REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2016

IN THE MATTER OF: AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI, MANDAMUS, INJUNCTIONS AND DECLARATORY ORDERS

AND

IN THE MATTER OF: IMPERIAL BANK LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF: ARTICLES 47, 20(1), 20(2), 20(4), 23(1), 21(3), 27, 35, 40, 10,232(1), 232(2)OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: CENTRAL BANK OF KENYA ACT CAP 491 LAWS OF KENYA, THE KENYA DEPOSIT INSURANCE ACT CAP 487 C, THE BANKING ACT CAP 488 LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

IMARAN LIMITED…….....1ST APPLICANT

REYNOLDS & COMPANY LIMITED.....2ND APPLICANT

EAST AFRICA MOTOR INDUSTRIES

(SALES & SERVICES) LIMITED.....3RD APPLICANT

MOMENTUM HOLDINGS LIMITED…….....4TH APPLICANT

ABDULMAL INVESTMENTS LIMITED..... 5THAPPLICANT

KENBLEST LIMITED..... 6TH APPLICANT

AND

CENTRAL BANK OF KENYA.....1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION..2ND RESPONDENT

AND

DIAMOND TRUST BANK LIMITED. . . . . .1ST INTERESTED PARTY

KENYA COMMERCIAL BANK LIMITED... 2ND INTERESTED PARTY

JOSEPHINE AWINO OGWENO

T/A J. KOGWENO & ASSOCIATES.....3RD INTERESTED PARTY

RULING

Introduction

1. The applicants herein, which are limited liability companies registered in Kenya under the Companies Act, are shareholders in ***Imperial Bank Limited***, (hereinafter referred to as "the Bank"), which is a company incorporated in Kenya and licensed by the 1st Respondent as a commercial bank under the ***Banking Act***, Cap 488 Laws of Kenya to carry out banking business in Kenya and which bank is currently under receivership.

2. The 1st Respondent, the ***Central Bank of Kenya***, (hereinafter referred to as "***the CBK***") is a Constitutional body established under the provisions of Article 231 of the Constitution and is incorporated under the provisions of section 3 of the ***Central Bank of Kenya Act, 2012*** Cap 491 Laws of Kenya charged with the responsibility of inter alia regulating and overseeing the operations of financial institutions in Kenya.

3. The 2nd Respondent, the **Kenya Deposit Insurance Corporation**, (hereinafter referred to as "**the Receiver**") is a statutory corporation established under section 4 of the ***Kenya Deposit Insurance Act, 2012***, Cap 487C of the Laws of Kenya (hereinafter referred to as "***the KDI Act***"), and it is charged with the responsibility inter alia of providing a deposit insurance scheme for customers of member institutions under the ***KDI Act***, and receiving, liquidating and/or winding-up any institution in respect of which it is appointed as receiver or liquidator.

4. The 1st and 2nd Interested Parties are companies incorporated in Kenya and licensed by the 1st Respondent as commercial banks under the ***Banking Act***, Cap 488 Laws of Kenya. The 1st and 2nd Interested Parties shall hereinafter be referred to as **"DTB"** and **"KCB"** respectively.

5. The 3rd interested party, **Josephine Awino Ogweno T/A J. Kogweno & Associates,** is a customer and depositor of the Imperial Bank.

6. The genesis of this suit seems to have been the events leading up to the appointment of the 2nd Respondent, by the 1st Respondent on 13th October, 2015, as receiver of the Bank for a period of twelve months, pursuant to section 43(1) and (2) and section 53(1) of the ***KDI Act*** pursuant to which **Mr Peter Gatere** was appointed as the Bank's receiver manager. The said appointment also coincided with the declaration of a moratorium on the Bank.

7. According to the applicants, on the appointment of the receiver the CBK announced that the receiver would be working closely with the Bank's Board for a resolution mechanism in order to facilitate its reopening and resumption of its operations. To this end the CBK proposed the injection of new capital, conversion of some of the large deposits to equity, recovery and collaterisation of the fraudulent loans, as well as a change of the Board and senior management, with the proposal entailing full access to small deposits and a structured schedule of repayment to large deposits.

8. Pursuant to this the applicants contend that they presented their own restructuring and recovery plan for the Bank. Despite this, the applicants contended that the CBK proceeded to release a statement by which it unprocedurally, illegally, unreasonably, unfairly and unconstitutionally decided to start a process of exclusion and transfer that entails the transfer and alienation of the assets and liabilities of the Bank to the 1st and 2nd Interested Parties herein. To the applicant this process is geared towards the liquidation of the Bank without consideration the other options.

