



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 276 of 2016**

**TULLA RESERVE SUPPLIES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ND</sup> DEFENDANT**

**MUSA A. ADAN.....2<sup>ND</sup> DEFENDANT**

**CENTRAL BANK OF KENYA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The streams of Justice must be kept pure, assert the 1<sup>st</sup> and 2<sup>nd</sup> Defendant!
2. Invoking the long held Legal maxim '*Ex turpicausa non orituractio*', National Bank of Kenya Ltd (the 1<sup>st</sup> Defendant or Bank) and Musa A. Adan (the 2<sup>nd</sup> Defendant) ask this Court to strike out this entire suit. In a Notice of Preliminary Objection dated 17<sup>th</sup> August, 2016, this Court is urged, *in limine*, to bring this action to an early end.
3. This Objection is elaborated in the written submission dated 7<sup>th</sup> September 2016 and filed on the same day. The basis of the objection is that the Plaintiff has in paragraphs 6C and 6D of the Amended Plaint, pleaded that he obtained a loan facility which is the subject matter in this suit by bribing officers of the 1<sup>st</sup> Defendant. It is submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that under Section 39 of the Anti-corruption and Economic Crimes Act, Act No. 3 of 2003, it is a criminal offence to induce or reward the officers of the 1<sup>st</sup> Defendant including the 2<sup>nd</sup> Defendant to offer a Banking Facility or to disburse additional loans. It is argued that the Plaintiff confesses to committing an economic crime.
4. *Ex turpicausa non oritur action* is Latin for "from a dishonorable cause an action does not arise" and its rationale is not doubted. And it is agreed that a Court of law will firmly and resolutely set its face against those who would breach, violate or defeat the law then turn to Court to seek their aid (see for example **Kenya Pipeline Company Limited Vs. Glencore Energy (G.K) Limited** [2015]eKLR).
5. So as to make its point the 1<sup>st</sup> and 2<sup>nd</sup> Defendant make extensive reference to the Amended Plaint of 12<sup>th</sup> August 2016.
6. The Plaintiffs claim is founded on facility for Kshs.245,000,000/-(Kenya Shillings two Hundred and forty five million) offered to it by the 1<sup>st</sup> Defendant under a scheme called '**Investment Musharaka**'. It

is explained that it is an Islamic Banking facility. As security therefor a charge for Ksh. 175,000,000/ dated 2<sup>nd</sup> December 2014 was registered in favour of the 1<sup>st</sup> Defendant, joint and several guarantees of Kshs.245,000,000/= given by the Directors of the Plaintiff and assignments of receivables from Unga Holdings Limited and Kenya Prisons executed by the Plaintiff. There were other securities as well. But nothing will turn on it even if I set them out. As would be typical of such schemes, a profit sharing ratio is said to have been agreed between the Plaintiff and the 1<sup>st</sup> Defendant.

7. At the end, it is alleged that the 1<sup>st</sup> Defendant disbursed Ksh.145,000,000 as opposed to Kshs.245,000,000/- agreed under the Contract and the Letter of Offer.

8. Paragraphs 6B, 6C and 6D of those Pleadings has attracted the current controversy and is reproduced hereunder:-

6B. The Plaintiff avers that the said contract was obtained by misrepresentation, coercion and undue influence through the 2<sup>nd</sup> defendant herein who is a director of National Amanah of the 1<sup>st</sup> Defendant.

6C. The Plaintiff avers that the 2<sup>nd</sup> Defendant extorted for funds using coercion and undue influence to a sum totaling Kshs.7,000,000.00 that was made through cash and cheque deposits and USD.10,000 made by cash in order to procure the said contract which is a total violation of the code of conduct as per the CBK prudential banking guidelines and the Banking Act.

