



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 523 OF 2015**

**IMPERIAL BANK KENYA LIMITED**

**(UNDER RECEIVERSHIP).....PLAINTIFF**

**-VERSUS-**

**JANCO INVESTMENTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**GULSHAN JANMOHAMED** (*sued as a beneficiary and as a Legal*

*Representative of the Estate of Abdulmalek Janmohamed*).....2<sup>ND</sup> DEFENDANT

**MEHDI JANMOHAMED JANMOHAMED** (*sued as a beneficiary and as a*

*Legal Representative of the Estate of Abdulmalek Janmohamed*).....3<sup>RD</sup> DEFENDANT

**SALIM JANMOHAMED** (*sued as a beneficiary and as a Legal*

*Representative of the Estate of Abdulmalek Janmohamed*).....4<sup>TH</sup> DEFENDANT

**NAEEM SHAH**.....5<sup>TH</sup> DEFENDANT

**JAMES KABURU**.....6<sup>TH</sup> DEFENDANT

**ALIYA JAHAN ARA JANMOHAMED** (*sued as a beneficiary and as a*

*Legal Representative of the Estate of Abdulmalek Janmohamed*).....7<sup>TH</sup> DEFENDANT

**AMYNMOHAMED JANMOHAMED** (*sued as a beneficiary and as a*

*Legal Representative of the Estate of Abdulmalek Janmohamed*).....8<sup>TH</sup> DEFENDANT

**TASNEEM ABIDA JANMOHAMED** (*sued as a beneficiary and as a*

*Legal Representative of the Estate of Abdulmalek Janmohamed*).....9<sup>TH</sup> DEFENDANT

**REHANA AFSHIN JANMOHAMED** (*sued as a beneficiary and as a*

*Legal Representative of the Estate of Abdulmalek Janmohamed*).....10<sup>TH</sup> DEFENDANT

**SHAISTA AMAL JANMOHAMED** (*sued as a beneficiary and as a*

**RULING**

[1] Before the Court for determination is the Notice of Motion dated **26 October 2015**. The Motion was filed by the Plaintiff, **Imperial Bank Kenya Limited (Under Receivership)** pursuant to **Sections 1A, 1B, 3, 3A and 63** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 40 Rules 1, 2 and 4** of the **Civil Procedure Rules, 2010**, and all other enabling provisions of the Law, for Orders that:

[a] The application be certified urgent and be heard ex parte on a priority basis in the first instance; (Spent)

[b] Pending service and the hearing *inter partes* of the application, a freezing injunction be issued to restrain the Defendants whether by themselves, their servants, and/or employees from removing from this jurisdiction, disposing of, mortgaging (and/or further mortgaging), charging (and/or further charging), assigning, diminishing, transferring, disposing, alienating, operating, pledging and/or otherwise interfering, intermeddling and/or dealing in any manner howsoever with their assets, investments and businesses including but not limited to the following known assets of the 1<sup>st</sup> Defendant, namely properties shares and interests in:

[i] Imperial Capital

[ii] Imperial Bank Kenya Limited

[iii] Nature Stone Quarries Limited (9.5% shareholding owned by the 1<sup>st</sup> Defendant)

[iv] Downtown Holdings Limited

[v] Downtown Investments Limited

[vi] Upperview Properties Limited (14.2% shareholding owned by the 1<sup>st</sup> Defendant)

[vii] City Park properties Limited (30% shareholding owned by the 1<sup>st</sup> Defendant)

[viii] Sandview Properties Limited (14.28% shareholding owned by the 1<sup>st</sup> Defendant)

[ix] Butali Sugar Mills Limited (5% owned by the 1<sup>st</sup> Defendant)

[x] Allgate Limited (12.5% owned by the 1<sup>st</sup> Defendant)

[xi] Serenity Limited

[xii] Plymouth Holdings Limited. (spent)

[c] Pending service and the hearing *inter partes* of the application, an injunction be issued restraining the Defendants whether by themselves, their servants, and/or employees from removing from this jurisdiction, disposing of, mortgaging (and/or further mortgaging), charging (and/or further charging), assigning, diminishing, transferring, disposing, alienating, operating, pledging and/or otherwise interfering, intermeddling and/or dealing in any manner howsoever with any of the assets and businesses comprising the Estate of the late **Mr. Abdul Janmohamed ("the Deceased")** and/or the **Abdulsultan Rehemtulla Janmohamed Trust (the Deceased's Trust)** including but not limited to:

[i] Share Portfolio at Apex Securities in the name of the Deceased;

[ii] Share Portfolio at Old Mutual in the name of the Deceased;

[iii] Shares in Goodwill Nairobi Limited;

[iv] Apartment Unit 2B, Aleena Apartments, The Riverside, (L.R. No. 42715);

[v] Fixed Deposit Receipts at the Bank in the name of the Deceased;

[vi] Fixed Deposit Receipts at I & M Bank in the name of the Deceased;

[vii] Apartment 1D, The Riverside, (L.R. No. 4275/120 Nairobi);

[viii] Apartment B6, Golden Jubilee, (L.R. 206/19102);

[ix] A plot on Links Road in Mombasa;

- [x] Apartment No. 60, Trident Grant, Plot No. 4580/14 & 4580/24;
- [xi] Apartment on 6th Parklands Avenue (being developed);
- [xii] Shares in Downtown Investments Limited;
- [xiii] Shares in Downtown Holdings Limited;
- [xiv] Shares in Imperial Capital;
- [xv] Shares in Imperial Bank Kenya Limited;
- [xvi] Standard Chartered Bank (Sterling Currency) Account Number 2802018381000;
- [xvii] Standard Chartered Bank (Euro Currency) Account Number 2802016885000;
- [xviii] National Bank of Kenya (Kenya Shillings) Account Number 0100365102900;

[d] Pending the hearing *inter partes* of the application, the Defendants be compelled to furnish the Plaintiff's Advocates within 5 days, a complete set and/or list of

- [i] all their Bank Account Statements for the period 2002 to 2015;
- [ii] all their assets and businesses both within and outside the country;
- [iii] all the assets and properties that they have obtained from the Deceased and/or the Bank;
- [iv] all the assets and businesses comprising the Deceased's Estate; and
- [v] all the assets and properties comprising of the Deceased's Trust;

which information should include the value and location of such assets and business whether or not such assets and/or businesses are in their own names or are solely or jointly owned; (spent)

[e] Due the urgency of the matter, the Applicant be permitted at the first instance to serve the *ex parte* order issued by the Court on the Defendant by way of an advertisement in one of the local daily newspapers; (Spent)

[f] The Orders of injunction sought in Prayer 2 and 3 be granted pending the hearing and determination of the suit herein;

[g] Such other, further, incidental and/or alternative orders as the Court may deem just and expedient;

[h] The costs of the application be provided for.

[2] The application, which was filed through the law firm of **M/s Oraro and Company Advocates**, was predicated on the grounds that the Plaintiff, **Imperial Bank Kenya Limited ("the Bank")**, is a duly licensed bank, and that it obtains deposits from customers in whose names accounts are opened and operated; and that from the formation of the Bank in **1992**, **Mr. Abulmalek Jannohamed**, the Deceased, was the Bank's Group Managing Director, until **15 September 2015** when he passed away after suffering sudden cardiac arrest. It was averred that shortly after the passing away of the Deceased, the Bank discovered that he, together with other senior officials of the Bank and their associates, were responsible for certain illegal and fraudulent activities that resulted in the loss of an amount in excess of **Kshs. 35 Billion**. The revelation prompted the **Central Bank of Kenya (CBK)** to place the Bank under receivership and appoint the Kenya Deposit Insurance Corporation (KDIC) as the Bank's Receiver, with a view of managing, controlling and conducting the affairs of the Bank, to safeguard, not only the interests of its depositors and creditors, but also the wider Kenyan public, including the banking industry and the economy in general.