9. In these proceedings therefore the applicants seek to prohibit the Respondents from unilaterally taking the said action to their exclusion and declarations that the decision by the Respondents to treat them as culprits in the events leading to the receivership of the Bank is also unlawful.

10. When this matter was filed, the same was placed before the **Hon. Mr Justice Korir** on 4th February, 2016 who proceeded to certify the same urgent and granted the applicants leave to commence judicial review proceedings. The learned Judge was however of the view that since what was being challenged was expected to be concluded by the end of March, 2016, there was no need to direct that the grant of leave operates as a stay of the proceedings in question. The Judge accordingly declined to grant directions along those lines.

11. When the matter was placed before the Judge on 16th February, 2016, the Judge directed that the matter be placed before me for hearing or directions as he was on his way out of the station on official duties. When the matter was placed before me I proceeded to give directions and directed that the matter be mentioned on 16th March, 2016.

12. On 19th February, 2016, **Mr Wandabwa**, learned counsel for the applicants appeared before me with the application dated 18th February, 2016 which application is the subject of this ruling.

13. By the application brought by way of Notice of Motion dated 18th February, 2016, the applicants herein seek the following orders:

> **1) This Application be certified urgent and that the same be heard forthwith in view of its urgency, the grounds whereof are detailed in the Certificate of Urgency filed herewith.**
>
> **2) Directions be given as to an early hearing date in respect of prayer 3, 4 and 5 herein below.**
>
> **3) Pending the hearing and determination of the Notice of Motion dated 9th February 2016, conservatory orders do issue barring the Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns, from:**
>
> > **a. transferring, assigning, disposing of, dissipating or in any other manner whatsoever or howsoever, dealing with or alienating any of the assets of Imperial Bank Limited (in receivership) and any of the deposits held at the Bank whether through the Interested Parties and/or any other parties whatsoever or howsoever; and**
> >
> > **b. undertaking or engaging in any exclusion and transfer process of any of the assets of Imperial Bank Limited (in receivership) and any of the deposits held at the Bank whether through the Interested Parties and/or any other parties whatsoever or howsoever; and**

c. taking any decisions and/or actions and/or continuing to take any such decisions and/or actions as would cumulatively or otherwise result in the liquidation of Imperial Bank Limited (in receivership) in any form whatsoever; and

d. taking any decisions and/or actions relating to the business, assets and deposits of Imperial Bank Limited (in receivership) without due involvement and consultation of the Applicants; and

e. taking any decisions or actions which would affect and/or render nugatory, any such orders as this Honourable Court may make in the pending proceedings.

4) Pending the hearing and determination of the Notice of Motion dated 9th February 2016, an order do issue directing the Respondents jointly and severally, to within 7 days of this order, file with this Honourable Court, and serve the Applicants with all such documents as are relevant and necessary for the purposes of apprising the Applicants of the current financial condition of the Bank and for the preparation of a current and optimal recovery plan including but not limited to;

a. statement of affairs of the Bank as at 13th October 2015 together with supporting schedules;

b. the current financial position together with supporting schedules;

c. schedules supporting movements in impairments and other reserves including any work done on recoverability of the advances portfolio;

d. reports on the review of the completeness of contingent liabilities and any provisions required;

e. list of outstanding advances at 13th October 2015 tied to the management accounts clearly showing performing accounts, past due accounts and impaired accounts together with workings of provisions held against each of the impaired accounts;

f. impairment history over the last five years;

g. list of the top 50 advances (aggregated at the group level) showing the nature of the advance, the amount outstanding, securities held and details of any impairment provisions held;

h. list of all advances subject to litigation showing the nature of the advance, the status of litigation and the potential exposure;

i. Bank reconciliation for all nostro, vostro and Central Bank accounts including details of how all outstanding items were cleared supported by independent confirmations;

j. workings of financial instruments carried at amortized costs (Government securities);

k. listing agreed to general ledger providing description of the asset, date of acquisition, location, cost, accumulated depreciation, net book value and the state of asset;

l. valuation reports for all land and buildings;

m. details of other receivables, prepayment and deposits including ageing and provision for irrecoverable items;

