



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 24 OF 2018

IN THE MATTER OF: ARTICLES 22, 23, 40 & 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 7, 9 & 11 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: ADMINISTRATIVE ACTIN BY THE RECEIVER MANAGER, IMPERIAL BANK LIMITED (IN RECEIVERSHIP)

BETWEEN

- 1. EMBAKASI MANAGEMENT LIMITED**
- 2. KIMAKIA ESTATES LIMITED**
- 3. MASINDENI ESTATES LIMITED**
- 4. OLD TOWN PROPERTY DEVELOPMENT LIMITED**
- 5. PWANI WAREHOUSING LIMITED**
- 6. SAKU DEVELOPMENT LIMITED**
- 7. SIBEN ESTATES LIMITED**
- 8. TURUMA PROPERTIES LIMITED**
- 9. AIRPORT WAREHOUSING LTD.....PETITIONERS**

VERSUS

- 1. IMPERIAL BANK LIMITED (IN RECEIVERSHIP)**
- 2. KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENTS**

JUDGMENT

The Petition

1. The petition before the Court is dated 26th February, 2018. The Petitioners are a group of companies while the 1st Respondent is their bank which has since been put in the receivership of the 2nd Respondent.
2. The petition is premised on the Supporting Affidavit of **Mohamed Rashid** sworn on 26th February, 2018 and a Supplementary Affidavit of the same person sworn on 1st August, 2018.

3. The Petitioners' case is that they are limited liability companies forming part of the Milly Group of Companies although each is designated to carry out specific business goals. The 1st to 9th Petitioners at all material times held various current and fixed deposit accounts with the 1st Respondent. The accounts are as follows:

No.	Account Holder	Account Number	Account Type
1.	Embakasi Management Company Limited Fixed	7200011685 Current	002DEP3152250003 Fixed 002DP12131780002
2.	Kimakia Estates Limited	720006716 Current	002DEP3133360001 Fixed
3.	Masindeni Estates Limited	7200006719 Current	
4.	Old Town Property Development Limited	7200011273 Current	
5.	Pwani Warehousing Limited	002DEP3133330002 Fixed	002DEP3152260002 Fixed
6.	Saku Development Limited	002DEP315229001 Fixed	002DEP3152780001 Fixed
7.	Siben Estates Limited	002DEP3150860005 Fixed	7200006718 Current
8.	Turuma Properties Limited	7200006717 Current	
9.	Airport Warehousing Limited	1003844451 Current	

4. The Petitioners state that on 13th October 2015 the Central Bank of Kenya in exercise of its statutory powers under the Central Bank of Kenya Act Cap 491 placed the 1st Respondent under receivership and appointed the 2nd Respondent as its Receiver Manager. On 11th December 2015, the 2nd Respondent issued a press release to all depositors of the 1st Respondent informing them (the depositors), that the 2nd Respondent would commence paying out claims to depositors of the 1st Respondent up to a sum not exceeding Kshs. 1,000,000.00 for each depositor. That the 2nd Respondent issued a subsequent press release on 19th July 2016 informing the public that it would pay out a further Kshs. 1,500,000.00 to depositors of the 1st Respondent. (These two press releases will be called The First Press Release).

5. The Petitioners aver that the 1st to 8th Petitioners, pursuant to the First Press Release, applied as directed to be paid various amounts of money held by the 1st Respondent as follows:

No.	Account Holder	Account Number	Amount in Kshs
1.	Embakasi Management Company Limited	7200011685,	1,087,071.50
			002DEP3152250003, 1,000,000.00,M
	002DP12131780002 ,		524,787.57
2.	Kimakia Estates Limited,	720006716,	801,129.91, 002DEP3133360001, 1,167,147.29
3.	Masindeni Estates Limited,	7200006719,	163,064.42
4.	Old Town Property Development Limited,	7200011273,	31,007.87
5.	Pwani Warehousing Limited,	002DEP3133330002,	1,326,666.45, 002DEP3152260002 2,000,000.00
6.	Saku Development Limited,	002DEP315229001,	2,000,000.00 , 002DEP3152780001 1,500,000.00
7.	Siben Estates Limited	002DEP3150860005	1,041,749.76 7200006718 732,545.40
8.	Turuma Properties Limited	7200006717	839,186.40
			TOTAL 14,214,356.57