[3] It was further the contention of the Plaintiff that it had reasons to believe that the Deceased's Estate, the Deceased's Trust and the 1<sup>st</sup> Defendant Company were wholly and/or partially comprised of assets that were acquired using funds that were fraudulently and/or unlawfully obtained from the Bank by the Deceased, the 5<sup>th</sup> Defendant and other senior officials of the Bank and their associates. That the beneficiaries of the Deceased's Estate and the Deceased's Trust, being the 2<sup>nd</sup> to 4<sup>th</sup> Defendants, and the 6<sup>th</sup> to 10<sup>th</sup> Defendants, had therefore been unjustly enriched thereby, and that it would be unconscionable for them to retain the same. Thus, it was posited that the Bank is entitled to trace the said assets and liquidate the same with a view of recovering the amounts misappropriated from it.

[4] In support of the application, the Plaintiff averred that it had recently received information indicating that the Defendants had already begun to transfer, dispose of and/or alienate their assets as well as the assets comprising the Deceased's Estate and the Deceased's Trust. The Bank further contended that it had also noted that some of the fictitious, false, illegal and fraudulent accounts that were used by the Deceased and the senior officials of the Bank and their associates to defraud the Bank were still active and that vast sums of money were being withdrawn or transferred from those accounts; the latest being an entry made on **7 October 2015**. The Plaintiff was of the conviction that the transactions were being made with a view of defeating the enforcement of any judgment that may be entered against the Defendants in these

or in related proceedings.

[5] On account of the foregoing, it was the contention of the Plaintiff that it would be in the interest of justice that the Defendants be restrained as a matter of urgency from removing from this jurisdiction, disposing, mortgaging (and/or further mortgaging), charging (and/or further charging), assigning, diminishing, transferring, disposing, alienating, operating pledging and/or otherwise interfering and/or dealing in any manner howsoever with the said assets pending the hearing and determination of the application and the suit, to avoid the dissipation of the assets. The Plaintiff added that the aforesaid illegal and fraudulent actions of the Deceased, the 5<sup>th</sup> Defendant and other officials of the Bank and their associates, had caused and continued to cause substantial loss and damage to the Bank, its depositors, creditors, bond-holders and the public in general, who were unable to access their funds. For this reason, the Plaintiff posited, it was crucial that the prayers for, inter alia, discovery, disclosure and freezing injunctions be granted as a matter of urgency so as to enable the Bank to crystallize the total amount of funds that were unlawfully and fraudulently obtained from it, in order for a decision to be made as to whether to reopen the Bank or liquidate it.

[6] The application was supported by the affidavit of **Peter K. Gatere**, the Bank's Receiver/Manager, appointed by the **KDIC** on **13 October 2015**. He averred that the Bank was established in **1992**, and that it had grown steadily and profitably over the years, such that by **2014**, it recorded a **Kshs. 2.4 Billion** pre-tax profit; and had accumulated assets worth about **Kshs. 11.2 Billion** as of **30 September 2015**. **Mr. Gatere** further deposed that the Bank had a history of unqualified and clean audit reports and inspections; and that it had floated a bond on or about **12 August 2015** for the sum of **Kshs. 2 Billion**, which was fully subscribed and was poised for enlistment at the Nairobi Securities Exchange from **13 October 2015**.

[7] It was further averred by **Mr. Gatere** that, at all material times, **Mr. Abulmalek Janmohamed**, the Deceased, was the Bank's Group Managing Director until his demise on **15 September 2015**; and that soon thereafter, the **CBK** appointed the **KDIC** as the Receivers for the Bank following the discovery of what appeared to have been a long-running systematic fraud, perpetrated by the Deceased, the 5<sup>th</sup> and 6<sup>th</sup> Defendants and other senior officials of the Bank in conjunction with their associates. Up to that point in time, an amount in the region of **Kshs. 34,969,881,891.60** had been ascertained to have been misappropriated. Thus, **Mr. Gatere** added, he was instructed by **KDIC** to assume control of the assets, liabilities and business affairs of the Bank pursuant to **Section 44(2)(b) of the Kenya Deposit Insurance Act, No. 10 of 2012, (KDIA)** with a view of safeguarding the interests of the Bank's depositors, customers, bond-holders and the public in general.

[8] **Mr. Gatere** further averred that upon reviewing the Bank's books of account, he noted several anomalies whereby several fictitious accounts had been opened and funds moved from account to account on the instructions of the Deceased and with the collusion of the 5<sup>th</sup> and 6<sup>th</sup> Defendants and other senior officials of the Bank. The specific details thereof are set out in Paragraph 12 [a]-[o] of **Mr. Gatere's** Supporting Affidavit. He added that, as at the time of filing this suit, an independent forensic audit exercise had established that sums in excess of **Kshs. 34,969,881,891.60** had been misappropriated. It was therefore the averment of **Mr. Gatere** that the 5<sup>th</sup> and 6<sup>th</sup> Defendants were direct beneficiaries and/or knowing recipients of the monies that were falsely, fraudulently and unlawfully obtained from the Bank and its depositors by the Deceased; and that they knew or ought to have known of the fraudulent scheme by the Deceased, and therefore knowingly retained monies from the Bank which they knew they were not entitled to. They were additionally faulted for having concealed the fact and the whereabouts of the proceeds of their own fraud from the Bank. Thus, it was averred by **Mr. Gatere** that the 5<sup>th</sup> and 6<sup>th</sup> Defendants, being the Bank's constructive trustees, are liable to it for the loss amounting to **Kshs. 34,969,881,891.60** and should therefore be required to account for the aforesaid sum.

[9] It was also the averment of **Mr. Gatere** that, given that the Deceased's Estate owns substantial real estate holdings in Kenya and internationally, as well as significant investments in various companies in Kenya and in the Kenya stock market, there is sufficient cause to believe that all or most of the assets and funds comprising the Deceased's Estate were wholly or partially acquired using funds that the Deceased misappropriated from the Bank; hence the joinder of the Deceased's beneficiaries to this suit. A list of the known assets and businesses of the Deceased were listed at Paragraph 22 of **Mr. Gatere's** affidavit, one of them being **Janco Investments Limited** (the 1<sup>st</sup> Defendant herein); while at Paragraph 27, the Plaintiff listed the known assets and businesses owned by the 1<sup>st</sup> Defendant.

[10] **Mr. Gatere** also made averments in connection with the Deceased's Trust, known as **Abdulsultan Rehemtulla Janmohamed Trust ("the Deceased's Trust")** contending that he believed that the assets of the Trust were wholly or partially acquired from funds that were unlawfully or fraudulently misappropriated from the Bank; and that the 7<sup>th</sup> to 11<sup>th</sup> Defendants, who are the Deceased's nieces and nephews, and who have been named as beneficiaries of the Deceased's Trust, are beneficiaries or recipients of monies that the Deceased unlawfully and/or fraudulently obtained from the Bank. On this account he posited that the 7<sup>th</sup> to 11<sup>th</sup> Defendants have acquired an unjust enrichment which they should not be allowed to retain; and that they should be required to account for the same.