n. reconciliation of all inter-branch accounts;

o. details of amount due from directors, employees etc including travel advances and short-term advances;

p. a breakdown of all major pre-paid expenses;

q. list of outstanding creditors reconciled to suppliers statements;

r. details of all current guarantees, bid bonds, letters of credit, foreign exchange exposure;

s. details of all outstanding commitments to acquire shares, assets, foreign exchange and any other outstanding commitment not reflected on the face of the balance sheet;

t. foreign currency exposure and any hedging contracts to protect on foreign currency losses;

u. details of guarantees to suppliers and service providers;

v. details of all litigation claims including fees and charges or for services provided to the company; and details of litigation with employees;

w. tax returns and computations filed with the tax authorities for the last five years, including details of all tax audits and investigations carried out in the last five years and their status;

x. withholding tax, Paye as Your Earn, reverse VAT and any other tax returns filed in the last five years;

y. List of staff members as at 13th October 2015 and current staff list including full details of remuneration and benefits; and

z. IT Systems, software licences, renewals hardware update.

5) Costs of this Application be provided for.

Applicants' Case

14. The application was based on the following grounds:

1) The 1st Respondent, vide a Press Release dated 2nd December, 2015 unjustly based its commencement of the exclusion and transfer process on the fact that there had been a failure by the Applicants herein to furnish it with a restructuring and reopening proposal for Imperial Bank Limited (in receivership) ("the Bank"). This publication was marred by glaring fabrications, inconsistencies and falsehoods in the face of the numerous proposals and counterproposals that had been presented to the Respondents by the Applicants for the Respondents' consideration.

2) The 1st Respondent's allegation made vide its Press Release of 2nd December, 2015 that the Applicants had failed to provide the Respondents with the Bank's restructuring and reopening proposal was solely meant to hoodwink the Bank's depositors, creditors, bondholders and the general public that due process was being followed, whilst ignoring the Applicants' restructuring and reopening proposals made to the Respondents on diverse dates to *wit*;12th, 27th and 29th October, and then again on 3rd, 11th and 12th November, 2015. The exclusion and transfer process is thereby a well-choreographed charade by the Respondents to liquidate the Bank.

3) Despite the reasons behind the commencement of the exclusion and transfer of the assets and liabilities of the Bank to the Interested Parties herein being false and unfounded, the aforesaid exclusion and transfer process is in itself, being conducted by the Respondents in a manner that is in breach of mandatory constitutional and statutory provisions, which breach amounts to an unreasonable and unfair administrative action. Specifically, the Respondents have neglected/failed and/or refused to *interalia*:-

a) Issue the Applicants with any notice of the commencement of the exclusion and transfer process of the assets and liabilities of the Bank;

b) Give reasons as to why the Respondents deemed the exclusion and transfer process as being necessary in the circumstances; and

c) Furnish the Applicants with any information, materials and evidence relied upon in making the exclusion and transfer decision of the assets of the Bank.

4) Though the 1st Respondent stated in its aforesaid 2nd December, 2015 Press Release that, **"An announcement on the way forward will be made upon the completion of this exercise, expected by the end of March 2016",** it is manifest that given the intensity of recent meetings between the 1st Interested Party and employees of the Bank, the said transfer and exclusion process is proceeding in earnest, albeit in a secretive and irregular manner.

5) The finalization of the process of exclusion and transfer would inevitably lead to the dissipation of the Bank's assets and liabilities which will eventually result in the liquidation of the Bank and the consequent grave and irredeemable loss to the Applicants, the Bank's depositors, creditors and bondholders in addition to members of the public, financial and otherwise, hence the need for the interim orders of protection sought herein.

6) It has now come to the attention of the Applicants herein that there exists a great conflict of interests between the 2nd Respondent and the Interested Parties in that, *inter alia*:-

a) The 1st Interested Party's Chief Executive Officer-**Ms. Naseem Devjiand** the 2nd the 2nd Interested Party's Chief Executive Officer– **Mr. Joshua Oigara** both sit on the 2ndRespondent's Board of Directors;

b) One of the entities responsible for the fraudulent disbursement of funds from the Bank, W. E. Tilley is a customer of the 1stInterested Party and a substantial amount of the funds drawn illegally from the Bank was deposited in W. E. Tilley's account in the 1stInterested Party; and

c) A good number of the assets acquired by **W. E. Tilley** using the funds obtained illegally from the Bank have been charged in favor of the 1stInterested Party.