6. The Petitioners further aver that by eight (8) separate but similarly worded letters dated between 5th October 2016 and 8th November 2016, the 2nd Respondent notified the 1st to 8th Petitioners that their applications had been allowed but that the funds requested would be utilized to offset a Hire Purchase Facility advanced to **Farm Africa Mills Investments Limited** by the 1st Respondent as follows:

a. Embakasi Management Company Limited - Kshs. 2,329,187.73

b. Kimakia Estates Limited	- Kshs. 1,968,277.20
c. Masindeni Estates Limited	- Kshs. 163,064.42
d. Old Town Property Development Limited	- Kshs. 31,007.87
e. Pwani Warehousing Limited	- Kshs. 1,500,000.00
f. Saku Development Limited	- Kshs. 1,500,000.00
g. Siben Estates Limited	- Kshs. 1,774,294.18
h. Turuma Properties Limited	- Kshs. 839,186.40
Total	- Kshs. 10,105,017.80

7. The Petitioners state further that on 28th December 2016, the 2nd Respondent issued another press release (The Second Press Release) advising that it would pay depositors of the 1st Respondent upon their making the relevant application. The 9th Petitioner, pursuant to the Second Press Release, applied as directed to be paid the sum equivalent to 10% of the deposit held at the 1st Respondent. The 2nd Respondent accepted the 9th Petitioner's aforesaid application to an extent of Kshs. 3,184,976.38 but again withheld and applied the said amount purportedly to offset a facility given by the 1st Respondent to Farm Africa Mills Investment Limited.

8. Further, the 9th Petitioner, by a letter dated 8th January 2018 sought to have released to it, the logbook for motor vehicle registration number KBX 223 K which it had purchased through an asset finance facility from the 1st Respondent. The 1st & 2nd Respondents responded by a letter dated 18th January 2018 where they refused to do so on the ground that there was an outstanding amount owed by Farm Africa Mills Investment Limited. The Petitioners aver that the 1st and 2nd Respondents in utilising the aforesaid funds to offset the debt owed by Farm Africa Mills Investment Limited were acting contrary to their previous lawful conduct since they had earlier on paid, without offsetting, Kshs. 1,000,000.00 to **Pwani Warehousing Limited** (the 5th Petitioner), Kshs. 1,000,000.00 to **Saku Development Limited** (the 6th Petitioner) and Kshs. 2,500,000.00 to **Airport Warehousing Limited** (the 9th Petitioner). The Petitioners aver that the only connection they have with Farm Africa Mills Investments Limited is that they share a shareholder, **Mr. Mohamed Rashid**. They do not have any other connection with Farm Africa Mills Investments Limited; they have not guaranteed nor in any other way offered security to the facility advanced to Farm Africa Mills Investment Limited nor have they ever authorised the 1st & 2nd Respondents to offset Farm Africa's debt with monies belonging to the Petitioners.

9. Concerned by the alleged unlawful and unreasonable approach taken by the 1st and 2nd Respondents, the Petitioners, through their advocates' letter dated 18th April 2017 sought information and reasons for the 1st and 2nd Respondents' aforesaid actions. It is averred that the 1st and 2nd Respondents, despite receiving the request for information and reasons, have never responded to the aforesaid request by the Petitioners nor have they reversed their decision to utilize the Petitioners property to pay the debts of Farm Africa Mills Investments Limited.

Provisions of the constitution and law alleged to be violated

10. The Petitioners allege that:

(a) By treating the Petitioners' property as that of Farm Africa Mills Investments Limited by virtue of the common shareholding of Mr. Mohamed Rashid, the 1st and 2nd Respondents are negating the separate corporate identity of the Petitioners and the identity of their shareholders. They are thus exercising their administrative functions contrary to section 50(2)(a) of the Kenya Deposit Insurance Act No. 10 of 2012 and the common law.

