



**Katambo v SBM Bank (Kenya) Limited & 2 others (Commercial Petition E018 of 2023)
[2025] KEHC 128 (KLR) (Commercial and Tax) (16 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION E018 OF 2023
JWW MONG'ARE, J
JANUARY 16, 2025**

BETWEEN

HENRY MUTUA KATAMBO PETITIONER

AND

SBM BANK (KENYA) LIMITED 1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION 2ND RESPONDENT

CENTRAL BANK OF KENYA 3RD RESPONDENT

JUDGMENT

1. It is common ground that sometime in April 2016, the 3rd Respondent (“CBK”), exercising its powers under sections 43(1), 43(2) and 53(1) of the *Kenya Deposit Insurance Act* (Chapter 487C of the Laws of Kenya) (“the KDI Act”), on 7th April 2016, placed Chase Bank under receivership and appointed the 2nd Respondent (“KDIC”) as its Receiver Manager. Pursuant to their appointment, KDIC contemporaneously declared a moratorium on Chase Bank’s liabilities until such a time the bank’s normal operations would have resumed. During the course of receivership, KDIC, under the powers donated to it by section 6 (f) and 50 of the KDI Act passed, through its Board of Directors, a resolution on 9th April 2018 and 11th May 2018 approving the transfer of certain assets and liabilities to the 1st Respondent (“SBM Bank”). By their joint Press Release dated 17th April 2018, CBK and KDIC informed depositors of Chase Bank that the 75% of the value of deposits had been transferred to SBM Bank. By way of Gazette Notice No. 3651, dated 16th April, 2021, CBK appointed KDIC as Chase Bank’s Liquidator.
2. The Petitioner, has filed a petition dated 24th October 2023 stating that in the year 2015, Chase Bank sought to raise Kshs.10 billion through a 7-year corporate bond which was granted when the Capital Markets Authority granted Chase Bank approval to issue the medium- term bond for



Kshs. 10 Billion. The Petitioner avers that Genghis Capital, being subsidiary of Chase Bank, was appointed joint transaction advisers for the bond and the Petitioner, through Genghis Capital invested a sum of Kshs. 15,000,000.00/= in the aforesaid corporate bond under a Chase Bond Number CHBD.02/06/22-0044-13.25. However, the Petitioner claims that his investment was not transferred to SBM Bank pursuant to the aforementioned transfer of certain assets and liabilities of Chase Bank to SBM Bank. The Petitioner accuses the Respondents of an “opaque” transfer of assets and liabilities and that as a result, he has been unable to recover his investment with Chase Bank.

