

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 471 OF 2023

EFATHA FOUNDATION LIMITED.....APPELLANT

VERSUS

DEPOSIT INSURANCE BOARD Liquidator of

EFATHA BANK LTD1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

RULING

Date of Last Order: 10th November 2023

Date of Judgement: 17th November 2023

Mwaipopo, J:

This is an application for leave filed by Efatha Foundation Ltd, the Applicant herein versus Deposit Insurance Board (DIB) as a liquidator of Efatha Bank Ltd and Attorney General as the respondents herein.

The Application has been filed by way of Chamber summons supported by an affidavit of Natujwa Shilla, Secretary of the Applicant's Board. The same is made under the provisions of section 9(1), section 97 of the Bankruptcy Act Cap 25 R.E 2019 and section 288 of the Companies Act Cap 212 RE 2019 and it contains the following prayers;

- a) That this honourable court be pleased to grant the Applicant with leave to institute suit against the Respondents for breach of

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Lease Agreement by way of failure to pay arrears of **rent from 04th January 2018 to December 2020 for a rented premise located at plot No. 90 Bagamoyo Road Mwenge-Area in Dar es salaam.**

- b) Costs of this Application to follow even
- c) Any other relief this honourable court may deem fit and just to grant.

When this matter was called on for hearing on 10th November 2023, Ms Jackline Kulwa, learned Advocate, appeared for the Applicant while Mr. Boaz Msoffe and Lilian Mirumbe learned State Attorneys represented the Respondents.

At the commencement of the hearing and before the Application was heard on merit both parties first addressed the court on the competency of the Application for leave, in particular whether leave is required for the Applicant to sue DIB as a liquidator of Efatha Bank Ltd for the debt which accrued after the receiving date and it is attributable to DIB itself.

The Counsel for the Applicant began her submission by highlighting the fact that, the 1st Respondent, DIB is being sued for the reason that he acceded to the Lease Agreement, which was entered between Efatha Foundation Ltd and Efatha Bank Ltd. She elaborated that the claims of the Applicant are clearly stated in the Affidavit and they range from 4th of January 2018 to December, 2020 when the first respondent moved out from the premises.

With regard to the law which supports this application, she stated that section 9(1) of the Bankruptcy Act, RE 2019 requires a party who wants to institute any legal proceedings against the liquidator from the date of receiving order to apply for leave of the court. She further stated that this provision is read together with section 97 of the same Act, which gives jurisdiction of this court to hear this application.

The learned counsel went on submitting that; section 288 of the Companies Act which is in line with section 9 (1) of the Bankruptcy Act, states that; where the liquidator has been appointed any action or proceedings shall not be commenced unless with the leave of the court. She submitted further that the application and the debt, which the Applicant is claiming against the respondent, are within the ambit of the law. They are not among the debts, which are provable before the liquidator. She thus submitted that the application is proper before the law.

In rebuttal, Mr. Boaz Msoffe, learned State Attorney, vehemently submitted that the Application is misconceived and untenable hence incompetent in the eyes of the law, for the following reasons;

One; he stated that; section 288 of the Companies Act, gives a right to a creditor to apply for leave before instituting a case against the **company under liquidation**. The same applies to section 9(1) of the Bankruptcy Act Cap 325 RE 2019. The two sections enumerate requirements for leave for a debt under liquidation but not the debt by the liquidator himself. He pointed that If the Court goes through the paragraphs in the Affidavit in support of the Application specifically from paragraph 4, 6 and 7, it will note that the

deponent is making reference to the existence of the Lease Agreement **between the Deponent and the liquidator** and the said rent arrears do not form part of the provable debts which are under the liquidation process.

The learned State Attorney alluded further that, as per section 9(1) of the Bankruptcy Act Cap. 25 R. E. 2019 the creditor will require leave if the debt is part of the company's debts. He contended that if one reads the contents of the affidavit and paragraphs, will note that the applicant is suing the liquidator for his business, not as part of the company's debts. The same applies to section 288 of the Companies Act, he clarified further that leave will only be applicable against the Company's debt. The debt in the instant application is the arrangement between the liquidator and the deponent and not part of the company's debt under liquidation. If there is a lease agreement, as from the receiving date then it is between the applicant and the liquidator. He submitted further that under paragraph 3 of the Affidavit, the Deponent has cited the Lease Agreement between Efatha Bank and the Deponent which was supposed to run its course in 2019. The Applicant does not state that the rent due was incurred by the company rather the affidavit shows that the rent due has been incurred by the liquidator, DIB. That being the case, since the chamber summons and the affidavit do not show the relationship between the said debt and company, under liquidation then he prayed for the Application to be struck out.

