

Financial Services Sector Report

Q1 2024



BANKING

A) HIGHLIGHTS OF THE RELEVANT HIGH COURT CASE LAW

Mohamed v Diamond Trust Bank Kenya Limited (Commercial Case E029 of 2023) [2024] KEHC 766 (KLR) (18 January 2024) (Ruling)¹

BACKGROUND:

The Plaintiff (hereafter, “**the Borrower**”) obtained a term loan from Diamond Trust Bank (hereafter, “**the Bank**”). The loan facility was secured by, among other things, a charge over a building owned by the Borrower.

Sometime in 2010, the Borrower defaulted on his repayment obligations under the lending agreement and the charge instrument thus prompting the Bank to invoke its statutory power of sale to realise the charged property.

The Borrower instituted two separate suits against the Bank, later consolidated, seeking to stop the Bank from exercising its statutory power of sale. In its response to the consolidated suits, the Bank **counterclaimed** against the Borrower **for the entire outstanding balance** due under the charge and the lending agreement.

After a 13-year legal battle that culminated at the Court of Appeal, the dust on the litigation between the Borrower and Bank settled, or so it would seem. The Bank emerged holding a money decree for, among other reliefs, the entire balance of the outstanding term loan.

Subsequently, the Bank instructed property agents to advertise the charged building for sale to interested purchasers.

The Borrower, once more, moved the High Court to stop the Bank from selling the charged property. Together with his substantive suit seeking a permanent injunction, the Borrower lodged an application seeking to injunct the Bank from exercising its statutory power of sale pending the determination of the suit.

On its part, the Bank applied to have the Borrower’s suit struck out on grounds that the issues raised therein were *res judicata* and *sub-judice*.

BORROWER’S CASE:

In support of its request for an interim injunctive order stopping the sale of the charged property, the Borrower contended as follows:

1. The Bank had, through its counterclaim against the Borrower, sued for the loan balance and obtained a money decree therefrom.
2. Having obtained a money decree, the Bank could not turn around and seek to exercise its statutory power of sale. This set of facts satisfied the limb of *prima facie* case.
3. The suit was neither *res judicata* nor *sub-judice*.
4. The property agents instructed to sell the charged property had not prepared or served a Statutory Notification of Sale.
5. Even though the Bank was capable of paying any damages suffered by the Plaintiff, the Court should not countenance

¹ <https://kenyalaw.org/caselaw/cases/view/279759/>

an illegality by declining to issue the injunction.

BANK'S CASE:

In opposing the Borrower's Application, the Bank submitted that:

1. The Borrower defaulted in his repayment obligations thus constraining the Bank to exercise its statutory power of sale.
2. The issues raised by the Borrower had been the subject of 4 different suits which had been concluded, both at the High Court and the Court of Appeal.
3. All the courts that heard the dispute between the Borrower and the Bank had certified that the Borrower ought to settle a certain money decree, arising under the charge.
4. The Borrower had failed to disclose the existence of the different suits between himself and the Bank.
5. The Bank was entitled to exercise its statutory power of sale.

ISSUES FOR DETERMINATION:

The court identified the following as the issues arising for determination:

- 1 Whether the issues raised in the suit (and the application) were *res judicata* or *sub judice*.
- 2 Whether the Borrower was entitled to the interim injunctive order sought.

HELD:

Borrower's suit was neither *res judicata* nor *sub judice*

Contrary to the Bank's submission, the suit raised the novel issue of whether any loan

balance due to the Bank from the Borrower could be pursued outside the ambit of the money decree issued by the Court of Appeal. Put differently, the new suit sought to answer the question of whether a chargee holding a money decree could exercise its statutory power of sale.

In the court's mind, once the Court of Appeal rendered its judgement and issued a money decree to the Bank, the outstanding amounts due from the Borrower were pegged on the decree, not the charge instrument.

Additionally, the court found that the Borrower's fresh challenge of the Banks' statutory power of sale was not based on any notices (as was the case in the concluded suits) but arose from pure operation of the law.