(b) By using the Petitioners' property to offset debts owed to a distinct entity and without reasons for so doing, the 1st and 2nd Respondents are violating the Petitioners' rights not to be deprived of their property arbitrarily under Article 40 of the Constitution.

(c) By releasing, without offsetting, a sum of Kshs. 4,500,000.00 to the 5th, 6th & 9th Petitioners and then subsequently offsetting the same Petitioners' other funds under the First and Second Press Releases, the 1st and 2nd Respondent's actions are arbitrary, illogical and thwarts the Petitioner's legitimate expectation.

(d) By releasing Kshs. 4,500,000.00 to the 5th, 6th and 9th Petitioners but then offsetting all the other sums due to the 1st to 4th, 7th & 8th Petitioners, the 1st and 2nd Respondent's actions amount to discrimination against the 1st to 4th, 7th & 8th Petitioners and an infringement of the right to equality.

(e) By failing to give the Petitioners notice of the intention to utilize the Petitioners' funds to pay for the liabilities of a totally distinct entity, the 1st and 2nd Respondents violated the Petitioner's right to a hearing under Article 47 of the Constitution as well as section 4(3)(a) of the Fair Administrative Action Act 2015.

(f) By refusing to provide the Petitioners with the information or documents that led to the decision to utilize the Petitioners' funds in the manner the 1st and 2nd Respondents did, the Petitioners' rights under section 4(3)(g) of the Fair Administrative Action Act

2015 were infringed.

Injuries caused or likely to be caused

11. The Petitioners aver that pursuant to above alleged illegal actions of the Respondents, the Petitioners are likely to suffer or forfeit:

- (a) The right to be informed of the reasons for the decision;
- (b) The right to the use and enjoyment of their property totalling to Kshs. 13,289,994.18
- (c) The 9th Petitioner's right to the full enjoyment and use of its motor vehicle registration number KBX 223 K

(d) Future payments the same way thus perpetually denying the Petitioners their right to the use and enjoyment of their money.

12. Reliefs sought

- (a) A declaration that the 1st and 2nd Respondents' decision to use the Petitioners' deposits to offset the loan facility advanced to Farm Africa Mills Investments Limited is a violation of the Petitioners' right to property under Article 40 of the Constitution and right to fair administrative action under Article 47 of the Constitution.
- (b) A declaration that the 1st & 2nd Respondents have no statutory power to deduct any deposits held by the Petitioners in settlement of the obligations owed by Farm Africa Mills Investments Limited in the absence of express authorization by the Petitioners.
- (c) An order compelling the 1st and 2nd Respondents to forthwith release to the Petitioners, the sum of Kshs. 13,289,994.18 unlawfully withheld together with interest at commercial rate of 20% per annum from the date of the unlawful withholding till payment in full.
- (d) An mandatory injunction compelling the 1st & 2nd Respondents to forthwith release to the 9th Petitioner, the original logbook for motor vehicle registration number KBX 223 K and to initiate the transfer process on the National Transport Authority's website.
- (e) Costs of the Petition with interests at court rates.

The Response

13. The petition is opposed vide a Replying Affidavit sworn by **DAVID KIPTOO** on behalf of the 2nd Respondent.

14. The 2nd Respondent denies that Respondents are in breach and or in violation of Articles 22, 23, 40 and 47 of the Constitution of Kenya 2010 and Sections 7, 9 and 11 of the Fair Administrative Action Act of 2015, or any other laws as alleged by the Petitioners, as the Respondents followed the right legal procedure for all the transactions carried out and required of the 2nd Respondent as specifically provided for under the Kenya Deposits Insurance Act of 2012 ("KDI Act").