3. The Petitioner avers that the moratorium on deposits was subsequently lifted and KDIC released other accounts holders’ deposits but it failed to release the Petitioner’s investment bond and accrued interest which the Petitioner avers amounts to discrimination. That efforts by the Petitioner to set off the Loan acquired by other related businesses owned by the Petitioner and subsequently transferred to SBM Bank with the investment made by the Petitioner, have failed. He claims that he has previously traded with the bond/asset to secure facilities in Equity Bank Limited and repaid fully, leaving the corporate bond intact. The Petitioner is apprehensive that he risks losing not only the amount of Kshs. 15,000,000.00/- invested in the corporate bond, but also the accrued interest on the bond which was set to mature in the year 2022 which is threat to his right to property under Article 40 of *the Constitution*.
4. The Petitioner also claims breach of his constitutional right to fair administrative action under Article 47 of *the Constitution* as SBM Bank did not publish the Mandatory notice as stipulated under section 3(1) as read together with section 4 of the *Transfer of Businesses Act*. He further claims that the transfer process was marred with malice and perceived fraud as no written reasons for discriminatory decisions were issued to him and that he was neither given adequate notice nor accorded a fair opportunity to be heard and make his representations. That the administrative decision and/or refusal by the Respondents to account for and pay the Petitioner the investment Bond upon maturity and in the absence of any written communication is unreasonable and against the principles of natural justice.
5. The Petitioner also states that the criteria used to transfer certain assets and certain liabilities from Chase Bank to SBM Bank was discriminatory as his investment was not transferred to SBM Bank without any justification. That such discriminatory transfer of assets and liabilities has to an extreme extent infringed on the Petitioner’s rights and welfare. For these reasons the Petitioner prays for the following orders:
 - i. A declaration be and is hereby issued that failure to transfer the Asset owned by the Petitioner, being an investment of a sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) vide a corporate bond under a Chase Bond Number CHBD 02/06/22-0044-13.25 to the 1st Respondent, which poses a risk of loss of the said sum, is an infringement of the Petitioner’s right to property.
 - ii. A declaration be and is hereby issued that the failure to transfer the Asset owned by the Petitioner being an investment of a sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) vide a corporate bond under a Chase Bond Number CHBD 02/06/22-0044-13.25 to the 1st Respondent; subject to the transfer of certain assets and assumption of liabilities of Chase Bank Kenya Limited (in Liquidation) to the 1st Respondent; was discriminatory and hence a violation of the Petitioner’s Constitutional Right of equality and freedom from discrimination.
 - iii. A declaration be and is hereby issued that the transfer of the liability held with Chase Bank Kenya (in Liquidation) by the 2nd Petitioner to the 1st Respondent subject to the transfer of certain assets and assumption of certain liabilities of Chase bank Kenya Limited (In liquidation) to the 1st Respondent, was discriminatory, unfair as against the Petitioner.



- iv. A declaration be and is hereby issued that the administrative decisions and actions by the Respondents herein were not expeditious, efficient, lawful, reasonable and/or procedurally fair and hence a violation of the Petitioners' Constitutional right to fair administrative action
 - v. Judgement be entered in favour of the Petitioner against the Respondents jointly and severally for a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00/-) invested vide a corporate bond under a Chase Bond Number CHBD.02/06/22-0044-13.25, together with the accrued interests therein be and is hereby issued.
 - vi. A finding that the failure by the 1st Respondent to publish the mandatory notices as required by the law meant that the 1st Respondent assumed the Petitioner's Investment bond under a Chase Bond Number CHBD.02/06/22-0044-13.25 of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00/-) and is therefore liable to pay the Petitioner together with the accrued interest.
 - vii. An order for General Damages for breach of the Petitioner's, constitutionally protected rights by the Respondents as enumerated in this Petition.
 - viii. The Cost of this Petition be issued to the Petitioner against the Respondents herein.
 - ix. Interest on(v) and (vi) above at Court's rate.
 - x. Any other relief the court shall deem just and expedient.
6. The Petition is supported by the grounds set on its face, the Petitioner's supporting affidavit sworn on 24th October 2023. In response to the Petition, KDIC relies on the replying affidavit of its Chief Executive Officer, Hellen Chepkwony sworn on 16th September 2024 whereas CBK relies on the replying affidavit sworn on 3rd September 2024 by Kennedy Kaunda Abuga, its General Counsel. There was no response from SBM Bank. KDIC depones that in approving the transfer and exclusion process through the transfer of certain assets and certain liabilities, KDIC was guided by the provisions of the KDI Act and the *Banking Act*(Chapter 488 of the Laws of Kenya) as noted in the Gazette Notices communicating the decisions. That in view of the foregoing, it is evident that the transfer was not undertaken in an opaque manner, as alluded to in the Petition, as all decisions taken were notified to the general public through issuance of relevant Gazette Notices.
7. KDIC states that as captured in the petition and as provided for under section 2 of the KDI Act, the transfer and exclusion process resulted in a transfer to SBM Bank of 75 per cent of the value of deposits currently under moratorium at Chase Bank and the transfer of the majority of staff and branches of the existing Chase Bank operations. That 25 per cent of the value of moratorium deposits would remain in Chase Bank and KDIC is adamant that the Petitioner's investment does not fall within the meaning of a deposit and liability under the exclusion and transfer process under the KDI Act. KDIC agrees that the Petitioner's investment was not transferred to SBM Bank as the same did not amount to a deposit and liability within the meaning of the Asset Purchase Agreement, the KDI Act and its regulations. That the nature of the Petitioner's investment made him assume the role of a creditor within the meaning of section 31 of the KDI Act.
8. KDIC depones that as a creditor, the investment made as a bond holder remains payable to the Petitioner, however, such repayment is subject to the ranking of debts provided for under section 50(9) as read together with section 33 and section 57 of the KDI Act. Arising from the foregoing, KDIC avers that the nature of injury caused or likely to be caused to the Petitioner, as enumerated in the Petition, are denied in total as the creditors are recognized under the KDI Act. KDIC further contends that section 50(8) and 51(1) of the KDI Act provides that the transfer and exclusion process does not require the sanction of creditors of an institution, as such the requirement to give adequate notice and



