



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**ORIGINATING SUMMONS NO. 342 OF 2014 (O.S)**

**IN THE MATTER OF PAN AFRICAN BANK LIMITED (IN LIQUIDATION)**

**AND**

**IN THE MATTER OF SECTION 13(2), 55(2) AND 76(7) OF**

**THE KENYA DEPOSIT INSURANCE CORPORATION ACT 2012**

**BETWEEN**

**UHURU HIGHWAY DEVELOPMENT LIMITED.....APPLICANT**

**VERSUS**

**KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT**

**AND**

**ETHICS & ANTICORRUPTION COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**CENTRAL BANK OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. This Court has been moved by way of Originating Summons for the following orders:

1. *THAT this Originating Summons be certified as urgent and be heard inter partes on a priority basis.*

2. *THAT a declaration do issue Under Section 55 (2) of the Kenya Deposit Insurance Corporation Act 2012 that:-*

2.1 *There has been inordinate, egregious and/or unjustifiable delay and breach of trust and statutory duty by the Respondent liquidator in settling the residue of the claim by UHURU HIGHWAY DEVELOPMENT LIMITED under the claims procedure in respect of Pan African Bank Limited (in Liquidation), which is being supervised by the Respondent, whether acting solely or in concert with the Interested Parties; and*

2.2 *UHURU HIGHWAY DEVELOPMENT LIMITED is entitled to the immediate settlement by the Defendant liquidator of its remaining claim in the sum of Kshs.55,585,978 together with interest thereon to reflect the time value of this money, which is being unjustifiably and improperly withheld and not timely paid, by the liquidator.*

3. *THAT consequential to (2) above:-*

3.1 *An order do issue under Section 55(2) of the Kenya Deposit Insurance Corporation Act 2012, and under the penalty of contempt, compelling and directing the Kenya Deposit Insurance Corporation, as liquidator, to immediately settle the Applicant's remaining claim in the sum of Kshs.55,585,978, within 30 days of the Court's order or within such other times as the Court may deem reasonable in the circumstances;*

3.2 For sufficient cause demonstrated by the Applicant, an order do issue under Sections 13 (2) and 55 (2) of the Kenya Deposit Insurance Corporation Act 2012, that the sum in (3.1) above be paid together with interest thereon at court rates (12% p.a) from 1<sup>st</sup> April 2012 when the last dividend was declared and paid, until payment in full; and

3.3 Without prejudice to any other alternatives the Plaintiff may have, in the event of default of payment by the Respondent as above and within the court directed timelines:-

3.3.1 The Applicant shall be entitled to an additional default interest on the principal sum, which default interest shall be computed at 12% p.a on the principal sum, compounded annually, from 1<sup>st</sup> April, 2012 until payment in full (on a reducing balance basis); and

3.3.2 The additional default interest on the principal sum shall be paid out of assets of the company in liquidation but the Respondent liquidator shall, under Sections 13 (2) of the Kenya Deposit Insurance Corporation Act 2012, be liable to repay the same to the company in liquidation by way of compensation for its misfeasance in settling the Applicant's claim; and

3.3.3 The Applicant shall be at liberty to commence contempt proceedings against the relevant officers of the Kenya Deposit Insurance Corporation.

3.4 The costs, charges and expenses of and incidental to these proceedings be awarded to the Applicant on an Advocate/client basis, and:-

3.4.1 The said Costs, charges and/or expenses of and incidental to these proceedings be paid to the Applicant out of the residue assets of the company available for payment of creditors; and

3.4.2 If the said Costs, charges and/or expenses of and incidental to these proceedings shall not be agreed upon and paid within 30 days after the entry of the order on costs (grace period), the same shall accrue interest, at court rates, from the 31<sup>st</sup> day after the entry of the order on costs, until payment in full.

3.5 The Court be at liberty to make such further or alternative orders, and grant such further or alternative relief as this Honourable Court may deem fit in the circumstances.

2. One of the provisions of statute under which the application is pegged is Section 55 of the Kenya Deposit Insurance Corporate Act 2012 which reads:-

55. (1) Notwithstanding the provisions of any other written law, the Corporation shall, where it is appointed a liquidator, have power to-

(a) carry on the business of an institution so far as may be necessary for the beneficial winding up;

(b) appoint professionals to assist it in the performance of its duties;

(c) pay any classes of creditors in full;

(d) make any compromise or arrangement with creditors;

(e) compromise all calls and liabilities to call, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, subsisting between an institution and a contributory or other debtor or person apprehending liability to the institution and all questions in any way relating to the institution, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof;

(f) set off payment made to an insured depositor out of the Fund against any dividend subsequently determined as payable to such depositor;