15. The Respondents admit that the Petitioners had various accounts with the 1st Respondent which had different balances as is stated in the Petition. The 2nd Respondent avers that it is also true, which fact the Petitioners seem to avoid, that Farm Africa Mills Investments Limited, an account holder with the 1st Respondent, had a Hire Purchase Finance facility advanced to it to the tune of USD 1,792,850. That Hire Purchase Finance facility was approved by the 1st Respondent subject to, *inter alia*:

- (a) Submission of personal guarantee of Mr. Mohamed Azim Sajjad Rashid, one of the Directors of Farm Africa Mills Investments Limited among other directors.
- (b) Submission of duly signed and witnessed Right of set off forms signed by the Directors.
- (c) Any other security that the 1st Respondent may determine from time to time to secure the said facility.

16. The Respondents' case is that in the years 2015, 2016, 2017 and 2018, Farm Africa Mills Investments Limited defaulted in the repayment of the facility including both the principle and interest. As at 13th October 2015, the total balance due was USD 1,334,298 relating to both interest and principle sum. A total sum of USD 102,093.81 was used to offset the facility bringing the total balance due to USD 1,232,205 as at 30 September 2016. The 2nd Respondent avers that to date, neither Farm Africa Mills Investments Limited nor the Petitioners have made any further payments to settle the balance. The Respondents state that the act of offsetting the amounts held by the Petitioners against the amount due from Farm Africa Mills Investments Limited was informed by the fact that the 2nd Respondent was exercising his power under the KDI Act once it came to his attention that all the Petitioners and Farm Africa Mills Investments Limited had common ownership through common directors and shareholders as detailed in the table below.

No. Company Directors/Owners

1. Embakasi Management Company Limited

Mohamed Raza Sajjad

Mohamed Azim Sajjad Rashid

2. Kimakia Estates Limited

Mohamed Raza Sajjad

Mohamed Azim Sajjad Rashid Peranga Limited

Riverdale Limited

3. Masindeni Estates Limited

Mohamed Raza Sajjad

Mohamed Azim Sajjad Rashid

4. Old Town Property Development Limited

Mohamed Raza Sajjad

Sajjad Mohamed Ali Rashid

5. Pwani Warehousing Limited

6. Saku Development Limited

Mohamed Raza Sajjad

Mohamed Azim Sajjad Rashid

Milly Grain Millers Limited

Pwani Warehousing Limited

7. Siben Estates Limited

Mohamed Raza Sajjad

Mohamed Azim Sajjad Rashid

8. Turuma Properties Limited

Mohamed Raza Sajjad

Mohamed Azim Sajjad Rashid

9. Airport Warehousing Limited

Mohamed Raza Sajjad

Mohamed Azim Sajjad Rashid

Saku Development Limited

10. Farm Africa Mills Investments Limited

Mohamed Azim Sajjad Rashid

Milly Fruit Processors Limited

Venkat Jalagam

17. The Respondents aver that the fact of common ownership is admitted in the Petition by referring the Petitioners to a group of companies as well as the admission that one of the directors and shareholder of Farm Africa Mills Investments Limited, one Mohamed Azim Sajjad Rashid, is also a Director and/or shareholder in all the other Petitioner companies. That in addition to executing the personal guarantee and Right of set off forms for Farm Africa Mills Investments Limited the said Director/shareholder, Mohamed Azim Sajjad Rashid, also executed Right of Set off forms for each of the Petitioner companies clearly stipulating the power of the 1st Respondent to *inter alia*;

(a) Realize the securities and apply proceeds to set off or transfer any sum (s) thereof to any or more such accounts in or towards satisfaction of the Borrower's liabilities to the Company or any other account.

(b) Apply payments received in respect of any designated accounts to any other accounts within each of the Companies and/or between other group of companies.

(c) Combine or consolidate all or any of the Borrower's accounts with and liabilities to the Bank.

18. The 2nd Respondent states further that the said same Directors of the Petitioner companies executed the General Terms and Conditions of operating bank accounts for all the Petitioner companies where the 1st Respondent's right of set off was clearly provided for under paragraph 20.