In rejoinder, the counsel for the Applicant emphasized that section 9(1) of the Bankruptcy Act Cap 25 R. E. 2019 is very clear on the effect of receiving order it requires any person who has an issue with the liquidator to

commence proceedings by the leave of the court. Therefore, the debt which the applicant is claiming against the respondent, accrued from the date of receiving order. The 1st Respondent, (DIB) as a liquidator of Efatha Bank acceded to the terms and conditions of the contract from the receiving date. She submitted that when an accretor has a liability against the Company, there is another procedure for such a debt. One the conditions is stated under section 6 and 7 of the Bankruptcy Act, which requires the creditor to verify by affidavit debts, which were incurred by the company before liquidation. She however stated that this is not the case in the instant application.

Submitting on the contents of the affidavit, she stated that, paragraph 4 of the same refers to the 1st respondent as the liquidator of Efatha Bank and in the course of his duties, it encountered the Lease Agreement and proceeded to deal with it. The affidavit shows the relationship between DIB and Efatha Bank. She rounded up her submissions by stating that the cited sections 9(1) of the Bankruptcy Act Cap. 25 R. E. 2019 and 288 of the Company's Act are proper sections and the Application is proper before the court.

Having followed dispassionately the rival submissions of both parties, I now proceed to analyse the application and relevant laws in order to satisfy myself as to whether leave is indeed required for the Applicant to sue the Respondents in this matter, on a debt which became due after the receiving date or rather on a debt which is due on the part of DIB as a result of its business activities;

From the rival submissions, the main contention between the parties is on the issue of leave. The Applicant in her submissions has emphasized that leave is required for them to sue DIB since the stated debt in the instant application has accrued due to the accession of the 1st respondent(DIB) to the Lease agreement between itself and Efatha Ltd which is under receivership of the 1st Respondent hence leave is required under section 9(1) of the Bankruptcy Act and section 288 of the Companies Act to sue DIB as a liquidator. However, the Counsel for the Respondents has objected to that position, contending that leave is only required for the Applicant to sue the **company under liquidation** as per the provisions of section 9(1) of the Bankruptcy Act Cap 25 RE 2019 and Companies Act Cap 288 RE 2019. The reason being that the debt accrued to DIB in the course of its business, is not the debt which fell due before the receiving date. In other words, it is not the debt incurred by Efatha Bank Ltd which is now under liquidation. It does not form part of the provable debts under liquidation process.

After setting out the summary of the contentions between the parties I now proceed to give my analysis on the documents forming part of this application, the Counter Affidavit and their supporting documents as well as enabling laws cited in the instant application.

Firstly, I have perused the Application and noted that it has been made under the provisions of section 9(1) and 97 of the Bankruptcy Act Cap 25 RE 2019 and Section 288 of the Companies Act Cap 212 RE 2019. For easy of reference I will reproduce the said sections;

Section 9(1) states as follows;

"On the making of the receiving order the official receiver shall be thereby constituted receiver of the property of the debtor and thereafter except as directed by this Act no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose".

Section 97 reads;

"The court having jurisdiction in bankruptcy shall be the High court; save that the Chief Justice may by order delegate all or any part of the jurisdiction of the high court in bankruptcy to any subordinate court, either generally or for the purpose of any particular case or class of case".

Section 288

"When a winding up order has been made or an interim liquidator has been appointed under section 295, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose".

Based on these quoted sections, I have noted that section 97 gives power to the High Court to deal with matters to do with bankruptcy.