[11] At paragraph 30 of the Supporting Affidavit, **Mr. Gatere** averred that an anonymous note received by the Bank after the demise of the Deceased disclosed that on the day the Deceased died, a company incorporated and registered in the **United Kingdom** known as **Janco UK Limited** (Company Number 09050489), in which the Deceased held a 33% shareholding, had been dissolved. The note further disclosed that the funds held in the Deceased's personal banking facilities held at the Bank were transferred soon after the Deceased's death and the Deceased's Trust had been taken over by the Deceased's brother, namely the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The note was exhibited at Pages 3511-3512 of the Bundle of Documents annexed to **Mr. Gatere's** Supporting Affidavit (**Exhibit PG 1**).

[12] Thus, it was the contention of the Plaintiff that unless the Defendants are restrained as a matter of urgency, they would transfer the subject assets held in their names, and/or comprising Deceased's Estate and/or the Deceased's Trust, from the jurisdiction of the Court with a view of defeating any judgment or order that may be ultimately made against them in these and/or in other related proceedings. The Plaintiff further contended that the decision to re-open the Bank or to liquidate it will have a direct impact on the banking industry in Kenya and the economy in general; and therefore, that it would be in the interest of justice that the Court intervenes to exercise its jurisdiction to recover the sums that have been fraudulently taken from the Bank. The Supporting Affidavit has annexed to it several Bundles of Documents in support of **Mr. Gatere's** averments and which have been appropriately cross-referenced in the Supporting Affidavit.

[13] The application was opposed by the Defendants. The 1<sup>st</sup> to 5<sup>th</sup>, Defendants as well as the 7<sup>th</sup> to 11<sup>th</sup> Defendants were represented by the law firm of **M/s Ahmednasir, Abdikadir and Company Advocates**, while the 6<sup>th</sup> Defendant was represented by the firm of **M/s Kithi and Company Advocates**. They filed Grounds of Opposition and/or Replying Affidavits in response to the Plaintiff's application. In its Grounds of Opposition dated **10 November 2015**, the 1<sup>st</sup> Defendant asserted that the Plaintiff has no cause of action against it herein known to law or in equity; and that the entire suit is premised on conjecture and speculation, and therefore a classic case of abuse of the court process. It was further contended that the Plaintiff had neither satisfied the threshold for the grant of freezing injunctive orders, nor established that it had a **prima facie** case with any probability of success as established in **Giella vs. Cassman Brown [1973] EA 358**. Lastly, it was the contention of the 1<sup>st</sup> Defendant that it is not a necessary party to this suit as no cause of action had been pleaded no cause of action against it.

[14] On behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, Grounds of Opposition dated **7 December 2015** were filed herein on **8 December 2015**, by which they contended that they have been wrongly sued as Defendants for they are neither the legal beneficiaries nor the legal representatives of the Estate of the Deceased; and that the absence of any Grant of Probate renders them non-suited as Defendants. It was further their contention that the entire suit as filed and pleaded by the Plaintiff is based on false averments, rumours, conjecture, speculation and wishful thinking on the part of the Plaintiff. According to them, the Plaintiff pleads no law and fails to lay or build a legal claim against them, for it is premised on a false reading of the law that they are liable simply because they are related to the Deceased, which, they posit, is fallacious. They also took issue with the manner in which the suit was presented, contending that it is an unacceptable mixture of tortious claims against a deceased person and against them; yet they are separate distinct legal personalities.

[15] It was further the assertion of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants that, in the light of the pleadings and the affidavits filed by the Plaintiff in **Nairobi High Court Civil Case No. 522 of 2015: Imperial Bank Limited (Under Statutory Receivership) vs. W.E. Tilley (Muthaiga Limited and 19 Others)**, the suit herein is incurably defective and untenable in law, and is clearly a case where the Plaintiff has sued different parties for the same cause of action; is an abuse of the process of the court and inexcusable fraud on the Court, and is therefore a clear contravention of the express provisions of the law. It was similarly the contention of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants that the Plaintiff had failed to bring its case within the test established in the case of **Giella vs. Cassman Brown (supra)**, and therefore has no right to any equitable remedy as against them.

[16] Lastly, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants relied on the contention that, since the Plaintiff was run and managed upon directions, guidance and authority of the Board of Directors who authorized all that was done by the Deceased, if any persons are guilty of defrauding the Bank, they are the directors of the Plaintiff. It was thus their contention that, instead of suing the correct parties, the Plaintiff is engaging in scapegoating with a view to shielding members of its Board of Directors from the consequences of their actions and omissions. The Grounds of Opposition were augmented by the Replying Affidavit sworn by the 4<sup>th</sup> Defendant, **Salim Janmohamed**, on behalf of himself, as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That affidavit was filed herein on **22 December 2015**.

[17] The Grounds of Opposition filed on behalf of the 5<sup>th</sup> Defendant on **11 December 2015**, are, in the main, similar to the Grounds filed on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, save to stress that the relationship between the Plaintiff and the 5<sup>th</sup> Defendant was that of employer/employee. In addition to the Grounds of Opposition, the 5<sup>th</sup> Defendant filed a detailed Replying Affidavit, sworn on **17 December 2015** in response to the specific averments made in the Supporting Affidavit of **Mr. Gatere**.

[18] The 6<sup>th</sup> Defendant, **James Kaburu**, similarly opposed the application. His Replying Affidavit, sworn on **30 November 2015**, was filed herein on **1 December 2015**. He averred that his substantive position was that of Chief Finance Officer, and that he served as such until **19 September 2015** when he was appointed Deputy Group managing Director, after the demise of the Group Managing Director, **Abdulmalek Janmohamed**. He further averred that after his appointment as the Deputy Group Managing Director, he came across certain information which, although he had been suspicious about for some time, he had been unable to access. He confirmed that certain transactions had been approved by the Deceased in contravention of the Bank's established procedures. He singled out the Tilley Accounts, the Zulfikar and Barkhat Accounts and the Hanscombe Accounts as some of the Accounts that were created and operated unprocedurally.

[19] The 6<sup>th</sup> Defendant however denied that he played a part in the mismanagement of the said accounts, contending that he conducted his work with diligence and due care; and relied on the information he received from the various departments of the Bank in preparing the Bank's Financial Statements. He added that when he came across the evidence of the anomalies, he promptly informed the acting Group Managing Director, **Mr. Naem Shah**, the 5<sup>th</sup> Defendant herein, as well as the Chairman of the Board of Directors, **Mr. Alnashir Popat**. He also pointed out that his mandate did not include opening or supervision of opening of customer accounts, or review of the same; nor was he involved in loan approval or analysis of loan applications. Accordingly, the 5<sup>th</sup> Defendant denied that he unjustly enriched himself through illegal arrangements, connivance or collusion with the other Defendants or at all.

[20] On behalf of the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants, an affidavit in response to the application was sworn by **Amynmohamed Janmohamed** (the 8<sup>th</sup> Defendant herein) on **17 December 2015**. Their contention was basically that they had nothing to do with the Plaintiff or its employer/employee relationship with the Deceased, who was their uncle. They therefore denied any knowledge, express or implied, or otherwise, of the circumstances pertinent to the alleged fraudulent dealings by the Deceased; or the allegations that they conspired, colluded or participated in the alleged fraudulent activities. In any case, they averred, the Plaintiff had not demonstrated that they took part in any of the alleged acts.

