



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 69 OF 2016**

**SANDVIEW PROPERTIES LIMITED.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**UPPERVIEW PROPERTIES LIMITED.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP)....DEFENDANT/RESPONDENT**

**RULING**

1. The two plaintiffs have filed a Notice of Motion dated **8<sup>th</sup> March 2016** which is under consideration. The application seeks restraining orders and mandatory injunction. The restraining order are to restrain the defendant from carting away, destroying or otherwise disposing of all or any of the hard and soft files documents, materials records, financial accounting records, ledger or registers of VAT and tax returns held by the defendant in relation to both the plaintiffs. The plaintiffs seek mandatory orders directed at the defendant requiring the defendant to provide to the plaintiff all those aforementioned documents and ETR machines.

2. The application is based on the following grounds:

*a. From about the year 2007, some of the business affairs of the Plaintiffs were managed by the late **Abdulmalek Janmohamed**, who was the immediate former Group Managing Director of Imperial Bank Limited (In Receivership) (hereinafter, 'the Bank').*

*b. The management services provided to the plaintiffs by the late **Abdulmalek Janmohamed** included inter alia; collection of rent, building maintenance collection of and remittance of taxes to the Kenya Revenue Authority, payments to ordinary-course-of-business creditors, preparation of the plaintiff's books of accounts, as well as secured loan repayment administration in relation to the Plaintiffs' facilities with Kenya Commercial Bank ('the Management Services').*

*c. Since the demise of the late **Abdulmalek Janmohamed** and despite demand from the Plaintiffs, the Defendant has declined to surrender to them the records which were held at the Bank by the late **Abdulmalek Janmohamed**, including their ETR Machines.*

*d. There is no basis in law for the Defendant to continue to detain the Plaintiff's property.*

*e. Since **October 2005**, the Plaintiffs have been unable to collect rent from 2 of their properties as their tenants will not accept rent invoices without ETR receipts.*

*f. The Plaintiffs have otherwise been unable to manage their business and tax affairs by reason of the Defendant's detention and/or conversion of their records, materials and ETR Machines.*

3. The application was opposed by the defendant through a replying affidavit of **Mohamud Ahmed** and through a preliminary objection. The deponent of the replying affidavit is the Receiver Manager of Imperial Bank Limited (IBL).

4. The deponent **Mohamud Ahmed** make very serious allegations against the directors of the two plaintiffs companies. One such allegation is that the two properties registered in the plaintiff's names, namely **L.R. 209/11623** at Upper Hill Nairobi and property **Mombasa/Block XXVI/25**, are being investigated as part of what he terms as grand fraud of theft of Ksh 38 Billion belonging to IBL. The deponent further stated in his affidavit that some of the directors of the plaintiff are also director of IBL and therefore under section 45 (3) of the Kenya Deposit Act they are not permitted to either directly or indirectly to engage in the activities of IBL.

5. By a supplementary affidavit, **Anwar Hajee** a director of the plaintiffs denied the allegation of fraud against directors of the plaintiff company.

**DETERMINATION**

6. Having considered the affidavit evidence the submissions of counsels and the cited authorities I make the determination that the application fails and must be dismissed.

7. It is dismissed because the various matters presented by affidavit evidence are so controversial and cannot be determined by an interlocutory application. Further the granting of the prayers sought in the application will have determined the prayers in the plaint.

8. The application will also fail because the plaintiffs did not obtain the leave of the court to institute or to continue prosecuting this suit as required under the Kenya Deposit Insurance Act, Section 56. That section provides:

*i. No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.*

*ii. No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.*

*iii. No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue.*

9. The above being the determination of this court the Notice of Motion dated **8<sup>th</sup> March 2016** is hereby dismissed with costs to the defendant.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this **29<sup>th</sup>** day of **November**, 2018.

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Plaintiffs

..... for the Defendant

**MARY KASANGO**

**JUDGE**