19. The 2nd Respondent avers that in light of the enabling provisions of the KDI Act and more so Section 50 and having obtained evidence that the Petitioner companies are related to Farm Africa Mills Investments Limited, which had perpetually defaulted to repay the amount due, then it was procedurally correct, legal and fair to offset from the Petitioner companies. The 2nd Respondent denies the Petitioners allegation that with respect to the 9th Petitioner, the 2nd Respondent has offset the entire amount due to the 9th Respondent of Kshs. 3,184,976.38 to cater for the debt owed by Farm Africa Mills Investments Limited. To the contrary, the 9th Petitioner was in arrears of Kshs. 2,885,348.67 with respect to a specific facility advanced to it. The 9th Respondent has defaulted in making repayments towards the settling of the facility until the same was off set in February 2017. It is therefore only the balance of Kshs. 299,628.38 that was applied to offset the amount owed by Farm Mills Investments Limited.

20. The 2nd Respondent further aver that the fact that the 2nd Respondent had made an earlier payment to some of the Petitioners does not necessarily make his conduct of offsetting subsequently illegal, arbitrary, illogical or discriminatory in any way and the Petitioners are invited to prove to the contrary.

21. The Respondents contend that it is trite law that a party cannot seek to enforce or take refuge in a contract, which it has itself breached. In other words, the Respondents contend that a party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.

22. The Respondents further aver that the 2nd Respondent conducted himself in a lawful manner by lifting the veil of the group of companies on the basis of improper conduct as demonstrated by the companies' blatant refusal to honour the facility agreements entered into between the 1st Respondent and the 9th Petitioner and Farm Africa Mills Investments Limited and therefore avoiding a situation in which one refuses to honour his obligations while at the same time seeks to benefit under the cover of another entity. The Respondents aver that all the Petitioner companies and Farm Africa Mills Investments Limited are controlled and directed by Mohamed Azim Sajjad Rashid and Mohamed Raza Sajjad as the mind of the companies. Further the Respondents contend that the Receiver Manager does not operate under the direction of anyone and therefore, any attempt to direct or influence the decisions of the Receiver Manager would be misguided and an exercise in futility. The Respondent denies that there was any discrimination in the way Petitioners were treated. The Respondents aver that offsets were against all the Petitioners. Further the Respondents aver that this Petition is a waste of this court's time and an abuse of the process by the very fact that whatever alleged grievance that the Petitioners have can be remedied in a civil court. The Respondents aver that the allegations in the Petition do not meet the threshold of a constitutional petition as there is no evidence of fundamental breach of any rights of the petitioners or exercise of power by the Respondents outside their jurisdiction or in any manner *ultra vires*. The Respondents aver that Petitioners have failed to demonstrate the constitutional violations alleged to warrant the orders sought.

Submissions

23. Parties filed submissions which I have carefully considered. The issues I discern for determination are as follows:

(i) Whether the petition raises constitutional issues

(ii) Whether the Respondent can lift a corporate veil

24. The objection by the Respondents is that the remedies sought here can be obtained in a civil court, and so there is no need for this petition. The Petitioners respond firstly, that it is only the High Court that is clothed with jurisdiction to enforce fundamental rights. This much is clear in Article 23 of the Constitution. There is agreement that the money and Motor Vehicle the subject matter of the Petition belong to the Petitioners. The Petitioners contend that the manner in which the Respondents have conducted themselves amounts to a deprivation of that property contrary to Article 40 of the Constitution. Since the existence of the right is not challenged, then the enforcement jurisdiction for that right is with the High Court exercising its constitutional jurisdiction. Second, the petition alleges violation of Article 47 in the manner the Respondents have treated the Petitioners. The Petitioner cited **Lipisha Consortium Limited & another vs. Safaricom Limited [2015] eKLR** where the Court stated:

...the dispute took a constitutional trajectory when there is alleged non-compliance with the right to fair administrative action. That alone would entitle the court to consider and determine the dispute.

25. The Petitioners also alleged violation of Article 40 and 47 of the Constitution. Article 40. Article 40(2) reads;

Parliament shall not enact a law that permits the State or any person—

a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

26. The Petitioners submitted that “*arbitrary*” deprivation of property is unconstitutional. Therefore, any person who attempts to arbitrarily deprive another of his/her/it’s property, would be contravening the constitution in addition to violating that other person’s fundamental rights. To support this position the Petitioners cited **Crywan Enterprises Limited vs. Kenya Revenue Authority [2013] eKLR** where it is said:

Article 40(2) guards against ‘arbitrary’ deprivation of property....According to the Black’s Law Dictionary, 9th edition, at page 119, the term ‘arbitrary’ is described as “1. Depending on individual discretion; determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact.