Since none of the identified prior suits were pending determination before any court of competent jurisdiction, it could not be said that the Borrower's claims were *sub judice*.

In the circumstances, the Bank could not successfully rely on the legal shields of *res judicata* and *sub judice* to defeat the Borrower's suit.

Borrower had met the legal threshold for an injunctive order

The Borrower had established a *prima facie* case by presenting evidence that the Bank had invoked its statutory power of sale even though it had earlier elected to sue for the outstanding loan balance.

Having elected to sue the Borrower (by way of counterclaim) for the outstanding loan facility and obtained a money decree from the Court of Appeal, the court found, the Bank could not turn around and purport to exercise its statutory power of sale over the security charged to it by the Borrower.

On whether the Borrower would suffer irreparable loss if the intended sale was not injuncted, the court found that since the

Bank's conduct was inequitable and possibly illegal, it did not matter that the Bank was capable of remedying the Borrower's harm through an award of damages. In the court's reasoning, the Borrower would suffer irreparable loss in the event the Bank realized the Suit Property and also executed the money decree obtained against the Borrower.

On the final limb of the test for interlocutory injunctions, the court found that the balance of convenience favoured a grant of the injunctive orders given that the Bank was already in possession of a money decree it could execute against the Borrower.

CONCLUSION & IMPLICATION:

In view of the above findings, the Honourable Court:

- (a) dismissed the Bank's application seeking to strike out the suit for being *res judicata* and *sub judice*; and
- (b) allowed the Borrower's application seeking to injunct the Bank from exercising its statutory power of sale over the charged property.

Given the court's findings, chargees must be cautious and strategic in electing which of the remedies available to them under Section 90 (3) of the Land Act they should pursue in the event of a borrower's default under a charge.

Such an election must take into account various factors, key among them being the amount of the facility outstanding, the Borrower's ability to satisfy a money decree and the efficacy of exercising statutory power of sale. This assessment will help in overcoming challenges arising from an application of the rule on election of remedies. Briefly put, the rule on election of remedies provides that where a party has **inconsistent**

rights or remedies, once they make a deliberate choice of one of the remedies, they are bound by said election and are estopped from electing and resorting to the other remedy.

In the instant case, since it had elected to pursue and obtained a money decree, the Bank should have doubled down and exercised all efforts in executing the money decree against the Borrower. Instead of re-invoking its statutory power of sale, the Bank may have succeeded, as part of the execution process, in attaching and selling the charged property in satisfaction of the money decree.

B) REPORT OF REGULATOR CIRCULARS, GUIDELINES, LEGAL NOTICES, POLICIES, PRACTICE NOTES AND REQUESTS FOR STAKEHOLDER COMMENTS OR PUBLIC PARTICIPATION FROM 1ST JANUARY 2024 TO 31ST MARCH 2024

On 20th February 2024, the Central Bank of Kenya ('CBK') posted on its website an [invitation](#) for public and stakeholder comments on the [draft Banking \(Penalties\) Regulations, 2024](#). The regulations have been developed in response to section 55(2) of the [Banking Act](#) which requires CBK to prescribe penalties for violations of the Banking Act and are aimed at providing a clear framework for assessing and levying of monetary penalties to promote compliance with banking laws and enhance integrity of the banking sector. Submission of feedback closed on 18th March 2024.

The National Treasury issued a [public notice](#) announcing that it had developed a [draft Credit Guarantee Policy](#) and proposed [amendments to the CBK Act](#) in support of the establishment of the Kenya Credit Guarantee Company. The draft

policy intends to address access to quality and affordable credit in a sustainable manner as well as the development, implementation and growth of private and public credit and guarantee facilities. Proposed amendments to the CBK Act include giving the CBK powers to regulate credit guarantee business which has been defined as *‘the business of providing a guarantee to a lender through the absorption of all or a portion of the lender’s risk on credit facility made to a borrower in case of default’*. Submission of comments will close on 6th May 2024.