[21] It was further the contention of the 7<sup>th</sup> to 11<sup>th</sup> Defendants that the Deceased had been in the employ of the Plaintiff since its inception; and that with his salary, benefits and performance related bonuses throughout the period of his employment, he was in a position to make the investments he made. They added that the Deceased was a highly skilled entrepreneur, which, combined with dedication to work and sheer determination, enabled him to build up his fortune lawfully. As for the **Abdulsultan Rehemtulla Janmohamed Trust**, it was averred by the 8<sup>th</sup> Defendant that it is comprised wholly of assets that were lawfully acquired by the Deceased through his diverse investment portfolio. Thus, the 7<sup>th</sup> to 11<sup>th</sup> Defendants were also of the contention that the Plaintiff has failed to meet the minimum threshold for the grant of interim injunction as laid down in **Giella vs. Cassman Brown** as no allegation of wrongdoing on their part has been made or proved to warrant the issuance of the orders sought.

[22] The record shows that interim orders were granted on **27 October 2015** with a view of preserving the subject matter of the dispute. The Order of **27 October 2017** included a *Mareva* injunction to restrain the Defendants from removing from this jurisdiction or disposing of in any manner, their assets, investments, businesses, including the specific assets listed in that Order, pending the hearing and determination of the instant application. Similarly a temporary injunction was issued restraining the Defendants from disposing of the assets and businesses comprising the Estate of the Deceased, as listed in the Order, pending the hearing and determination of the instant application. In the interim, several applications were filed herein in respect of which various responses were exchanged. One of them is the application dated **19 November 2015**, which was filed herein, seeking the joinder of 8 additional Plaintiffs. That application was however withdrawn on **25 April 2016**. The Plaintiff also filed an application dated **25 February 2016** for the appointment of a *Guardian ad Litem* for the 7<sup>th</sup> Defendant, who was then a minor. The said application was granted by consent on **22 March 2016**.

[23] The 6<sup>th</sup> Defendant's Notice of Motion dated **30 November 2015** for limited access to his funds was also heard and determined on **7 November 2016**, whereupon Further Affidavits were exchanged in respect of the issues that were still outstanding in respect of the initial application dated **26 October 2017**. Pertinent to the application are the affidavits of **Ann Muoki** sworn on **15 February 2016** and filed on **16 February 2016** in response to the Replying Affidavits sworn by **Salim Janmohamed, Naeem Shah, and Amymohamed Janmohamed**. Additional affidavits were also filed in support of the Plaintiff's Notice of Motion by **Mohamud Ahmed, Aliasger Aesmailjee, Andrew Durant, Samuel Cepher Kiruthu Mwangi, and Robinson Kipkoech Boreh**. The averments in those affidavits elicited further responses from the Defendants by way of Supplementary Affidavits by **Salim Janmohamed and Naeem Shah**.

[24] The application was disposed of by way of written submissions, which were highlighted on 13 and 14 September 2016; 8 and 9 November 2016; 10, 11 and 18 January 2017; 7 and 8 March 2017; 23 May 2017; 6 June 2017; and 24 July 2017. The Plaintiff's written submissions were filed on 19 April 2016 and the same were highlighted by **Mr. Oraro, SC**, with the assistance of **Ms. Lubano**, Advocate. **Mr. Oraro's** submissions were that a trust relationship has been shown to exist between the Plaintiff and the Defendants. His argument was that a "**trust relationship**" exists either when one holds property on behalf of another, which is then appropriated for one's own use in breach of that trust, or when a defendant is implicated in a fraud and although he is a stranger to the trust, he would be liable as a constructive trustee in equity for knowingly receiving or dealing with the trust property or for knowingly assisting in a fraudulent design even without receiving trust property. Counsel relied on the case of **Kuwait Oil Tanker Co. SAK & Another vs. Al Bader & Others [2002] 2 All ER 271** in support of this argument and urged the Court to find that sufficient evidence has been presented herein to demonstrate breach of trust on the part of each of the 11 Defendants. Thus, it was the submission of **Mr. Oraro** that the contention by the Defendants that the suit lacks adequate particulars cannot constitute a ground for discharging the *Mareva* Injunction issued herein. He added that the Plaintiff at this stage can only plead its case in general terms and defer particularization of its case until after discovery. For this proposition, Senior Counsel cited the case of **Arab Monetary Fund vs. Hasham & Others [1990] 1 All ER 673**.

[25] The second plank of **Mr. Oraro's** submissions was in respect of the Plaintiff's contention that the Defendants have unjustly enriched themselves as a result of their dishonest assistance in the fraud committed on the Bank and on account of their dishonest receipt of monies which were fraudulently obtained from the Bank. According to him, the fact that some of the Defendants may not have been directly involved in the fraud committed against the Bank, and the fact that their receipt of the Bank's funds may be innocent, is irrelevant. The authority of **Lipkin Gorman vs. Karpnale Limited [1992] 4 All ER** was relied on to support this argument.

[26] The risk of dissipation of the assets within the Court's jurisdiction was also raised by **Mr. Oraro** in support of the application. He directed the attention of the Court to averments in connection with an anonymous notes which the Bank received, after demise of the Deceased (at **Volume 7, page 3511** of the Gatere Affidavit) to the effect that a company by the name of **Janco Investments UK Limited**, in which the Deceased owned a significant shareholding, was set to be dissolved soon after his death; and that the Deceased family members were in the process of replacing the Deceased's name as the settlor of the Trust with their own names. Thus, coupled with the fact that a substantial amount of the Deceased's assets are held overseas, there was sufficient cause for the Plaintiff's apprehension that the Defendants would attempt to remove their assets or the assets comprising the Deceased's Estate from the jurisdiction or reach of the Court in order to defeat any judgment that may be made against them. Senior Counsel relied on the cases of **Third Chandris Shipping Corporation vs. Unimarine SA [1979] 2 All ER 972** and **Ninemia Maritime Corp vs. TraveShiffanhrstgesellschaft mbH & Another ("the Niederdachsen") [1984] 1 All ER 398**.

[27] In respect of Prayer 4 of the Plaintiff's Notice of Motion, whereby the Plaintiff sought an order for discovery, disclosure and tracing, It was the argument of **Mr. Oraro** that the Court has power to make an order for discovery of documents or for interrogatories in aid of a *Mareva* Injunction, for the proper and effective exercise of the *Mareva* Jurisdiction; and in particular to enable it trace the Bank's assets that have fallen into the hands of the Defendants. The case of **Motorola Credit Corp vs. Uzan & Others [2002] 3 All ER 353** was relied on for the holding that a freezing injunction would not, in normal circumstance, be effective without such an order.

[28] Lastly, it was the submission of **Mr. Oraro** that the ultimate test for the exercise of the jurisdiction to grant a *Mareva* Injunction is whether in all the circumstances, the case is one in which it appears to the Court that it would be just and convenient to grant the injunction. He added that the decision to place the Bank under receivership had caused and continues to cause the Bank as well as its customers, depositors, bond-holders and creditors immense suffering, hardship, loss and damage, as they are unable to access the funds in their accounts; and that the decision as to whether to reopen the Bank or to liquidate it would depend on whether the Court will allow the Receiver Manager to trace and recover the amounts in excess of **Kshs. 34 Billion** that have been fraudulently and unlawfully obtained from the Bank. He therefore urged the Court to allow the Plaintiff's application dated **26 October 2015** and grant the orders sought therein.