Further, I have noted that section 9(1) of the Bankruptcy Act Cap 25 RE 2019 and section 288 of the Companies Act Cap 325 Re 2019, place a requirement for leave for any person who would wish to sue the Debtor or rather company under liquidation process. In this regard I agree with the counsel for the Respondents that the said sections are not applicable in the situation at hand since they have been cited or applied to sue DIB, the second Respondent which is not a Company under liquidation. DIB is just a Government Institution and not Efatha Bank Ltd either, much as it is supervising its affairs since the receiving date.

Secondly, the first prayer in the Chamber summons reads as follows;

- a) That this honourable court be pleased to grant the Applicant with leave to **institute suit against the Respondents for breach of Lease Agreement by way of failure to pay arrears of rent from 04th January 2018 to December 2020 for a rented premise located at plot No. 90 Bagamoyo Road Mwenge- Area in Dar es Salaam.**

Based on this prayer I have noted that the claim is directed to the 1st Respondent (DIB) for breach of Lease Agreement by way of failure to pay **arrears of rent from 04th January 2018 to December 2020** for a rented premise located at plot No. 90 Bagamoyo Road Mwenge- Area in Dar es salaam. I have noted that the cut off period is 4th January 2018 to December 2020. Therefore, the debt is for DIB the 1st Respondent and not Efatha Bank, which was in existence before the cutoff date.

Thirdly, I have also perused the contents of the Affidavit of the Applicant and noted that they support the contents of the prayer in the chamber summons as per my analysis above. They attribute the debt to DIB and not Efatha Bank as follows;

- a) Paragraph 4 of the affidavit states that; the 1st Respondent acceded to the Lease Agreement and continued to stay and do its business in the Leased premises **from 4th of January 2018 to December, 2020.**
- b) Paragraph 5 of the Affidavit states indicates the alleged breach by the 1st Respondent, it states that; **the 1st Respondent stayed into the applicant's premises from 4th of January 2018 to December 2020 without paying rental charges thus falling into arrears of rent at USD 3500 per month from the receiving date that is from 4th January 2018 to December 2020 which makes a total of USD 123,660 lying unpaid to date.**
- c) Paragraph 6 of the Affidavit indicates the breach period which clearly shows that it happened after the receiving date and the debt itself is not one of the provable debts, the paragraph reads; **That the accrued arrears of rent the subject of the intended suit covers he period from the date the 1st respondent receiving order was made and the debt does not form part of provable debts before the liquidator as the 1st respondent used the premise for his liquidation business and is liable to pay rental charges as per the lease agreement.**

d) Paragraph 7 of the Affidavit continues to give details of the said arrears it states; **That the applicant through me and other officials have made several demands to the 1st respondent for payment of rents in arrears as agreed without success and the 1st respondent after agreeing to pay demanded upfront issuance of EFD Receipt but still no payment was effected by the respondent.**

Fourthly, I have also perused the Lease Agreement entered between Efatha Foundation Ltd and Efatha Bank Ltd on 20th July 2009. The Agreement was to last for a period of ten years from 1st June 2009 to 31st May 2019, for consideration of annual rent of USD 42,000 to be payable in two instalments. As per the contents of the affidavit above, the 1st Respondent acceded to the Lease Agreement from the receiving date, i.e. 4th January 2018. This is also further elaborated in the 90 days Statutory Notice to sue the Government made under section 6(2) of the Government Proceedings Act Cap.5 served to the Respondents herein on 3rd of March 2021. In the said Notice, the Applicant has made it clear that the debt that is the subject of this Application for leave is claimed against the 1st Respondent and it is attributed to the 1st Respondent and not Efatha Bank Ltd.

I shall also extract the relevant parts as well as follows;

The first paragraph reads;

We act for our esteemed client named Efatha Foundation Limited who has instructed us to give you notice of intention to sue in the Court for recovery of the total sum of **USD 105,000.000 equivalent to TZS**

241,500,000/= being unpaid rent for the rented building/premises located at plot No. 90 Bagamoyo Road at Mwenge area in Dar es salaam running from January 2018 to December 2020. You being the successor of Efatha Bank Limited by being appointed official receiver by the Bank of Tanzania with effect from 4th day of January 2018, you are liable to pay rental charges for all the period you occupied the rented premise without further delay. The claim for rental charges is not subjected to liquidation procedure because the claim accrued after making the receiving order thus not provable in bankruptcy. (emphasis is mine).