7) Owing to this manifest conflict of interest, the 2nd Respondent's ostensible role as an agent of the Bank acting in the best interests of the Bank is inevitably defeated. This, for the reason that that **Ms. Devji**, is part of the administrative and decision making organ of the 2nd Respondent and yet her Bank, the 1st Interested Party has a direct and substantial financial interest in the illegal exclusion and transfer exercise being undertaken by the Respondents.

8) The Complicity of the 1st Respondent's officers in the illegal activities which facilitated the illegal withdrawal of vast amounts of money from the Bank leading to the Bank being placed under receivership, has been clearly demonstrated by *inter alia*:-

a) failing to subject its own staff to any form of scrutiny or accountability in view of the

supervisory roles that it had over the Bank and its duties in this regard to all stakeholders in the Bank, including the Applicants;

b) the 1st Respondent by its own officers, was involved in the manipulation of the Bank's schedules that would guide the publication of the official accounts which were presented to the Board, the Applicants and the public at large;

c) the 1st Respondent's failure to protect the rights of the Applicants and depositors in allowing complicit staff free access to the Bank's highly sensitive and confidential data, and information, which the Applicants fear may have been passed onto unauthorised third parties to the detriment of the Bank;

9) The improper and unprofessional relationship between the top leadership of the 1st Respondent and the former Group Managing Director of the Bank, **Mr. Abdulmalek JanMohamed** as evidenced by *inter alia*, the email dated 11th August 2011.

10) In view of the foregoing, it is clear that the Respondents would not be interested in the restructuring and reopening of the Bank but would rather liquidate the Bank for the collateral purpose of inter alia, concealing and suppressing the true facts relating to the Respondents' complicity in the illegal activities complained of.

11) Unless this Honourable court intervenes at this stage, the Respondents through the unlawful and unreasonable decisions, actions and omissions complained of, will effectively drive the Bank to liquidation prematurely, to the grave detriment and loss of the Applicants, the Bank and its stakeholders including depositors, bondholders and employees.

12) Unless the conservatory orders sought are granted, the Notice of Motion dated 9th February, 2016 would be rendered nugatory and the entire substratum of the proceedings will have been destroyed.

13) Similarly, unless the conservatory orders sought in this Application are granted, the court would henceforth be acting in vain and the entire purpose and objective of these proceedings will have been defeated.

14) It is just and fair that the subject matter of these proceedings be preserved pending the hearing and determination of the substantive Notice of Motion dated 9th February, 2016 on merit.

15) Unless the conservatory orders sought are granted, the Respondents will effectively have been allowed to continue with their illegal and irregular acts, hereby undermining the authority and dignity of this Honourable court and the fair administration of Justice.

15. The application was supported by an affidavit sworn by **Anwar Hajee**, a director of **Abdumal Investments Limited** (hereinafter referred to as "**Abdumal**"), one of the applicants in this case on 18th February, 2016.

16. According to the deponent, subsequent to the filing of the subject Judicial Review Application, it came to his knowledge that on or about the mid-month of December KCB's Corporate Team visited Imperial Bank Limited Mombasa Branch Office where they had discussion with the Bank's management regarding the Bank's customers and the Receiver's plan to pay out Kshs 1,000,000/= to them. Thereafter on the 24th of December 2015, the KCB's Managing Director **Joshua Oigara** ("Joshua") visited the Bank's Mombasa Branch offices, where he communicated his appreciation for their work in processing the pay out of the Kshs. 1,000,000/= claims, and congratulated them for the level of customer Service they had achieved. Similarly, it was averred, on the 8th of January 2016 DTB's Managing Director, **NasimDevji** ("**Nasim**") with two of her Senior Colleagues visited the Bank's Mombasa Branch Office and held a meeting with the Staff, in which she congratulated **Mustaq Dar**, the Banks Mombasa Branch

General Manager for the dynamic team he ran, and subsequently had lunch with Senior Members of the Branch where she commented that the Bank's Staff "work with their hearts". In addition, CBK's Governor also visited the Banks Mombasa Branch on the 15th of January 2016, in which he commended them for their high level of Customer Service, expressed concern for their situation and indicated that he would take Responsibility for them.