C) LEGISLATIVE REVIEW – SUBSIDIARY LEGISLATION

Computer Misuse and Cybercrime Act (Critical Information Infrastructure and Cybercrime Management) Regulations, 2024

The Computer Misuse and Cybercrime Act (Critical Information Infrastructure and Cybercrime Management) Regulations, 2024 (“Regulations”) were published on 9th February 2024 pursuant to section 70 of the Computer Misuse and Cybercrimes Act, 2018, (Act”) that empowers the Cabinet Secretary for Interior and National Administration to make Regulations in regards to cyber security in Kenya.

The regulations provide a framework to monitor, detect and respond to cybersecurity threats in the cyberspace belonging to Kenya. Some of the Key takeaways are in regards to:

i. Administration And Management of The National Computer and Cybercrimes Co-ordination Committee

In performing the functions of the Committee² provided under section 6 (1) of the Act³, the Committee shall:

- (a) issue prompt and timely advice to the Government on cybersecurity strategies relating to various technologies and sectors;
- (b) undertake advocacy and create public awareness on cybersecurity matters;
- (c) receive and approve reports from the Cybersecurity Operations Centres⁴; and
- (d) in collaboration with relevant agencies, formulate Information Security Standards

ii. Cybersecurity Operations Centres

The Cybersecurity Operations Centres contemplated above shall include:

- (a) National Cybersecurity Operations Centre;
- (b) Sector Cybersecurity Operations Centres; and
- (c) Critical Information Infrastructure Cybersecurity Operations Centres.

A National Cybersecurity Operations Centre shall be the national focal point for monitoring, detecting, preventing, responding, investigating and attribution of cyber threats, computer and cybercrimes in Kenya.

The capability of a Cybersecurity Operations Centre shall include:

- (a) real time event monitoring, analysis, log collection and aggregation;
- (b) an alert system;

² “Committee” means The National Computer and Cybercrimes Co-ordination Committee

³ The Committee shall — Functions of the Committee. (a) advise the Government on security related aspects touching on matters relating to blockchain technology, critical infrastructure, mobile money and trust accounts; (b) advise the National Security Council on computer and cybercrimes;

(c) co-ordinate national security organs in matters relating to computer and cybercrimes; (d) receive and act on reports relating to computer and cybercrimes;

⁴ “Cybersecurity Operations Centres” means the capability that encompasses cutting-edge technology, tools and a team of cybersecurity experts organized to protect, monitor, detect, analyse, respond and report on cybersecurity incidents and threats.

- (c) cybersecurity specialists organized to prevent, detect, analyse and respond to threats;
- (d) asset inventory;
- (e) vulnerability management;
- (f) network detection and response; and
- (g) end point detection and response.

iii. Critical Information Infrastructure

Pursuant to section 9 of the Act⁵, the Director shall in designating a system as a critical infrastructure:

- (a) identify the system being designated as a critical information infrastructure;
- (b) identify the owner of a critical information infrastructure;
- (c) inform the owner of critical information infrastructure of his responsibilities under the Act and these Regulations; and
- (d) provide the owner of critical information infrastructure with particulars of the requirement to designate a chief information security officer to provide the requisite technical support to the organization.

Further, the owner of critical information infrastructure shall be required to:

- (a) conduct annual risk assessment;
- (b) develop incidence response plans;
- (c) implement suitable security measures; and
- (d) ensure personnel are adequately trained in security best practices.

An owner of a critical information infrastructure shall not make any significant changes to the design, configuration, security or operations of a critical information infrastructure, without prior notification to the Director.

iv. Cyber threats Reporting

The basis for reporting cyber threat as contemplated under section 40 of the Act⁶ shall be to:

- (a) provide actionable information or complaints which may form a basis for investigations and prosecutions;
- (b) identify cybercrime threats on citizens and organizations, including understanding and measuring trends;
- (c) establish a channel of communication between citizens including victims, witnesses of cybercrime and the law enforcement agencies;
- (d) coordinate between law enforcement agencies and public authorities; and
- (e) foster a culture of public and private sector cooperation and information sharing including international cooperation.

