



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC NO. 159 OF 2017

CHASE BANK LIMITED (IN RECEIVERSHIP).....PLAINTIFF/ APPLICANT

-VERSUS-

ZAFRULLAH KHAN.....1ST DEFENDANT/RESPONDENT

DUNCAN KABUI.....2ND DEFENDANT/RESPONDENT

MAKARIOS AGUMBI.....3RD DEFENDANT/RESPONDENT

JAMES MWAURA.....4TH DEFENDANT DEFENDANT/RESPONDENT

RIVERSIDE MEWS

INVESTMENTS LIMITED.....5TH DEFENDANT DEFENDANT/RESPONDENT

RINASCIMENTO GLOBAL LIMITED.....6TH DEFENDANT/RESPONDENT

GENGHIS CAPITAL LIMITED.....7TH DEFENDANT/RESPONDENT

KEN OBIMBO.....8TH DEFENDANT DEFENDANT/RESPONDENT

DANIEL MAVINDU.....9TH DEFENDANT DEFENDANT/RESPONDENT

ALI CHEEMA.....10TH DEFENDANT DEFENDANT/RESPONDENT

RINASCIMENTO PROPERTIES LIMITED.....11TH DEFENDANT/RESPONDENT

NINE FIFTY LIMITED.....12TH DEFENDANT DEFENDANT/RESPONDENT

RIVERSIDE MEWS LIMITED....13TH DEFENDANT DEFENDANT/RESPONDENT

MATHATANI LIMITED.....14TH DEFENDANT DEFENDANT/RESPONDENT

THE LIGHTHOUSE PROPERTY

COMPANY LIMITED.....15TH DEFENDANT DEFENDANT/RESPONDENT

BOULEVARD PROPERTIES LIMITED.....16TH DEFENDANT/RESPONDENT

FRIENDS PROPERTY

HOLDINGS LIMITED.....17TH DEFENDANT DEFENDANT/RESPONDENT

SEVEN FORTY INVESTMENTS

LIMITED.....18TH DEFENDANT DEFENDANT/RESPONDENT

ANTHONY F. GROSS.....19TH DEFENDANT DEFENDANT/RESPONDENT

RUTH MUTHONI.....20TH DEFENDANT DEFENDANT/RESPONDENT

RULING

1. By an application dated 11th July 2017, the Law Society of Kenya (“**L S K**”) sought to be enjoined to this suit as an Interested Party.
2. The applicant indicated that some of its members were owed money by the bank, and that the said members were unable to have access to both their personal funds, as well as their clients money which were tied down at the bank.
3. It was the intention of the applicant to support the Receiver Managers of Chase Bank (*In Receivership*).
4. The applicant pointed out that it had been approached by many of its members, who requested **L S K** to assist them in the recovery of the said moneys.
5. The applicant also pointed out that money belonging to it and also to the Advocates Benevolent Fund were also tied down at the bank, and were therefore un-accessible.
6. The amount of money belonging to **L S K** members and to their respective clients was said to be in excess of Kshs. 2.0 Billion.
7. Meanwhile, the amount of money belonging to **L S K** was said to be in excess of Kshs. 38 Million.
8. In the light of those funds, **L S K** deems itself as being an entity which has an identifiable stake in these proceedings.
9. Therefore, the applicant perceives itself to fall within the definition of “*an Interested Party*”. The said definition is to be found in Section 2 of The Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013, which reads as follows;

“Interested Party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.

10. The applicant also invoked the provisions of Order 1 Rule 8 (1) of the Civil Procedure Rules. That rule stipulates as follows;

“Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them”.

11. Thirdly, the applicant invoked the provisions of Order 1 Rule 8 (3) of the Civil Procedure Rules, which provides thus;

“Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to court to be made a party to such a suit”.

12. Pausing there for now, I find that the applicant has not demonstrated to me that Order 1 Rule 8 (1) would be a basis for an order for joinder.

13. Assuming that these proceedings were commenced by one of the many persons who have the same interest, Rule 8 (1) of the Civil Procedure Rules actually reinforces that such proceedings may be continued by that one person.

14. Meanwhile Order 1 Rule 8 (3) allows the joinder into a suit, of any person on whose behalf or for whose benefit the suit was instituted.

15. In this case, the plaintiff, is **CHASE BANK (IN RECEIVERSHIP)**. Therefore, in a literal sense, the suit was brought by the Receiver, **KENYA DEPOSIT INSURANCE CORPORATION (K D I C)**.

16. Pursuant to Section 5 of the Kenya Deposit Insurance Act, the Corporation was established to provide a deposit Insurance Scheme for customers of member institutions.

17. In its capacity as an Insurance Scheme, the Receiver was mandated to receive, liquidate and wind-up any institution, in respect of which the Corporation was appointed either a liquidator or a receiver.

18. I agree with the Receiver that it had the requisite statutory mandate to, inter alia, bring actions for the recovery of money which had been lost by its member institutions.

19. The proceedings herein had been brought by the Corporation, with a view to recovering the deposits which had been placed at the bank.