17. The applicants added that forty (40) members of the Bank's staff based in the Nairobi Branches have so far been called for Interviews by DTB, with most progressing to the final round and the mandatory pre-appointment medical Check-Up. On the other hand, the core of the Bank's Credit Card Team (5 members) has been poached by DTB while **Suraj Shah** CBK's Head of Operations and Projects has severally called two senior members of the Bank, seeking reference on the Bank's Staff currently being interviewed by DTB and **Shahzad Karim**, Head of DTB's corporate Division has been calling **Mehbooba Shamji**, the Bank's Business Development manager, enquiring on which accounts should be taken over, and which ones shouldn't.

18. The deponent further disclosed that both the 1st and 2nd Interested Parties' Managing Directors and their Respective Senior Staff have had various meetings at the Bank's Head-quarters with a view to evaluate the Assets of the Bank. He added that it had come to the applicants' knowledge that both **Nasim** and **Joshua** in addition to being the Managing Directors of the Respective 1st and 2nd Interested Parties, are also Directors of CBK.

19. It was based on the foregoing that the applicants believed that the plans for the 1st and 2nd Interested Parties to Cherry Pick the Bank's assets are at a very advanced stage. They were further concerned by the fact that the largest alleged recipient of the Bank's funds, **Messrs. W.E. Tilley** has various properties charged to KCB, yet based on information from the Managing Director of **W.E. Tilley**, **Mr. Firos Jessa**, these properties were purchased by monies emanating from the Bank. In addition, they came to know that CBK has during the period when the Bank was operational had a more than arms-length relationship with the Bank as exemplified by the fact that the spouse of a Senior Bank official enjoyed the largesse of the Bank's then General Managing Director **Abulmalek JanMohamed** (now deceased).

20. To the applicants based on the foregoing, the actions aforesaid are being undertaken with a view of obscuring certain matters. To them, the current state of the Bank's affairs could only lead to the liquidation of the Bank, a matter that would adversely affect the Applicants irredeemably. Based on legal advice, it was deposed that by reason of all the foregoing, the purported on going exercise being carried out by the Respondents and 1st and 2nd Interested Parties is being undertaken for ulterior purposes and is tainted with self-interest, bias, and not the adversely affected parties who are the Depositors, Bond Holders, the Applicants herein, the Banking Sector as whole, and the Public at large hence their apprehension that come the contemplated date of March 2016, when certain unspecified announcements ought to be made, various irrevocable steps could have been undertaken by the Respondents and 1st and 2nd Interested Parties. It was therefore nnecessary that the Court intervenes by way of the grant of Interim Measures of Protection, to obviate the Substantive Application herein from being rendered a mere academic exercise, which would irredeemably affect the Applicants.

21. It was their view that it is in the interests of Justice, the Public at Large, the Depositors and Bond Holders that Interim Orders of Protection as prayed for be granted to ensure that due process in respect of the Banks affairs is observed, so that all affected parties rights are not abrogated.

22. It was submitted by **Mr Muite**, learned Senior Counsel for the Applicants that the Bank ought not to be liquidated and that the applicants ought to be given an opportunity to revive it, otherwise the subject matter of these proceedings will be defeated. According to leaned SC, the matter deposed to came to the applicants' knowledge subsequent to the filing of these proceedings though the events in question may have taken place earlier. While reiterating the visits by the KCB and DTB Teams to the Bank yet the first two Interested Parties were the intended transferee of the Bank's business though they were not the Respondents herein. He also referred to the interviews of the staff of the Bank and contended that all these were evidence of the fast tracking of the transfer of the assets of the Bank without being transparent

to the exclusion of the applicants.

23. It was contended that there was evidence of collusion between the Governor of the CBK and the then MD of the Bank, hence evidence of collusion. To learned counsel, the reasons for the dismissal of the proposals made by the applicants point further to this collusion. According to him, the reason behind the intended transfer of the Bank's business to the 1st and 2nd Interested Parties was to bury the wrongdoing perpetrated by the CBK. To further buttress, this position it was contended that the Respondents instituted legal proceedings against Tilley, one of the beneficiaries of the fraud, and failed to prosecute the same.

24. Leaned Senior Counsel submitted on the basis of **Dr. Paul Nyongesa Otuoma & 2 Others vs. Attorney General & 2 Others [2007] eKLR** and **David Ndolo Ngiali & 2 Others vs. The Director, Directorate of Criminal Investigations & 4 Others [2015] eKLR**, that this Court has the jurisdiction to grant the conservatory orders sought herein.