In the event of a cybersecurity incident, the owner of a critical information infrastructure shall:

- (a) facilitate the investigations by law enforcement agencies;
- (b) report and mitigate impact of the incident in accordance with the cybersecurity standards formulated by the Committee; and
- (c) report all cybersecurity incidents to the relevant Sectoral Cybersecurity Operations Centre within twenty-four hours of becoming aware of an incident pursuant to section 40 of Act.

The Committee or any law enforcement agencies, or an organization, shall provide platforms for anonymous reporting to allow any person to disclose useful information relating to cyber incidents or crimes anonymously. However, any person who provides false information maliciously intended to injure another person commits the offence chargeable under section 22 of the Act.⁷

⁵ The Director shall, by notice in the Gazette, designate certain systems as critical infrastructure.

⁶ A person who operates a computer system or a computer network, whether public or private, shall immediately inform the Committee of any attacks, intrusions and other disruptions

to the functioning of another computer system or network within twenty-four hours of such attack, intrusion or disruption.

⁷ A person who intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be

More information on the regulations can be accessed through [Microsoft Word - L. N. 44 The Computer Misuse and Cybercrimes Act, formatted.doc \(kenyalaw.org\)](#)

INVESTMENTS

A) REPORT OF REGULATOR CIRCULARS, GUIDELINES, LEGAL NOTICES, POLICIES, PRACTICE NOTES AND REQUESTS FOR STAKEHOLDER COMMENTS OR PUBLIC PARTICIPATION FROM 1ST JANUARY 2024 TO 31ST MARCH 2024

The Capital Markets Authority ('CMA') published a [public notice](#) on 13th March 2024 inviting stakeholder and public feedback on drafts of the following documents:

- a) [Capital Markets \(Margin Trading\) Regulations, 2024.](#)
- b) [Guidelines on Financial Resource Requirements for Market Intermediaries.](#)
- c) [Amendments to the Capital Markets \(Commodity Markets\) Regulations 2020.](#)

CMA noted that the draft regulations and amendments had been prepared in response to market demands and emerging issues. Submission of comments closed on 11th April 2024.

B) LEGISLATIVE REVIEW – SUBSIDIARY LEGISLATION

National Construction Authority Act (National Building Code), 2024 (LN 47 2024.pdf (kenyalaw.org))

The National Construction Authority Act (National Building Code), 2024 ("Code") was published on 20th February 2024 pursuant to section 42(2)(aa) of the National Construction Authority Act ("Act") that empowers the Cabinet Secretary for Lands, Public Works, Housing and Urban Development, in consultation with the Board of the National Construction Authority to make a code to promote order and safety in construction works, and the health and safety of persons in or about construction works.

i. Scope of the code

The scope covers standards for:

- a) design, construction, operation, inspection and maintenance of a building;
- b) design, building materials, products, elements, systems and building services;
- c) infrastructure services;
- d) operations and works at a construction site;
- e) disaster management at a construction site; and
- f) safety and security of the users and occupants of a building.

ii. Compliance with applicable laws

Any person who engages in construction works, or a person who owns or occupies a building shall comply with the Code and shall obtain;

- a) a development permission in accordance with the Physical and Land Use Planning Act, 2019; No. 13 of 2019;
- b) an environmental impact assessment licence issued in accordance with the

considered or acted upon as authentic, with or without any financial gain, commits an offence and shall, on conviction, be

liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both.

Environmental Management and Coordination Act (Chapter 387 of the Laws of Kenya);

- c) a compliance certificate issued in accordance with the Act; and
- d) any other applicable approval.

iii. Siting and Space About Buildings

An owner engaging in construction works shall comply with the conditions as may be imposed by the approving authority regarding the siting, size, height, shape and appearance of the building to safeguard, maintain or impose the dignity or preserve the amenity and general appearance of a road, square, public place.

iv. Preparation of Construction Sites

Before the erection, alteration, scaffolding or demolition of a building, an owner shall install a boundary to prevent the public from entering the construction site and to protect the public from the activities on the construction site.