6D. The Plaintiff avers that the said extortions were made through cash and cheque deposits by the Plaintiff to the 2<sup>nd</sup> Defendant in the 2<sup>nd</sup> Defendant's Bank Account as follows:-

| Date       | Amount     | cheque Number |
|------------|------------|---------------|
| 9/08/2015  | 2,000,000  | 000002        |
| 16/12/2014 | 3,000,000  | 000120        |
| 17/12/2014 | 2,000,000  | 000125        |
|            | USD.10,000 | Cash          |

6D. The Plaintiff avers that the 2<sup>nd</sup> Defendant used coercion and undue influence so as to obtain funds of the aforesaid sum of monies to procure the said contract in breach of the code of conduct.

The Court must necessarily return to these.

9. Ultimately, the Plaintiff seeks various Declarations including that the 1<sup>st</sup> Defendant is in breach of its duty and obligations under the facility letters and loan agreements. Of interest is Prayer b(3) which reads:-

**“Special damages against the 2<sup>nd</sup> defendant for the sum of Kshs.7,000,000 and USD 10,000 as per paragraph 6C and 6D of the Amended Plaintiff”.**

10. This is the view of the Court. It is true that paragraphs 6B, 6C and 6D of the Amended Plaintiff alleges that the 2<sup>nd</sup> Defendant who is a Director of the 1<sup>st</sup> Defendant bank extorted Kshs.7,000,000/= and USD 10,000 from the 1<sup>st</sup> Defendant. That this bribe was to enable the 1<sup>st</sup> Defendant use his influence to assist the Plaintiff obtain the facility which is now the subject of this suit. The Plaintiff then seeks a refund of that sum from the 2<sup>nd</sup> Defendant.

11. Whilst the Plaintiff alleges that the 2<sup>nd</sup> Defendant may have assisted it to obtain the facility, the

Plaintiff does not allege that the contract between it and the Bank is illegal and should be voided for that reason only. As is apparent from the Plaintiff, the Plaintiff also attacks the contract as being unenforceable because of other reasons which include that it is:-

1) Contrary to Section 11 of The Banking Act as it purports to create a partnership and interest by the Bank in business of a customer.

2) Contrary to the Islamic Banking Practice.

12. The Plaintiff also complains of the manner in which the Contract was implemented. It is averred on behalf of the Plaintiff that there was failure of consideration on the part of the 1<sup>st</sup> Defendant as it only disbursed a sum of Kshs.145,000,000/= out of the contractual amount of Kshs.245,000,000/=. The Plaintiff also avers that the 1<sup>st</sup> Defendant levied unlawful and unilateral debits in the Plaintiffs Account and overcharged it.

13. This Court has set out those allegations in an abridged form to demonstrate that the Plaintiff's cause of action is founded on much more than the allegation of improper conduct of the 2<sup>nd</sup> Defendant. A substantial part of the Plaintiffs cause does not seem to arise from the alleged dishonorable conduct and must survive the Defendants' attack.

14. That said the contents of paragraphs 6B, 6C and 6D of the Amended Plaintiff is a bold statement by the Plaintiff that it bribed the 2<sup>nd</sup> Defendant so that the 2<sup>nd</sup> Defendant would assist it get the facility. The Plaintiff seeks the intervention of Court to recover this bribe money. If it is true that the Plaintiff indeed bribed the 2<sup>nd</sup> Defendant then it too is guilty of criminal conduct. Both the giver and taker of a bribe are culpable. The Court cannot lend assistance to a lawbreaker in the manner in which the Plaintiff seeks.

15. This Court does hereby hold that so as to set its face against the request by the Plaintiff and so as to save these proceedings from further impurity, it does hereby strike out that portion of the Plaintiff in which the Plaintiff seeks to recover money which it gave as a bribe.

16. Only to that extent does the Preliminary objection succeed. As the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have only succeeded partially, each party shall bear its own cost on the Preliminary objection.

**Dated, Signed and Delivered in Court at Nairobi this 30<sup>th</sup> day of March,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Makokha for Plaintiff

Mugacha for Chege for 3<sup>rd</sup> Defendant

Makambo for Ojiambo for 1<sup>st</sup> & 2<sup>nd</sup> Defendant

Alex - Court Clerk