25. It was submitted that it was the Board of the Bank that brought the issue of fraud to the attention of the CBK. While not disputing the statutory provisions relied upon by the Respondents, learned Senior Counsel submitted that the applicants were contesting the manner in which the Respondents were exercising their powers under the Act hence the commencement of these judicial review proceedings pursuant to Article 165(2)(d)(ii) of the Constitution. According to him, under Article 47 of the Constitution the Respondents were duty bound to be accountable and transparent in deciding whether to reopen the Bank or close it and the applicants were entitled to information. However the decision to close the Bank, it was submitted ought not to be made at this stage before these proceedings are determined in order for the Court to fully adjudicate the rights of the parties.

26. It was submitted that the mere fact that the powers of the Bank's directors are suspended does not confer impunity on the Respondents who are answerable to the law. It was submitted that all the applicants were seeking was an order preserving the subject matter pending the determination of these judicial review proceedings.

27. On his part, **Mr Wandabwa** who appeared with **Mr Muite**, submitted that though the Respondents denied that they intended to transfer the assets of the Bank and contended that they were merely conducting investigations, the affidavits show that there was a process feverishly going on by way of secretive agreements in which the assets of the Bank were being transferred to the 1st and 2nd Interested Parties. According to him, this process was irregular and was contrary to rule 15 of the Kenya Deposit Corporation Rules. In his view the purported demand for capitalisation was grossly unfair and contrary to tenets of fair administration, the Constitution and the Common Law Principles. While the Respondents relied heavily on statutory provisions, it was submitted that the exercise of the powers thereunder must be looked at in light of Article 47 of the Constitution. While appreciating that under Article 24 of the Constitution rights can be limited, the provisions relied upon do not fall within Article 24 and the manner in which the Respondents were purporting to exercise their powers amounted not to limitation of the rights but the doing away with the same.

28. Learned Counsel clarified that the applicants did not intend to hinder or interfere with forensic investigations herein. He however lamented that the applicants were being driven straight into liquidation without considering their options.

Respondents' Case

29. The Respondents opposed the application vide a replying affidavit sworn by **Mohamud Ahmed**, the Receiver Manager on 20th February, 2016.

30. According to him, the instant suit and in particular the application for conservatory orders are a blatant attempt to stop the forensic investigation into the admitted grand theft of Kshs. 38 billion in order to ensure that both the extent of the fraud and its perpetrators will never be known, and hence an abuse of this Honourable Courts process. To him, the request for documents as per prayer 4 of the Notice of Motion dated 18th February 2016 is calculated by the Applicants to establish the nature, extent and

progression of the ongoing investigations.

31. The deponent averred that the Receiver is not under any law or at all, obliged to accept any recovery plan from the Applicants, or the board of directors, that further jeopardizes the interest of the depositors and creditors of the Bank. However, it is **e**mpowered by law under Section 45(3)(a), and Section 50(1)(a), as read with Section 2 of Cap 487C exclude and transfer the assets of a problem institution, and it is not required to notify or obtain the approval of shareholders or creditors of the institution in a general meeting or otherwise notwithstanding any rule of law, contract or anything in any law including the ***Companies Act*** or anything in the constituent documents of the institution.

32. The deponent then proceeded to set out the background of the surrounding issues. According to him, whereas **PKF Kenya** was appointed by the board of directors and has remained the auditors to IBL since inception of the Bank, the applicants, seasoned businessmen, in order to compromise the said auditors, and prevent them from rendering accurate audits, and conceal the monumental fraud the Applicants through the board of directors approved a massive loan at a concessionary interest to the partners of **PKF Kenya**, trading as **East Africa Property Holdings (K) Limited** which at the point of receivership, was listed as number 16 in the list of "Top 50 Borrowers", with an exposure to the Bank of Kshs. 371,283,849.32.

33. From the formation of the Bank in 1992, the late **Abdulmalek Janmohamed** was appointed and served as the Bank's Group Managing Director (GMD) until 15th September, 2015, when he unexpectedly passed away following an alleged heart attack whose circumstances were not disclosed by the Applicants. Thereafter, the directors of the Bank allegedly appointed **Mr. Naeem Shah** and **Mr. James Kaburu** the principal officers used to effect the fraud, as acting Managing Director and Deputy Managing Director respectively, in the full knowledge that the two were responsible for the fraudulent activities in the Bank, and would continue to suppress and cover up the fraud within the Bank, and with instructions to continue to covering up the fraud.