[29] In response to the Plaintiff's written submissions, the 1<sup>st</sup> Defendant filed its written submissions herein on **8 June 2016**. Those submissions were highlighted by **Mr. Ahmednasir, SC**, and were hinged on the 1<sup>st</sup> Defendant's Grounds of Opposition dated **10 November 2015**; the Replying Affidavit sworn by **Salim Janmohamed** on behalf of the 1<sup>st</sup> Defendant and filed on **19 January 2016**; the 1<sup>st</sup> Defendant's Supplementary Affidavit also sworn by **Mr. Salim Janmohamed** and filed herein on **6 June 2016** as well as the List and Bundles of Authorities filed on behalf of the 1<sup>st</sup> Defendant. It was the submission of **Mr. Ahmednasir** that, in line with the principles enunciated in **Giella vs. Cassman Brown**, the Plaintiff was required to demonstrate a *prima facie* case with probability of success; that it stands to suffer irreparable injury which would not be compensable by an award of damages; and that the balance of convenience is in its favour.

[30] It was further urged by **Mr. Ahmednasir** that the Plaintiff was under duty to further satisfy the distinct requirements for the grant of a freezing injunction, including proof that it has "**a good arguable case.**" The case of **The Niedersachsen [1983] 2 Lloyd's Rep 600** was cited in support of these arguments. Senior Counsel reiterated the 1<sup>st</sup> Defendant's contention that no cause of action lies against it in the instant matter since fraud allegedly perpetrated by the Deceased would arise by virtue of the contract of employment between the Deceased and the Plaintiff. Relying on **Dimskal Shipping Co. Ltd vs. International Transport Workers Federation [1991] 4 All ER 871**, Senior Counsel submitted that, where the law of contract and the law of unjust enrichment collide, the law of contract would prevail.

[31] It was further the submission of the 1<sup>st</sup> Defendant that the Plaintiff had failed to demonstrate any real risk, on its part, of dissipation of assets; and added that the unsigned anonymous note that was relied on by the Plaintiff was insufficient for this purpose. The case of **Ninemia Maritime Corp. vs. Trave Schiffahrtsgesellschaft mbH & Co. [1984] 1 All ER 398** was cited for the proposition that it is not enough for the Plaintiff to assert that the assets will be dissipated; but must demonstrate, by solid evidence, for instance that the 1<sup>st</sup> Defendant had previously acted in a way which shows that its probity is doubtful.

[32] The 1<sup>st</sup> Defendant further submitted that Plaintiff is not entitled to the equitable reliefs sought, for complaining that the alleged fraud had been ongoing for a period of more than 10 years, yet it had its Board of Directors in place which ought to have exercised care and due diligence in protecting the assets of the company, whose members were yet to be put to task by the Plaintiff; and for failing to make full and frank disclosure to the Court of all matters which are pertinent to this suit, such as the Report by **FTI Consulting Limited**. The Plaintiff was further faulted for having filed two separate suits in respect of the same subject matter, but against different defendants, being **Nairobi HCCC No. 522 of 2015: Imperial Bank Limited (Under Receivership) vs. W.E. Tilley (Muthaiga) Limited & 19 Others** and the instant suit. Additional evidence was adduced by way of the Further Affidavit of **Naeem Shah**, the 5<sup>th</sup> Defendant to shown that, during the pendency of the two suits aforementioned, the Plaintiff filed a third suit one year later, on **30 September, 2016**, being **Nairobi HCCC No. 392 of 2016: Imperial Bank (Under Receivership) and Others vs. Alnashir Popat and 17 Others**. That affidavit was filed herein with the leave of the Court on **8 November 2016**. It was filed in addition to the 5<sup>th</sup> Defendant's Replying Affidavit sworn on **17 December 2015** and his Further Affidavit sworn on **6 June 2016**. Its purpose was simply to introduce as an exhibit, the Plaintiff filed by the Plaintiff in **HCCC No. 392 of 2016** to show that the Plaintiff has claimed the same reliefs against 17 other individuals, some of whom are the Plaintiffs directors and/or shareholders. Thus, the Court was urged to find that this particular suit was filed in abuse of the process of the Court.

[33] With regard to the balance of convenience, it was the submission of **Mr. Ahmednasir** that, since the Plaintiff has been less than truthful with the Court, the balance of convenience lies in refusing to grant the injunctive orders sought. It was further submitted that it was upon the Plaintiff to show that the inconvenience it will suffer should its application fail, is greater than that which the 1<sup>st</sup> Defendant would suffer if the orders sought are granted; which burden has not been discharged by the Plaintiff. He added that a freezing injunction, being such a draconian remedy as it is, ought not to be granted unless entirely merited. Thus, the 1<sup>st</sup> Defendant urged for the dismissal of the Plaintiff's Notice of Motion dated **26 October 2015**.

[34] By and large, the same submissions were made in respect of the 2<sup>nd</sup> to 4<sup>th</sup> Defendants, as well as the 7<sup>th</sup> to 11<sup>th</sup> Defendants, whose written submissions were also filed herein on **8 June 2016**, save for the peculiarities that are distinct to the different categories of Defendants; who were all represented by the firm of **Ahmednasir, Abdikadir & Company Advocates**, and whose written submissions were highlighted on their behalf by **Mr. Ahmednasir, SC**.

[35] As for the 6<sup>th</sup> Defendant, whose written submissions were filed herein by **Kithi & Company Advocates** on **18 July 2016**, it was his submission that he was a mere employee and therefore cannot be sued as a fiduciary of the company. Three reasons were advanced in support of this contention. Firstly, it was the submission of the 6<sup>th</sup> Defendant that the management of any company as recognized in law is hierarchical at two levels: the shareholders at a general meeting, and the Board of Directors on a day to day basis; and that, as the Principal, the Bank is liable for the acts of its agents, employees, servants and agents. It was thus the contention of the 6<sup>th</sup> Defendant that under this principle, the instant application and the suit ought not to have arisen in the first place, as the company would ultimately be liable for its acts and wrongs. The case of **Lennard's Carrying Co. Ltd vs. Asiatic petroleum Co. Ltd [1915] AC 705** was cited in support of this argument.

[36] Secondly, it was argued on behalf of the 6<sup>th</sup> Defendant that, given the hierarchy at the Bank, the Deceased kept a tight control of operations and acted as the go-between for all the Bank's departments. That the Deceased therefore controlled, not only the flow of information, but also directed and controlled all the activities of the Bank. Thirdly, it was the submission of Counsel for the 6<sup>th</sup> Defendant that the contention that the 5<sup>th</sup> and 6<sup>th</sup> Defendants in concert with the Deceased, opened and operated a series of false and fictitious accounts and reported the same using a sophisticated computer programme, has neither been contextualized nor proved; and that the role of the 6<sup>th</sup> Defendant was limited to preparing accounts from the financial information extracted from the general ledger, payment of overheads and authorizing payments once voucher and the necessary documentation had been placed before him.

[37] Regarding allegations that the 6<sup>th</sup> Defendant knowingly received money from the Deceased, it was the submission of **Mr. Kithi** that the Plaintiff has not been able to cogently state the amount received, or when received. That the Plaintiff merely painted a hazy picture by way of reference to receipt of certain sums of money by the 6<sup>th</sup> Defendant; which amounts had not been traced to the 6<sup>th</sup> Defendant's bank accounts. Counsel urged the Court to disregard the references that the Plaintiff made to the report by **FTI Consulting** as the said report was never placed before the Court. Thus, it was the submission of the 6<sup>th</sup> Defendant that the Plaintiff had failed, not only in terms of setting out a prima facie case, but also in showing that the assets sought to be frozen belong to the 6<sup>th</sup> Defendant; that in any case, it was argued, the properties in respect of which the Plaintiff seeks a freezing order are charged to the Plaintiff, and therefore there can be no risk of dissipation thereof. Thus, it was the submission of **Mr. Kithi** that the freezing order, if at all, ought to be commensurate with the amount claimed against the 6<sup>th</sup> Defendant. He otherwise urged for the dismissal of the Plaintiff's application with costs.