accord a fair opportunity to be heard and make representations, as alluded to in the Petition, is not a requirement while performing the functions of a receiver under the KDI Act. That the intention of the drafters, in excluding the sanction of creditors under intention of the drafters under section 50 of the KDI Act, was to ensure that KDIC was in a position to facilitate efficiency in resolution of failing and/or failed institutions through prompt resolution of the problem institutions to protect depositors and maintain financial stability.

9. It is KDIC's further position that the provisions of the Transfer of Business Act do not apply to its functions undertaken under the KDI Act and that section 3 of the KDI Act provides that 'where there is any conflict or inconsistency between this Act and the provisions of any other Act in matters relating to the purpose of this Act, this Act shall prevail.' That in view of the provisions of the KDI Act and the requirements of the Transfer of Business Act, it is evident that failure by KDIC to apply the provisions of the said Business Act, does not render the actions undertaken, in furtherance of the objects of the KDI Act, by KDIC void and/or illegal. KDIC asserts that the provisions of the KDI Act were complied with during the process of transfer and exclusion without discrimination against any of the depositors and/creditors as seen from the Gazette Notice 2321 of 7th April, 2016 declaring a moratorium.
10. KDIC advances that this petition seeks orders to have the Petitioner treated preferentially, whereas the ranking of debts and the manner of settlement of the same is well elaborated under the provisions of the KDI Act. That the Petitioner's claim of being discriminated against is unfounded as the Petitioner has not provided any data confirming that KDIC has settled claims by other Chase Bank Bond holders to his exclusion. Further that the Petitioner's right to property can be limited under the provisions of Article 24 of *the Constitution* and that KDIC, in undertaking its functions in line with the provisions of the KDI Act complied with the requirements of Article 24 of *the Constitution*.
11. As such, KDIC contends that the Petitioner is undeserving of the orders sought as he has not demonstrated the manner in which KDIC, in undertaking its statutory function exceeded the powers donated to it by the KDI Act or ignored and/or failed to comply with the requirements of the Act and its regulations. That the Petitioner has not demonstrated that the decision arrived at and conveyed by way of Gazette Notices was irrational and therefore deserving of this court's interference/ review.
12. On its part, CBK states that present petition is abuse of the court process by virtue of previously instituted suits by the Petitioner, to wit, HCCOMM PET. No. E004 of 2022 and Mombasa HCCC No. 111 of 2018 and that the petition violates the sub judice rule under section 6 of the *Civil Procedure Act*. In any case, CBK depones that the Agreement for Sale and assumption of certain assets and liabilities of Chase Bank by SBM Bank was a contract between Chase Bank and SBM Bank and CBK was not a party or signatory to the said Agreement. That in light of the foregoing CBK is under a duty to comply with the *Banking Act* where section 9 requires any arrangement that involves one or more financial institutions for the transfer of assets and liabilities be subject to prior approval of the Cabinet Secretary, National Treasury and such approval is required to be published by CBK under section 9 (5) of the *Banking Act*.
13. CBK contends that the issue of what assets and/or liabilities were transferred to SBM Bank and the issue of why the Petitioner's investment was not transferred can only be determined by the Receiver, KDIC. CBK states that its notice informing the general public that the transfer of certain assets and assumption of certain liabilities of Chase Bank to SBM Bank was to take place on 17th August 2018 does not demonstrate a constitutional breach on the part of CBK against the Petitioner. That CBK was only complying with the requirements of the law and no more and it remains unclear why general damages may be payable by CBK for due compliance and fidelity to the law. CBK states that the prayer for payment by it to the Petitioner, his Chase bond investment of Kshs. 15,000,000.00/- is simply malicious as CBK was never privy to the said contract/transaction leading to creation of the