34. It was averred that the admitted massive fraud of approximately Kshs. 38 billion committed at the Bank was first brought to the attention of the Central Bank of Kenya (CBK) by way of a letter dated 12th October 2015, addressed to the Governor CBK, from **Alnasir Popat**, Chairman, for and on behalf of the board of the Bank.

35. To the deponent, the then admitted fraud of Kshs. 38 billion of depositors funds would render the Bank insolvent to the tune of Kshs. 28 billion and once confirmed independently by the Receiver, would expose the Bank to liquidation unless the amounts in question are immediately recovered from the alleged fraudsters, or an equivalent amount injected by the Applicants, the amount / level of insolvency may further increase at the completion of the investigation. Despite the massive fraud of depositors' funds, the directors in the letter dated 12th October 2015 requested the CBK to assist in protecting the "integrity of the bank" which integrity was by then totally nonexistent with the late GMD and the directors being presumed by law to be culpable. The directors presented a hurriedly prepared preliminary forensic report dated 12th October 2015, by FTI Consulting, an international financial forensic investigation firm, (hereinafter FTI), based on limited information provided by the directors, in which they made proposals which in the deponent's view were designed to direct attention away from the non executive directors associated with the Applicants, and draw CBK into an elaborate cover up scheme, in which all attention would be focused on the late GMD and associated entities while the surviving directors would not be subjected to any or thorough investigations. An example which implicates the Applicants' representatives on the board of IBL that requires to be investigated is found at paragraph 17 and 18 of the Supporting Affidavit sworn on 18th February 2016, by **Anwar Hajee,** and refers to the letter dated 10th October 2015, marked attached to the said Supporting Affidavit, which purports to be an acknowledgement by **W.E. Tilley (Muthaiga) Ltd**. of Kshs. 10 billion in credit facilities and an acceptance to collateralize the amount by way of second charges. **W.E. Tilley** in its Defence dated 15th February 2016 and filed in HCCC No 522 of 2015 - **Imperial Bank Ltd (In Receivership) -vs- W.E. Tilley (Muthaiga) Ltd & 19 Others**, pleaded that the letter was just a "letter of comfort" to pacify the Central Bank of Kenya who were conducting in-depth investigations of the Plaintiff's operations and to assist in avoiding the closure

of the Bank. It was this letter that the applicants in their recovery plan proposal put forward.

36. It was averred that after examining and rejecting directors proposals, the CBK on 13th October, 2015, appointed the 2nd Respondent as the Receiver of the Bank for a period of twelve months pursuant to Section 43(1) and (2) and section 53(1) of the ***KDI Act***, with **Mr. Peter Gatere** as the Bank's Receiver Manager. On 16th November 2015, the deponent was appointed to take over from **Mr. Peter Gatere** as the Receiver Manager of the Bank, with the mandate pursuant to section 44(2) (b) of Cap 487C of, inter alia but is not limited to, assuming control of the whole of the assets, liabilities and business affairs of the Bank and carrying on the whole of the business of the Bank and managing its assets, liabilities and affairs. In his view, his mandate in light of the massive fraud, requires that the Bank's records cannot be accessed by the shareholders and directors whose accounts, actions and omissions are under investigation. In support of this position, he relied on section 45(3) (a) of Cap 487C which provides that during the period of control of an institution by the Receiver, no director of the institution shall, either directly or indirectly, engage in any activity in relation to the institution, except as may be required or authorized by the Receiver or the appointed person, as the case may be. Further, section 51 of Cap 487C provides that the Receiver shall not be subject to the direction or supervision of any other entity in the exercise of its rights, powers, and privileges. To the deponent, the directors of IBL are representatives and directors of the Applicants, and allowing them to either directly or indirectly, engage in any activity in relation to the institution, would be a criminal offence punishable under section 45(6) of Cap 487C.

37. According to the Respondents, by filling this suit in their own names, the Applicants are attempting to circumvent the provisions of section 45(3) (a) of Cap 487C, which specifically excludes the involvement of directors in the affairs of IBL while under receivership, yet the directors of the Bank are well aware that they are not eligible to hold directorship of any banking institution under the provisions of section 8 of Cap 487C, which refers to the Schedule on the Provisions as to the Conduct of Schedule Business and Affairs of the Board.