[38] I have carefully perused and considered the Notice of Motion dated **26 October 2015**, the averments in support thereof, the affidavits in response thereto, as well as the written and oral submissions made herein by learned counsel. I have also perused and considered the pleadings thus far filed by the parties; and there appears to be no dispute that the Plaintiff is a bank duly licensed under the **Banking Act, Chapter 488** of the **Laws of Kenya**, to carry on banking business in the country. It is also not in dispute that from the formation of the Bank

in 1992, the Deceased, **Abulmalek Janmohamed**, was the Bank's Group Managing Director until his sudden death on **15 September 2015**. Thereupon, **Mr. Naeem Shah** (the 5<sup>th</sup> Defendant) and **Mr. James Kaburu** (the 6<sup>th</sup> Defendant herein) were appointed as the acting Managing Director and acting Deputy Managing Director, respectively. Soon thereafter, certain disclosures were made to the Bank's Chairman that the Deceased had, from time to time, authorized certain bank transactions by way of handwritten chits, which were not altogether lawful or procedural; and that in consequence thereof, the Bank had lost funds to the tune of **Kshs. 34 Billion**; and that to conceal the fraud, various accounts had been opened and used, at the instance of the Deceased. The chits were exhibited at Pages 726-1287 of Volumes 2 and 3 of the Plaintiff's Notice of Motion dated **26 October 2017**. This revelation led to the placement of the Plaintiff under the receivership of **KDIC** by the **Central Bank of Kenya**. A copy of the relevant Gazette Notice was exhibited at Page 196 of the annexures to the affidavit of **Peter Gatere** (in Volume 1 of the Plaintiff's Notice of Motion).

[39] At around the same time, an anonymous note was received by the Plaintiff, containing revelations to the effect that the Deceased was an appointed company director of a UK company named **Janco (UK) Ltd**, (with a 33.33% stake) alongside his brothers **Mehdi Janmohamed** (3<sup>rd</sup> Defendant) and **Salim Janmohamed** (the 4<sup>th</sup> Defendant); and that the aforesaid company was in the process of being dissolved. It was the uncontroverted averment of **Mr. Gatere**, the then Receiver/Manager of the Plaintiff, that it was necessary for him to present the subject application with a view of obtaining orders not only to preserve the assets that are the subject matter of this suit pending the hearing and determination of the application as well as the substantive suit. Interim orders having been made on **27 October 2015** for a freezing order pending the hearing and determination of the application, the question that presents itself herein is whether those orders should be confirmed pending the hearing and determination of the suit.

[40] **Order 40 Rule 1** of the **Civil Procedure Rules**, which is one of the enabling provisions cited by the Plaintiff, provides that:

"Where in any suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court things fit until the disposal of the suit or until further orders."

[41] In connection with the aforestated provision, it is well established that an applicant coming to Court thereunder is under obligation to demonstrate, to the satisfaction of the Court, the three conditions laid down in the case of **Giella vs. Cassman Brown [1973] EA 358**. The precedent set in that case was thus:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a **prima facie** case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

[42] And in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123**, a **prima facie** case was defined thus:

"A **Prima facie** case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

[43] I do note that quite a bit in terms of evidence was presented before the Court to demonstrate that the Plaintiff has a **prima facie** case or lack of it, judging by the number of affidavits filed and the annexures thereto. In the case of the Plaintiff, no less than 14 sizable volumes were filed as annexures to the Supporting Affidavit only. Thus, I find instructive the view taken by the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012**, that:

*"...in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

[44] Accordingly, it was the contention of the Plaintiff that it has made out a **prima facie** case herein to demonstrate that:

[a] Between 2006 to 2015, the Deceased in collusion with the 5<sup>th</sup> Defendant and other senior officials of the Bank and their associates operated what appeared to have been "a parallel bad bank" consisting of false, fictitious, unlawful and fraudulently-created accounts and used a sophisticated financial reporting software to manipulate the Bank's books in order to conceal the fraud;

[b] A substantial part of the illegal and unlawful withdrawals were made through the accounts of **W.E. Tilley (Muthaiga) Limited**

(Tilley), which maintained a number of accounts with the Bank for its various companies) and two other companies; and there was no evidence that the said facilities were either applied for or approved, nor were they lawful from the standpoint of the **Banking Act, Chapter 488 of the Laws of Kenya** or the Prudential Guidelines;

[c] Tilley had a US Dollar trading account **Number 0100805162 ("the Tilley USD Account")** with the Bank which had inflows of cash from what appeared to have been Tilley's legitimate trading activities; and that over the years, some of the money would be transferred from the **Tilley USD Account** to **Account No. 0100895006("the Tilley Account")** where it would be converted into Kenya Shillings. That from time to time, the Deceased issued handwritten chits to the 5<sup>th</sup> Defendant directing him to permit withdrawals on the Tilley Account up to a given maximum ranging from **Kshs. 10 million to Kshs. 100 million** per week, notwithstanding lack of sufficient amounts in the account, with the result that between **2006 and 2015**, an amount in excess of **Kshs. 34,969,881,891.60** had been fraudulently and unlawfully overdrawn and/or disbursed from the Tilley Account. Copies of the bank statements as well as a summary thereof were exhibited at pages 1288 to 3093 of **Annexure PG 1**.

[d] In order to conceal the overdrawn balances in the Tilley Account, the overdrawn amounts would be transferred to another fictitious, illegal and fraudulently established **Tilley Account Number 0102026004** (hereinafter "**the Overdrawn Special Account**") that was specifically created by the Deceased, the 5<sup>th</sup> and 6<sup>th</sup> Defendants and other senior officials of the Bank for the purpose; that the Tilley Account would then be credited with the fraudulent amounts so as to clear any debit balances, whereupon, a corresponding debit entry for the fraudulent credit would be entered in the Overdrawn Special Account. The principal amount would then be transferred to a series of fictitious, fraudulent, and illegal accounts ("**the Special Loan Accounts**") which could only be extracted in a system known as Flexcube but would not be reflected in the financial statements of the Bank. Thus, there were approximately 25 Special Loan Accounts ranging from **Kshs. 25 million to Kshs. 1.5 Billion**, making a total of **Kshs. 18,878,801,728.15**. The supporting documents are to be found at page 3226 and 3453 of **Annexure PG 1**.

[e] As part of the fraudulent scheme, the interest was accumulated in the Overdrawn Special Account and part of it paid to yet another fictitious account **Number 0012265026** in the name of **Mr. Zulfikar Jessa and Zarina Mohammed("the Zulfikar Account")**; that the deposits and withdrawals in respect of this account were either made in cash or through internal transfers; such that between **2006 and 2014**, a total sum of **Kshs. 1,110,155,320.31** had been transacted through this account. Copies of the bank statements in respect of the **Zulfikar Account** were exhibited at pages 3227 to 3252 of **Annexure PG 1**.

[f] The Deceased, the 5<sup>th</sup> and 6<sup>th</sup> Defendants and other senior officers of the Bank and their associates operated yet another fictitious account **Number 5011776002** in the name of **Mr. Barkatkhan ("the Barkat Account")**, and that various amounts of interest were credited into this account believed to have been funds transferred from the **Special Overdrawn Account** and the **Zulfikar Account**. Between **1 January 2006 and 7 October 2015**, the total amount transacted, all in cash, was **Kshs. 3,263,567,583.51**. It was further noted that even after the Deceased's death, the 5<sup>th</sup> Defendant continued to unlawfully and fraudulently operate the **Barkat Account**, such that between **15 September 2015 and 7 October 2015**, transactions in excess of **Kshs. 162 million** had been made in respect of the said account. A copy of the statement for the **Barkat Account** is to be found at page 3278 of Annexure PG 1.