27. In my view, there is no issue with the claim that the petition raises constitutional issue. Money is property, and under Article 40 of the constitution must be protected from arbitrary deprivation. So this court has no problem with that. What should concern this Court is whether or not indeed the Petitioners have been deprived of their property arbitrarily.

28. There is also no dispute that the Petitioners are a group of companies with common directorship. They have different accounts with the 1st Respondent bank. On April, 14, 2014, Farm Africa Mills Investments Limited accepted a loan facility from the 1st Respondent amounting to USD 1,797,174 in the terms set out therein. Among the terms and conditions were:

- Submission of personal guarantee of Mr. Mohamed Azeem Sajjad Rashid
- Right of set-off, forms signed by all directors
- Any other security that the bank may determine from time to time

29. A right of set off form was signed and *inter-a-lia* included the following terms:

“It is further understood and agreed that the company may in its own discretion do any or both of the following:

- Realize the securities and apply the proceeds to set off or transfer any sums thereof to any one or more such accounts in or towards satisfaction of the borrower’s liabilities to the company....”
- Apply payments received in respect of any designated accounts to any other accounts within each of the companies and/or between other **group of companies.**
- Combine or consolidate all or any of the borrowers account ... and liabilities to the bank.

30. From the above it emerges that the borrowing had in mind the nature of group of companies. The group of companies is expressly acknowledged in the terms and conditions of set off. Further, at all times there were only two main directors/shareholders and signatories to the Petitioners. It is easy to infer that there was no issue of lifting the corporate veil. It appears to me that the parties at the time of taking the loan had themselves lifted the corporate veil and decided that in the group of companies, accounts or liabilities can be settled through set-off.

31. It is now trite law that parties are bound by the terms of their agreement and the courts should not interfere with the same. This was the case in **National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Limited & Another Civil Appeal No. 95 of 1999** and **John Njoroge Michuki vs. Shell Limited Civil Appeal No. 227 of 1999.**

32. In this present case, according to the facility documents, it was clear that the bank had reserved the right of lien as per clause 19, of the General Terms and conditions set out the Account Opening form. Moreover, the bank further had stated that it reserves the right of set off over any property as per paragraph 20 of the aforementioned General Terms and Conditions set out in the Account Opening Forms. This is in addition to the right of consolidation of accounts as set out in the above named documents.

33. From the foregoing it is evident that the Petitioners entered into the contract in which the assets of the group of companies became additional security to the loan. It is therefore improper for the Petitioners to turn against the very contract they entered into free of undue influence, fraud or coercion and under the cover of a constitutional petition seek to run away from their lawful obligations.

34. This being the case it is the finding of this Court that Article 47 of the constitution would not apply. That Article demands that before a decision which has the capacity to adversely affect fundamental right of petitioner is taken written notice should be given. In the matter before the Court parties had themselves provided how to proceed in the event of default. It was therefore not necessary for the 1st Respondent to give written reasons, or even notice, of what they intended to do, although in this matter notice is alleged to have been given.

The Petitioners are deemed to have always been aware, through the common directorship or shareholding, that Farm Africa Mills Investment Limited was not repaying the loan. They cannot purport now to demand reasons under Article 47 of the constitution. It is the finding hereof that the matter before the Court, while couched in constitutional terms, is basically a civil suit, but which still must be dismissed for lack of merit.

35. For the foregoing reasons, the petition is not proved as required by law. The same is dismissed with costs to the 2nd Respondent.

Dated, Signed and Delivered in Mombasa this 19th day of June, 2019.

E. K. OGOLA

JUDGE

In the presence of:

M/s Mburu holding Kongere for Petitioners

No Appearance for Respondents

Mr. Kaunda Court Assistant