20. Although the deposits were allegedly lost from the bank, the suit was filed in the name of the bank (*in receivership*).

21. Ordinarily, when a limited liability company was placed under receivership, it cannot sue or be sued, save as an entity which was under receivership.

22. Secondly, when the claim was against a company, it would not, ordinarily, be instituted in the name of the said company.

23. When the company is alleged to have lost money which had been placed in its hands, the company would, ordinarily, be the defendant against whom an action would be brought.

24. In this case a Recovery Suit was brought by **K D I C**, in the name of the bank. Such an action could only be instituted by a person who had been given the requisite legal mandate.

25. As an Insurance entity, charged with the duty of guaranteeing the interests of depositors who had put their funds in member institutions, **K D I C** had a unique legal capacity.

26. The Law Society of Kenya did not have any such legal capacity as would enable it to provide a guarantee to depositors, with regard to money which such depositors had placed with financial institutions.

27. If anything, **K D I C** had an obligation to protect the interests of **LSK**, if the applicant was a depositor at Chase Bank.

28. The said obligation may be carried out through the means set out in Section 45 of the Kenya Deposit Insurance Act (*"the Act"*). That section authorizes the Corporation to carry on the businesses, and to manage the assets, liabilities and affairs of the financial institution over which the Corporation had been appointed as a receiver.

29. In order to make it possible for the Corporation to discharge its mandate, the Act authorizes the Corporation to enter into the premises of the financial institution, and to take possession and control of the assets.

30. L S K cannot share in those responsibilities.

31. Nonetheless, **L S K** asserted that its presence before the court was necessary, so as to enable the Court effectually and completely adjudicate and settle all questions involved in this suit.

32. In its submissions dated 4th December 2017, **L S K** said that its interests in the suit, coincide with the interests of the plaintiff.

33. In my understanding, the Corporation's interests in the suit is to recover money which appears to have been lost after the same had been deposited at the bank.

34. In so far as the applicant was desirous of recovering the same funds, its interests do coincide with those of the corporation.

35. However, whilst the Corporation would return any recovered funds to the bank, in the first instance, and thereafter hope to make the said funds available to all the depositors, **L S K** has the desire to make recoveries for itself and its members. This is what **L S K** said in its submissions;

7. The L S K has identified all its members and itself as depositors who are likely to otherwise lose out. It is not necessary at this stage to show any more.

8. L S K is more championing its own and its members interests in support of plaintiff's claims and is of assistance to the plaintiff. Little wonder the defendants do not wish L S K to be enjoined in the proceedings".

36. By championing its own interests and those of its members, **L S K's** intentions are more probably than not, on a collision course with the interests of the corporation, who has a duty to all depositors.

37. That position was amplified by **L S K** in its Response to the defendant's submissions, wherein **L S K** said;

“10. Receivership is an expensive affair, and the Receiver of the plaintiff bank may deplete the banks assets. It is a matter of notoriety that Receivership does not enure to the benefit of creditors in most cases”.

38. When the **L S K** is openly expressing doubts about the Receiver's ability to secure the bank's assets, and because **L S K** has serious reservations about the Receiver's ability to utilize the assets for the benefit of creditors, I find that **L S K** cannot really be keen to be enjoined into this suit, with a view to supporting the plaintiff's case.

39. **L S K** was already casting aspersions on the ability of the plaintiff. In the circumstances, if the two were placed side by side, in the same case, it is likely that their interests would clash, leading to a delay in the litigation.

40. If the corporation were to discharge its mandate properly, and considering that the applicant cannot discharge the Receiver's mandate in this case, I find that the applicant would not be prejudiced if it was not enjoined to the suit.

41. I also find that although the task of recovering assets which had been lost would be for the benefit of the members of the public who had deposited their money in the bank, the interests of the applicant may well clash with that of other depositors. I so find because the applicant was primarily focused on making recoveries for its own benefit and for the benefit of its members.

42. Finally, this suit is not the vehicle through which any particular depositor can recover the funds it had deposited in the bank. The suit was intended to have the money recovered by the bank.

43. Therefore, I decline the application by **L S K** to be enjoined tot his suit as an Interested Party.

44. Nonetheless, I order that each party will meet his or her own costs of the application dated 11th July 2017.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH day of January 2018.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Oraro, Chege, Ouma & Omoga for Plaintiff for 1st Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

No appearance for 3rd Defendant

No appearance for 4th Defendant

No appearance for 5th Defendant

No appearance for 6th Defendant

Miss Omondi for Ms. Mwangi for 7th Defendant

Ngugi for 8th Defendant

Ngugi for 9th Defendant

No appearance for 10th Defendant

No appearance for 11th Defendant

No appearance for 12th Defendant

No appearance for 13th Defendant

No appearance for 14th Defendant

No appearance for 15th Defendant

Miss Omondi for Ms. Mwangi for 16th Defendant

No appearance for 17th Defendant

No appearance for 18th Defendant

No appearance for 19th Defendant

No appearance for 20th Defendant

Sophia Kamunde – Court clerk.



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