(g) recover interest payable to the institution on loans, overdrafts and other credit facilities outstanding as at the date of liquidation;

(h) offset deposits and any other liabilities to customers against any loans or debts owed to the institution as at the date of liquidation;

(j) invest surplus funds in the liquidation account which are not immediately required for the purpose of financing day-to-day operations in short-term placements in Government securities or any other securities as may from time to time be prescribed in the Gazette by the Minister;

(k) sell or otherwise dispose of assets of the member institution;

(l) hold, manage and dispose of all the assets of an institution remaining unsold at the time of winding up;

(m) assign the assets or liabilities of an institution or of its debtors to third parties for the benefit of the creditors and depositors of

the institution;

(n) appoint any person to execute or authenticate by a seal on behalf of any institution under liquidation, any documents on behalf of the institution; and

(o) sue in the name of an institution in liquidation, without sanction of the Court or a committee of inspection.

(2) Any party aggrieved by the exercise of any of the powers specified herein may apply to the High Court for orders as appropriate.

(3) The Corporation shall upon appointment as liquidator open accounts in the Central Bank for the purposes of transacting the business of the institutions.

3. Whilst I have no reason to doubt that an application under the provisions of Section 55(2) can be mounted by way of Originating Summons, I entertain some doubt as to the efficacy of the procedure in respect to the matter at hand. That hesitation is informed by the well accepted proposition that the summary procedure of Originating Summons is unsuitable for resolving matters involving complex questions of law and highly contested facts.

4. The Court takes a view that unlike what counsel for the Plaintiff submits, the core facts of the case are disputed and the thesis of its case highly contested.

5. Uhuru Highway Development Limited (UHDL), the Plaintiff herein, had accounts in Pan African Bank Limited (now on liquidation). UHDL avers that at the time it was placed under receivership, it had the following deposits in the Bank:-

i. Fixed Deposit in an Account No. 2400143 Kshs.15,378,423.00

ii. Balance in various Accounts Kshs.55,85,978.00

6. UHDL lodged claims for the said sum with Deposit Protection Fund Board (DPFB) which is the forerunner to Kenya Deposit Insurance Corporation ((KDIC) or the Defendant). DPFB, however, paid Kshs.15,378,473 to the receiver manager of Grand Regency Hotel on behalf of UHDL. UHDL says that this payment was not on its authority but does not pursue it here. As to the residue, being Kshs.55,585,978, which is the subject of these proceedings, it is the case of UHDL that DPFB confirmed that it would keep payment of the same in abeyance and hold it in trust pending resolution of a separate dispute between UHDL and related parties, on the one hand, and Ethics & Anticorruption Commission (the 1<sup>st</sup> interested party) suing for the benefit of Central Bank of Kenya (the 2<sup>nd</sup> interested party), on the other hand, touching on a charge registered in favour of CBK over the land comprising the Grand Regency.

7. UHDL contends that the protracted dispute was finally settled in full in 2008 through a negotiated settlement with the interested party and a settlement registered and adopted in HCCC NO. 1111 OF 2003 KACC –VS- UHDL & 16 Others.(HCCC 1111 of 2003) The settlement reads:-

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1111 OF 2003**

**IN THE MATTER OF THE KENYA ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003**

**KENYA ANTI-CORRUPTION COMMISSION .....PLAINTIFF**

**VERSUS**

**KEMLESH M. D PATNI & 16 OTHERS..... DEFENDANTS**

**REGISTRATION OF SETTLEMENT**

*(Under Section 56B (2) & (4) of the Anti-Corruption and*

*Economic Crimes Act and Section 3A of the Civil Procedure Act)*

*Whereas a settlement for the discontinuation and termination of this suit has been reached between the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 12<sup>th</sup> Defendants in terms of the provisions of Section 56B (2) and (4) of the Kenya Anti-Corruption and Economic Crimes Act and the said parties wish to and hereby register the said settlement in Court.*

*And whereas the Plaintiff and the 1st, 2nd, 3rd, 4th and 12th Defendants have agreed to settle this suit under Section 56B (2) & (4) of the Anti-Corruption and Economic Crimes Act;*

IT IS HEREBY AGREED BY CONSENT THAT:-

1. The 1<sup>st</sup> Defendant Kamlesh Pattni and the 2<sup>nd</sup> Defendant Uhuru Highway Development Limited do hereby agreed to:-

i. Relinquish, assign, reconvey or otherwise transfer ownership and all their rights and interests in the property know as Land Reference Number 209/9514 together with all the improvements thereon including the Grand Regency Hotel, the fixtures thereto, moveable and immoveable assets (hereinafter referred to as “the Assets” to the Central Bank of Kenya.

ii. To execute any and all necessary instruments of transfer to give effect to (i) above and in default thereof the Deputy Registrar of the High Court to execute such instrument(s).