said investment bond. As such, CBK maintains that the Petitioner has wrongly sued it as evidenced on the face of the Petition which ought to be dismissed with costs to the Respondents.

14. Directions issued by the court to the parties to file written submissions were not complied with as there are none on record and therefore, I will determine the present petition based on the pleadings.

Analysis and Determination:-

15. Before delving into the substance of the petition, I note CBK's objection that the petition is res sub judice Mombasa HCCC No. 111 of 2018 and that there is a similar matter pending at the High Court in Machakos. There is no dispute that the Petitioner and another had filed an earlier petition against SBM Bank and CBK where they more or less sought similar prayers as those in the present petition. The court, in a ruling dated 25th September 2023(Katambo & another v SBM Bank (Kenya) Limited & 2 others [2023] KEHC 22963 (KLR)) noted that the said petition relates to the same issues properly pending before the High Court in Mombasa in HCCC No. 111 of 2018 and that to avoid issuing two conflicting decrees emanating from the same High Court on the same issues, this court downed its tools as it had no jurisdiction to entertain the said Petition before it. While striking out the petition, the court directed the Petitioner to raise the issues in the said petition before the High Court in Mombasa, being HCCC No. 111 of 2018. However, the Petitioner has raised the very same issues in this new petition before this court rather than in HCCC No. 111 of 2018, contrary to the court's directions of 25th September 2023.
16. I think the Petitioner assumes that adding or removing parties and bringing the petition in a different form may weaken the application of the res sub judice doctrine. It does not. Just like the doctrine of res judicata, parties cannot dress up cases differently, introduce new causes of action while seeking the same remedy and then escape the res judicata or res sub judice dragnet (see Nancy Wanja Gatabaki, Josephine Beatrice Gathoni & Esther Susan Wangari Gatabaki suing as ad litem representatives of Samuel Mundati Gatabaki (Deceased) & Nancy Wanja Gatabaki v Muga Developers Limited, Peter Kiarie Muraya, Sue Wacheke Muraya, Suraya Property Group Limited, Suraya Investment Fourways Limited, Suraya Sales Limited, New Attitude Limited, Equity Bank Limited, Director of Surveys, Chief Land Registrar, Attorney General & Nairobi City County [2020] KEHC 10332 (KLR)).
17. The substance of the Petitioner's petition did not change from the last one just because he introduced new parties and tweaked the remedies that he was seeking. It still remains that the issue of whether the Petitioner's corporate bond was to be transferred from Chase Bank to SBM Bank and the constitutionality of the Respondents' actions or inactions over the same are issues that ought to be raised before the court in Mombasa in HCCC No. 111 of 2018 as that court has the requisite jurisdiction and capacity to determine those issues.
18. For avoidance of doubt, I find that this petition is res sub judice Mombasa HCCC No. 111 of 2018 and I reiterate that the issues raised herein ought to be raised and determined therein. The Petition is therefore struck out in its entirety. Costs of this suit are awarded to the Respondents. It is so ordered.

Conclusion and Disposition:

19. The Petition dated October 24, 2023 is struck out with costs to the 2nd and 3rd Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 16TH DAY OF JANUARY 2025

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J.W.W. MONG'ARE



JUDGE

In the Presence

No appearance for the Petitioner.

Mr. Chege holding Mr. Oraro SC for 1st Respondent.

No appearance for 2nd Respondent.

Mr. Chege for 3rd Respondent.

Amos - Court Assistant