Second paragraph also reads as follows;

"On 4th January 2018 Efatha Bank Limited was put under liquidation/receivership by virtue of the Banking and Financial Institutions Act, 2006 where the Deposit Insurance Board was appointed liquidator/Receiver Manager,Our client has made unlimited number of claims regarding payment of rental charges in arrears from Deposit Insurance Board but to date the same has not been paid for unknown reasons. Deposit Insurance Board has occupied our client's premises from 4th January 2018 to 10th December 2020 covering a period of 36 months at rental charge of USD 3500.00 per month, we understand that you paid for six months only leaving out outstanding balance claimed herein".

Therefore, the 90 days Notice also shows that the said rent is attributable to DIB and not part of the provable debts under the liquidation process.

Fifthly, I have also gone through the letters from Efatha Foundation annexed to the Application and directed to DIB and BOT respectively concerning the outstanding sum to be paid by DIB to Efatha foundation Ltd. The documents indicate that the said debt is attributed to DIB and it accrued after the receiving date and on the face value there is consensus on this understanding as between parties. If I may also emphasize on this point that the parties have also reached a stage where they have exchanged demand letter and account numbers for effecting payments running from the receiving date, 4th of January 2018 (without going to the merit of the application, I refer to following documents annexed on the Application which also indicates on the face value that the rent arrears accrued after the receiving date and are attributable to DIB as DIB in the course of its business and not Efatha Bank;

- a) Annexure NCA 2, which has differentiated between the rent accrued to Efatha Bank and rent from DIB for the use of the Building.
- b) Annex 3 which is a letter from Efatha Foundation Ltd to the Governor BOT requiring DIB to vacate the office which was being formerly used by Efatha Bank, then DIB, since January, 2018 and which also reminded DIB to pay rent for the period of January – March, 201 as per the attached contract.
- c) Annex 5 with Ref. No. UB.18/56/10 from DIB to Efatha Foundation Limited – clarifying on the claims which accrued before closure of

Efatha Bank and afterwards which are to be paid in accordance with the procedure provided in liquidation law, subject to the availability of liquidation proceeds and claims of rent arrears related to the period after the closure of Efatha Bank, i.e. 4th January 2018 which DIB committed to pay subject to it being supplied with the EFD receipts and bank details. (in this regard see also para 7 of the Respondents Counter affidavit which confirms the issue of EFD receipts).

- d) Annexure 17 – which is a letter dated 14th May 2020 with ref no. EFL/DIB/01/2020 from Efatha Foundation Ltd notifying DIB to have occupied the office premises for 2 years and six months to the date they vacated the premises. The same also directed them to pay the amount due in full before they vacate the building (with a handover note of the Building dated 10th December, 2020 attached).
- e) Refer also to ongoing negotiations between parties which have focused on the rent arrears for dates after the receiving date. (letter with reference No.UB.56/342/05/F.69)

Therefore, based on all these cited documents, it is very clear that the debt or rent arrears are in respect of DIB the second respondent and not Efatha Bank Ltd since they accrued after the receiving date and there is no dispute that the rent arrears are directly attributed to DIB as far as the documents attached to the application are concerned. As rightly contended by the counsel for the Respondents, the rent arrears, the subject of the instant application are not in respect of the company under liquidation, as per the provisions of section 9(1) of the Bankruptcy Act Cap 25 and Section 288 of the Companies Act Cap 325 RE 2019. Hence the requirement for leave in

order to sue DIB, the second respondent and Government Institution or the respondents herein is not applicable. This court will not proceed to hear the application on merit.

That said, the Application is hereby struck out. Each party shall bear its own costs.

It is so ordered.

Dated at DAR ES SALAAM this 17th day of November, 2023.



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S. D. MWAIPOPO,

JUDGE

17/11/2023

The Ruling delivered this 17th day of November, 2023 in the presence of Karoli Chami, State Attorned, for the Respondents and Bernadeta Fabian, learned Advocate, for the Applicant, is hereby certified as a true copy of the original.



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S.D. MWAIPOPO

JUDGE

17/11/2023