[g] The Deceased further established an account, **Account Number 5010192007**, in the name of his mother, **Gulshan Janmohamed** (the 2<sup>nd</sup> Defendant, who has also since passed away). That there were similarly substantial deposits made by way of internal transfers from the **Barkat Account** into this account, ("**the Gulshan Account**") from which withdrawals were made in cash as shown in the bank statements exhibited at pages 3280 to 3424 of Annexure PG 1.

[h] That the said false and fraudulent transactions were further concealed by creating a fictitious account, **Account No. 0100157012** in the name of **Hanscombe Management Limited ("the Hanscombe Account")**; yet the said company went into liquidation in **2002** and was gazetted as such on **8 February 2002**. A total of **Kshs. 30,310,517,186.25** was transacted through this account after the dissolution of the company and in proof thereof, the Plaintiff relied on the documents at pages 3425 to 3451 of Annexure PG 1. That, as at **30 September 2015**, well after the death of the Deceased, entries of between **Kshs. 3,040,477,471 and Kshs. 17,962,003.68** had been passed through the **Hanscombe Account** under the charge of the 5<sup>th</sup> Defendant.

[45] Thus, it was the contention of the Plaintiff that deposits that were made by the Bank's customers and which were supposed to be yielding a return for the Bank were instead being fraudulently transferred to the Tilley Accounts on the instructions of the Deceased; and with the assistance and/or collusion of the 5<sup>th</sup> Defendant and other senior officials of the Bank. A careful consideration of the various Replying Affidavits filed herein shows that the details set out in Paragraphs [43][a] to [h] above were largely un rebutted. The position taken by the 1<sup>st</sup> to 4<sup>th</sup> Defendants, as well as the 7<sup>th</sup> to 11<sup>th</sup> Defendants was that they were unaware of what was going on at the Bank, being neither shareholders nor directors of the Plaintiff. As for the 5<sup>th</sup> Defendant, he conceded in his Replying Affidavit sworn on **17 December 2015** that he was the Plaintiff's Head of Credit at the material time; and while denying that he was a party to the fraudulent activities, he did concede that there were irregularities that came to light after the demise of the Deceased. At paragraph 14 of that affidavit he averred that if at all any facility for the transfer of the colossal amounts referred to were made by him then they could only have been made with the express instructions of the Deceased or the Board of Directors.

[46] The 6<sup>th</sup> Defendant was more explicit in his Replying Affidavit of **30 November 2015**. At paragraph 6 thereof, he averred that upon being appointed as the Deputy Group Managing Director, after the demise of the Deceased, he came across certain information in connection with the management of the **Tilley, Zulfikar, Barkat and Hanscombe** Accounts which were intended to conceal or suppress the actual financial position of the Bank. He added that, out of suspicion that there was something amiss, he had confronted the Deceased as well as the 5<sup>th</sup> Defendant about his concerns but was assured then that all was well. The 6<sup>th</sup> Defendant further averred that on discovery of the irregular transactions, he notified the Chairman, **Mr. Alnashir Popat** on **20 September 2015**. There is, prima facie, sufficient indication therefore that the Deceased presided over certain irregular transactions at the Bank. Indeed, the Plaintiff's contentions in this regard have the support of the affidavits of **Mohamed Ahmed, Anne Muoki, Samuel Cepher Kiruthu Mwangi, Robinson Kipkoech Boreh, Aliasger Aesmailjee and Andrew Durant**, the Senior Managing Director of **FTI Consulting LLP** that was engaged by **KDIC** to ascertain the extent of the fraud.

[47] It bears repeating that injunctive orders having been issued on **27 October 2015**, what remains is simply to determine whether those orders should be confirmed for purposes of Prayer 6 of the Notice of Motion, to last pending the hearing and determination of the suit. As to whether the Plaintiff is entitled to confirmation of the freezing injunction issued herein on **27 October 2015**, a useful analysis was made in **International Air Transport Association & Another vs. Akarim Agencies Company Limited & 2 Others [2014] eKLR** and some of the factors to consider are:

- [a] whether the applicant has a good arguable case based on a pre-existing cause of action;
- [b] Whether the claim is one over which the court has jurisdiction;
- [c] Whether the Defendant appears to have assets within the jurisdiction;
- [d] Whether there is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and
- [e] whether the balance of convenience is in favour of granting the injunction.
- [f] The court can also order disclosure of documents or the administration of requests for further information to assist the applicant in ascertaining the location of the defendant's assets.

[48] As to whether the Plaintiff has an **arguable case**, the definition thereof in **The Niedersachsen Case** (supra) is pertinent. According to **Mustill J**, a good arguable case is "**...one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success...**" The authority was adopted in **DCF Engineering Limited vs. Johari Limited & Another [2013] eKLR**. Thus, although copious submissions and authorities in support were made and relied on herein by the Defendants to show that the Plaintiff has no case against the Defendants, at this stage of the proceedings, the burden of proof is obviously lower than a balance of probabilities. Accordingly, whereas I find pertinent and formidable the arguments by both **Mr. Ahmednasir** and **Mr. Kithi** that:

- [a] the decision to place the Plaintiff under receivership was made in contravention of **Section 34** of the **Banking Act** and the relevant provisions of the **Central Bank Act, Chapter 491 of the Laws of Kenya**;
- [b] That this suit is incompetent from the standpoint of **Section 6** of the **Civil Procedure Act**, there being in existence other suits, namely **HCCC No. 522 of 2015** and **HCCC No. 392 of 2016**, in connection with the same subject matter but against different parties;
- [c] That there is no evidence that the handwritten chits relied on by the Plaintiff were written by the Deceased;
- [d] That the FTI Report had not been presented before the Court;

the limited scope of the application is, as pointed out herein above, the preservation of assets pending the determination of the suit on the merits. Thus, if I do not make specific reference to and analyze each of the points raised by Learned Counsel, including the useful authorities cited, it is to be understood that I found the same to be peripheral to the key issues on which the instant application turns, though of course they are pertinent to the eventual outcome of this suit.

[49] The Plaintiff's cause of action is hinged on breach of trust as well as unjust enrichment; and it has been shown, on a prima facie basis, how the Tilley Accounts were used by and on the instructions of the Deceased, to siphon funds from the Bank. Copies of handwritten chits allegedly written by the Deceased permitting the questionable withdrawals have been exhibited herein. There is sufficient proof that the overdrawn accounts were either omitted altogether or suppressed in the Bank's financial statements; and while admitting that this was improper, the 5<sup>th</sup> and 6<sup>th</sup> Defendants were content in their posturing that the withdrawals were approved by the Deceased and/or the Board of Directors. In the Further Affidavit of **Anne Muoki** sworn on **15 February 2016**, there is indication that the Deceased, the 5<sup>th</sup> and the 6<sup>th</sup> Defendants personally benefitted from the irregular withdrawals.