The boundary shall be retained for as long as is necessary and maintained by the owner in a safe condition and any access to the construction site shall be subject to approval of the owner and no part of a boundary shall be removed until the construction works have been completed.

v. Building Materials

A person shall not use or permit to be used, in any construction works, any material which is not:

- a) of a suitable nature and quality for the purpose for which it is used;
- b) adequately mixed or prepared for the functions for which it is designed; or
- c) applied, used or fixed in such a manner as to adequately perform the functions for which it was designed.

vi. Structural Design

Every building, structural element or component of a building and an incidental structure shall be designed to be safe and serviceable and a design of

a building shall provide adequate structural resistance, serviceability, durability and reliability.

According to the code, a building shall be designed to::

- a) withstand wind, seismic and accidental loading;
- b) withstand flood action for a defined flood event;
- c) resist floatation, collapse of significant movement from hydrostatic hydrodynamic scour, caused by a defined flood event;
- d) comply with elevation requirements,
- e) comply with material requirements and utilities; and
- f) enable occupant egress.

vii. Inspection and Maintenance

An inspection of a building shall be conducted within every five years after the completion of a building.

The following types of inspections shall be carried out on a building—

- a) a visual inspection;
- b) a full structural or civil inspection;
- c) a full building condition survey by a surveyor;
- d) a full building services (electrical and mechanical) inspection; and
- e) a specialized building investigation

viii. Demolition of Buildings

Where a building containing a basement storey is demolished to ground level, the owner shall provide a safe lateral support to the sides of the basement storey and if due to construction works, a road is damaged, the approving authority may either:

- a) serve a notice in writing upon the owner, requiring the owner to make good the damage to the road to the satisfaction of the relevant approving authority, within the period specified in the notice; or
- b) make good the damage and recover from the owner the expenses incurred in doing so.

ix. Disaster Risk Management on Construction Sites

A person undertaking a design, planning, preparation, or construction phase, in the use or demolition of a project shall take account of general principles of disaster prevention in the performance of those duties during all the stages of the project.

All persons involved in a project and upon whom a duty is placed shall coordinate their activities with one another in a manner which ensures, so far as is reasonably practicable, the health and safety of persons;

- (a) carrying out the construction works; or
- (b) affected by the construction works.

The code provides guidelines on all matters to do with building and construction and the safety of all persons involved in the construction and affected by the same. For deeper analysis the code can be accessed through [Microsoft Word - L.N. -x The Nation Construction Authority Act, formatted2024.doc \(kenyalaw.org\)](#)

RETIREMENT BENEFITS

A) REPORT OF REGULATOR CIRCULARS, GUIDELINES, LEGAL NOTICES, POLICIES, PRACTICE NOTES AND REQUESTS FOR STAKEHOLDER COMMENTS OR PUBLIC PARTICIPATION FROM 1ST JANUARY 2024 TO 31ST MARCH 2024

On 25th January 2024, the Retirement Benefits Authority ('RBA') published a [notice](#) to the Retirement Benefits Industry on Amendments to Retirement Benefits Regulations. [Legal Notice](#)

[No. 18 of 2024](#) introduced amendments to the existing Retirement Benefits (Managers and Custodians) Regulations, 2000, focusing specifically on the requirements for valuing scheme funds.

Under the new provisions:

- Debt instruments held to maturity are to be reported at amortized cost.
- The fair value method will be used for determining the value of both debt instruments available for sale and equities.

Additionally, [Legal Notices Nos. 19, 20, 21, and 22 of 2024](#) extended their impact to various regulations governing the determination of net interest to be declared and credited to members. The affected regulations included:

- The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000.
- The Retirement Benefits (Individual Retirement Benefits Schemes) Regulations, 2000.
- The Retirement Benefits (Umbrella Retirement Benefits Schemes) Regulations, 2017.
- The Retirement Benefits (Income Drawdown Funds) Regulations, 2023.

In light of the amendments, net returns declared and credited to members' accounts would exclude unrealized gains and losses arising from changes in the value of debt instruments held by a scheme at the end of the financial year.

As the above changes took effect from December 21, 2023. Investment reports and financial statements prepared as at December 31, 2023, are required to adhere to the amended regulations.



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