2. The joint Receiver Managers appointed pursuant to a Consent Order dated 31<sup>st</sup> May, 2004 are hereby discharged forthwith and the ownership and management of the Assets be and is hereby transferred to the Central Bank of Kenya.

3. All bank accounts held by any bank in the name of the joint Receivers/Receivers together with all funds held therein be and are hereby transferred to the Central Bank of Kenya.

4. The Plaintiff hereby discontinues the entire Civil Suit No. 1111 of 2003 and al pending applications therein.

5. The Central Bank of Kenya hereby abandons all its other claims against the defendants.

6. This consent constitutes the due registration of the Settlement Agreement between the Plaintiff and the 1st, 2nd, 3rd, 4th and 12th Defendants in terms of the provisions of Section 56B (4) of the Kenya Anti-Corruption and Economic Crimes Act.

7. That upon the filling of this settlement in court the same be and is hereby marked as duly registered under the provisions of Section 56B (4).

Dated at Nairobi this 9<sup>th</sup> day of April, 2008

Fatuma sichale (Mrs)

Advocate for the Plaintiff

Wetang'ula, Adan, Makokha & Co. Advocates for the 1st, 2nd, 3rd, 4th and 12th Defendants.

8. It is the case of UHDL that in the settlement, CBK abandoned all its claims against UHDL and its related parties in consideration of, *inter alia*, UHDL and related parties relinquishing and assigning to CBK all their rights and proprietary interests in Grand Regency Hotel standing on LR No. 209/9514. That CBK and UHDL has implemented the settlement and it was the expectation of UHDL that KDIC would immediately release the aforesaid deposit but this is yet to happen.

9. In their responses, KDIC, EACC and CBK contest the accuracy of the factual standpoint made by UHDL. EACC, for example, denies that the cash deposit which forms the subject matter of this suit was part of the subject matter of Civil Suit No. 1111 of 2003 and further that the settlement reached in any way relates to the said sum of Kshs.55,585,978. It asserts that reference to “**all its other claims against the Defendants**” in paragraph 5 of the settlement was not intended to include the moneys claimed herein.

10. KDIC on the other hand contends that it took over the assets and liabilities of DPFB which was at all times a department of CBK. Its position is that it was a term of the settlement recorded in 1111 of 2003 that all bank accounts held by any bank in the name of the joint receivers together with all funds held therein be transferred to CBK. Further, that upon the sale of Grand Regency Hotel, UHDL still owes CBK Kshs.1.5 billion which, nevertheless, had been written off. It states that it is unconscionable to pay any amount to UHDL and that this sum should be written back into the books of account of CBK.

11. It is on account of these competing assertions that the Court takes the view that the issues of fact and law involved in this matter are not straightforward. They could in fact be intricate. There are certain questions that affidavit evidence may not be able to answer. These include:-

a) What is the real scope of the consent entered in Civil Suit No. 1111 of 2003 given that one of the allegations in that suit is that the Defendants therein who include UHDL were holding assets or estates bought with public money paid to Kamlesh M.D. Pattni through Goldenberg International Limited and Exchange Bank Limited. For example, does that consent extend to the deposit which is the subject matter herein?

b) In respect to paragraph 3 of the settlement registered and adopted in Civil Suit No. 1111 of 2003 which reads:-

“All bank accounts held by any bank in the name of the joint receivers/receiver together with all funds held therein be and are hereby transferred to the Central Bank of Kenya”, was the bank account in the name of UHDL and which is the subject of these proceedings under the control of the receiver/s in terms of paragraph 2 of the said settlement?

12. This Court has to agree with counsel Philip Murgor for CBK that the Court is entitled to a more fully fledged inquiry before making any

final orders. A substantive suit gives opportunity for a more insightful interrogation.

13. Given the stance of the Court, I direct that these proceedings be continued as if the cause had been begun by way of plaint. The Court has power to make this order under **Order 37 Rule 19 of the Civil Procedure Rules** which reads:-

*Powers of court upon hearing of summons.*

*19. (1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.*

*(2) Where the court makes an order under subrule (1), Order 11 shall apply.*

*(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.*

*(4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).*

14. So as to progress the matter, the Court shall, on a date to be appointed shortly, give directions in respect to pleadings and other pre-trial matters.

**Dated, Signed and Delivered in Court at Nairobi this 23<sup>rd</sup> Day of September 2019**

**F. TUIYOTT**

**JUDGE**

**Present:**