[50] At Paragraph 22 of the Supporting Affidavit of **Peter Gatere**, it was averred the following assets of the Deceased were listed as assets being within jurisdiction:

- [i] Share Portfolio at Apex Securities in the name of the Deceased;
- [ii] Share Portfolio at Old Mutual in the name of the Deceased;
- [iii] Shares in Goodwill Nairobi Limited;
- [iv] Apartment Unit 2B, Aleena Apartments, The Riverside, (L.R. No. 42715);
- [v] Fixed Deposit Receipts at the Bank in the name of the Deceased;
- [vi] Fixed Deposit Receipts at I & M Bank in the name of the Deceased;

- [vii] Apartment 1D, The Riverside, (L.R. No. 4275/120 Nairobi);
- [viii] Apartment B6, Golden Jubilee, (L.R. 206/19102);
- [ix] A plot on Links Road in Mombasa;
- [x] Apartment No. 60, Trident Grant, Plot No. 4580/14 & 4580/24;
- [xi] Apartment on 6th Parklands Avenue (being developed);
- [xii] Shares in Downtown Investments Limited;
- [xiii] Shares in Downtown Holdings Limited;
- [xiv] Shares in Imperial Capital;
- [xv] Shares in Imperial Bank Kenya Limited;
- [xvi] Standard Chartered Bank (Sterling Currency) Account Number 2802018381000;
- [xvii] Standard Chartered Bank (Euro Currency) Account Number 2802016885000;
- [xviii] National Bank of Kenya (Kenya Shillings) Account Number 0100365102900;

[51] The foreign assets and businesses were listed as hereunder:

- [a] Shares in Titan Investments (Mauritius)
- [b] Shares in Mahba Resort Hotels Company Limited (Tanzania)
- [c] Shares in Astonfield Solar (Mauritius)
- [d] Asachi Solar Power Limited (Mauritius)
- [e] Shell Case 38 cc Limited (South Africa)
- [f] Janco (UK) Limited (United Kingdom)
- [g] Janco Limited (South Africa)
- [h] Janco Investments Limited (South Africa)
- [i] Parvel International Enterprises Limited (BVI)
- [j] Account Number 23455150213 held in trust for the Deceased by Blenheim Trust BVI in First Caribbean International Bank (BVI)
- [k] Share portfolio managed by MMI Holdings (South Africa)
- [l] One Studio Apartment at Silicon Gates (Dubai)
- [m] Joint investment in two undeveloped beach plots (Zanzibar)
- [n] Real property investments under construction (Mozambique)

[52] Similarly, the known assets of the 1<sup>st</sup> Defendant were also provided at paragraph 27 of the Supporting Affidavit thus:

- [i] Shares in Imperial Capital
- [ii] Shares in Imperial Bank Kenya Limited
- [iii] Shares in Nature Stone Quarries Limited (9.5% shareholding owned by the 1<sup>st</sup> Defendant)
- [iv] Shares in Downtown Holdings Limited

[v] Shares in Downtown Investments Limited

[vi] Shares in Upperview Properties Limited (14.2% shareholding owned by the 1<sup>st</sup> Defendant)

[vii] Shares in City Park properties Limited (30% shareholding owned by the 1<sup>st</sup> Defendant)

[viii] Shares in Sandview Properties Limited (14.28% shareholding owned by the 1<sup>st</sup> Defendant)

[ix] Shares in Butali Sugar Mills Limited (5% owned by the 1<sup>st</sup> Defendant)

[x] Shares in Allgate Limited (12.5% owned by the 1<sup>st</sup> Defendant)

[xi] Shares in Serenity Limited

[xii] Shares in Plymouth Holdings Limited.

[53] The supporting documents are to be found at pages 3455 to 3490 of Annexure PG 1; and at pages 3493 to 3510 of **Annexure PG 1** are documents to show that the Deceased established a Trust known as **Abdulsultan Rehemtulla Janmohamed Trust**. Whereas it is yet to be proved as to whether the documents allegedly found on the desk of the deceased were indeed prepared by him, given the analysis of the Deceased's income in terms of salaries and bonuses at pages 30 to 41 of the Further Affidavit of **Anne Muoki** sworn on **15 February 2016** in Reply to the 1<sup>st</sup> Defendant's Replying Affidavit, there appears to be merit in the Plaintiff's assertions that the Deceased may have enriched himself at the Plaintiff's expense; and that the Bank has reason to believe that there is a risk of dissipation of the aforementioned assets. In **The Niedersachsen Case** (supra) it was held that:

**"It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company he defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstance of the case..."**

[54] In the premises, I am satisfied that an arguable case has been made out by the Plaintiff; and, given the foregoing scenario, I am satisfied that the balance of convenience, including the interests of all parties hereto, including the Bank's depositors and bond-holders, would best be served by confirming the freezing order that was issued herein on **27 October 2017** pending the hearing and determination of this suit as prayed in Prayer 6 of the Plaintiff's Notice of Motion. In this connection, I find apposite the viewpoint taken by **Odunga, J.** in **Bonde vs. Steyn and Others [2013] 1 EA 16** that:

**"...Where the dispute not only affects the protagonists in the legal arena, but may also affect third party bystanders or observers, the court cannot shut its eyes from such circumstances. The fact that the sources of livelihood of third parties and their families are likely to be adversely affected in the meantime unless the injunction sought is granted, is not totally far-fetched and, does tilt the balance of convenience in favour of the maintenance of the status quo..."**

[55] As to whether an order for tracing and disclosure should issue, there is no gainsaying that there is jurisdiction to accompany a freezing order with an order for tracing and disclosure as necessary components of a *Mareva* Injunction for full tenor and effect. Hence, in **Motorola Credit Corp vs. Uzan & Others [2002] 2 All ER 945**, it was held that:

**"... the disclosure order, where there is a freezing order is intimately involved in the effectiveness of the freezing order. Normally, when making worldwide freezing orders it will be appropriate to make disclosure orders as well. The disclosure order gives the teeth which are critical to the freezing order."**

[56] The same view-point had been taken in **A vs. C [1980] 2 All ER 347**, in which it was held that:

**"...where the remedy sought by the plaintiff was tracing of property which in equity belonged to him, the court had power not only to grant an interlocutory injunction restraining disposal of the property but also to make an interlocutory order directed to ascertaining the whereabouts of the property ... the order ... requiring disclosure of the amounts in the defendant's bank accounts was necessary for the purposes of both the mareva injunction and the tracing claim."**

[57] Thus, the order for discovery and tracing ought to have accompanied the freezing order of **27 October 2015**, noting that time is always of the essence. Indeed, in the Notice of Motion dated **26 October 2015**, prayer 4, which is the prayer for tracing and discovery, was for intended to last pending the *inter partes* hearing of the application, and is therefore spent. Besides, as rightly pointed out by **Mr. Ahmednassir**, there was no indication at all by the Plaintiff as to whether any action was taken by it to preserve the subject assets following the issuance of the freezing orders on **27 October 2015**. There was no indication that the order had been registered against any of the properties. In the premises, it is my considered finding that Prayer 4 is spent. Besides, it is noteworthy that by its Amended Plaintiff filed herein on **21 March 2016**, the Plaintiff reduced the sums in issue from **Kshs. 35 Billion to Kshs. 3,757,162,208.10**; thus it was imperative for the Plaintiff to demonstrate the assets listed in the Order of **27 October 2015** are less in value than the aforesaid sum, to warrant any further intervention, for which I hereby grant the liberty to apply.

**[58]** In the result, the order that commend itself to me is an order confirming the *ex parte* orders issued on **27 October 2015** pending the hearing and determination of this suit, as prayed in Prayer 6 of the Plaintiff's Notice of Motion dated **26 October 2015**; and that the costs of the application be costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY 2018**

**OLGA SEWE**

**JUDGE**