protection as the Defendant's liquidator. Because of the said act, the Plaintiff averred that it was important that the court grants it sanction to proceed with the suit which was at an advanced stage. The Plaintiff then restated its grounds in support of the application which I do not wish to reproduce and thus sought for the application to be allowed.
8. Despite being served, the Defendant did not file any response to the application. However, this is a court of record. An application has to be determined on merits. Not as a matter of course.
9. Directions were given to have the application disposed off by way of written submissions. The Plaintiff duly complied by filing its submissions and cited various provisions of the law and authorities in support of its position. They are dated 18th April, 2024. The Defendant did not file any submissions.

Analysis and Determination

10. I have carefully considered the application, the submissions, the authorities cited as well as the law and I discern only one (1) issue for determination which is whether the Plaintiff has made out a case for grant of leave or sanction to continue the suit against the Defendant. Corollary to this is issue of costs.
11. The application is brought under the provisions of section 56 (2) of Kenya Deposit Insurance Act (KDI Act). Since it is not disputed that the Defendant was placed in liquidation on 8th December, 2021 through Gazette Notice No. 13395, the provisions of Section 56 of the *KDI Act* are applicable herein. The said Section reads as follows: -
 - (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



12. A plain reading of subsection 1 of the Act leaves no doubt that the liquidator is insulated from any cause of action which existed prior to liquidation and if not in existence, institution of a cause of action upon liquidation. However, a party desiring to maintain, continue or institute a suit against an entity in liquidation can only do so with leave or sanction of the court.
13. The operative part is Part VI of the *KDI Act* and more particularly sections 54 to 56. The only substantive prayer sought by the Plaintiff is for the court's leave or sanction to continue with the suit against the Defendant. There is no contest that at the time the suit was filed, the Defendant was in receivership and upon liquidation, the provisions of section 56 (2) automatically came into play.
14. In *Rashik Kumar Punja Shah & Another v Chase Bank Limited (In Liquidation) & Another* [2021] eKLR, the court had an opportunity to consider an almost similar application and went ahead to hold as follows: -

“...The intent and purpose of section 56 (2) is to eliminate any applications which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to institute the proceedings if the court is satisfied that there is a case for further consideration. The requirement that the court sanctions the proceedings is designed to shield the liquidator from busy bodies with misguided or trivial complaints, and to remove the uncertainty as to whether a liquidator could safely proceed with his functions while court proceedings pend in court even though misconceived. The court is called upon to identify and filter out, at an early stage, claims which may be trivial or without merit...At this stage an applicant must show that: -

- (i) 'sufficient interest' in the matter otherwise known as locus standi;
- (ii) that he/she is affected in some way by the decision being challenged; and,
- (iii) that he/she has an arguable case and that the case has a reasonable chance of success. The applicant has the burden of demonstrating that the application raises a serious issue...”

15. As was held in the above cited case, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's case. This is by discerning through the grounds which the application is hinged upon and the affidavit in support of the application. I have considered the grounds in support of the application as well as the affidavit sworn by Mohamed Noor Bachani and the response by way of grounds of opposition.
16. There was no response to the application and as such the averments in the application have not been rebutted. To me, the averments cannot be said to be frivolous. The Plaintiff has demonstrated that it has an arguable case which merits a full consideration by the court.
17. I equally do not discern any prejudice the Defendant stands to suffer if sanction is granted since it has already filed its statement of defence. Accordingly, I find merit in the Plaintiff's application.
18. 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”

19. Any departure from this trite position 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.”

20. Being an interlocutory application, the costs shall abide the outcome of the suit.
21. Having found as above, the following orders flow therefrom: -
- a. The application dated 20th March, 2024 has merits and the same is allowed;
 - b. Consequent to (a) above, the Plaintiff is hereby granted sanction to continue with the suit against Imperial Bank Limited (In Liquidation).
 - c. Costs to abide the outcome of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF MAY, 2024.

F. WANGARI

JUDGE

In the presence of:

Ms. Machogu Advocate h/b for Mr. Oluga Advocate for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Mr. Barille, Court Assistant