38. According to the deponent, section 45(2) of Cap 487C provides that throughout the period of control of an institution, there shall be vested in the Receiver or in the appointed person, as the case may be, all the powers of the institution, and of its directors, under the constituent documents of that institution, or exercisable by the institution or its directors under any law, regardless of whether such powers are exercisable by resolution, special resolution or in any other manner**.** Therefore the Applicants as shareholders and/or directors of IBL have no role whatsoever to play in its management and or revival once it was placed under receivership, except as may be required or authorized by the Receiver or the appointed Receiver.

39. According to the deponent, the Respondents, assisted by FTI, the Bank Fraud Investigations Department and the Ethics and Anti Corruption Commission, are currently undertaking forensic fraud investigations into the activities of the shareholders, directors and management of the Bank and 3rd parties, whoever they may be, with a view to taking the necessary action upon conclusion. He disclosed that he was investigating over 700 individual, corporate and institutional accounts within the bank, and that preliminary investigations on specific high priority accounts amount to 22,520 transactions and 60 members of the Bank staff are deployed in the go-downs on documents retrieval alone. The volume or quantity of data being investigated is 1.2 Terabytes (TB) requiring months to interrogate. To put this into perspective, if printed on paper would be equivalent to 250,000 copies of the King James Bible. After detailing the matters which were under investigations, the deponent averred that he could not at this stage reveal the exact nature and interim results of the forensic audit as it would jeopardize the same.

40. The deponent asserted that pursuant to section 10 of the ***Banking Act***, the Bank was prohibited from granting any advances, credit facilities, financial guarantees or other liabilities in excess of 25% of the bank's core capital. In addition, section 11 thereof prohibited, *inter alia,* the grant of advances, loans or other credit facilities which are unsecured and or grants of advances, loans or other credit facilities in a fraudulent or reckless manner or otherwise that in accordance with the said Act. The directors of the Bank, he averred, are not only the principal Shareholders of the Applicants, but are also seasoned businessmen who frequently transacted with and borrowed from the Bank, either in their personal capacities or through their various other companies. The Chairman and directors of the Bank apart from

Mr. Omurembe Iyadi, and **Mr. Eric Gitonga** are all the majority or significant shareholders of the Applicants and at the appropriate stage the 2nd Respondent will apply for the lifting of the corporate veil to demonstrate that the Applicant companies, and many others, were merely for the use of the directors of IBL, to perpetrate the wanton fraud at the bank. Mr. **Eric Gitonga**, apart from being a director at the Bank, was the advocate of the majority shareholder of the Bank, the 1st *ex-parte* Applicant, represented on the board of the Bank by **Mr. Alnashir Popat**, the Chairman, and cannot therefore be described as independent. To the deponent, the Directors of the Bank conceded that they had regular board meetings, and therefore must have known the state, and financial health of the bank, which is further confirmed by the Affidavit of **Naeem Shah** sworn on 17th December 2016, in HCCC No. 523 of 2015.

41. It was the Respondents' case that the instant application is nothing but a red herring to direct blame for the manifest fraud at IBL by its shareholders through its directors, on **Mr. Abdulmalek Janmohamed**, and divert attention from the Applicants' involvement in the fraud. To the deponent, this suit is a mechanism by the Bank's directors to create a smoke screen to distract the Respondents from finalizing investigations to determine the extent of their culpability. The suit is also intended to delay the investigations undertaken, and due diligence to ascertain the level of irregularities and malpractices and determine the most appropriate resolution mechanism as fast as possible, at the detriment of the Bank and the depositors' interest. This is self evident at prayer 4 of the Notice of Motion dated 18th February 2016; being aware of the state of documentation and record keeping at the Bank prior to it being place under receivership, *inter alia*, misfiling, bad record keeping and in some instances no records at all, still attempt to sneak in a final order in a premature application for interim orders, and that the same be provided within 7 days.

42. It was averred that the Bank is currently insolvent to the tune of Kshs. 28 billion based on the preliminary findings by FTI and the directors' admissions, and in need of massive capitalization by the shareholders before any consideration of a strategic investor and any other options. The proposals by the directors, all comprise conversion of deposits to equity and involvement of an unnamed strategic investor, all designed to ensure that the fraudsters keep the misappropriated money, and are not held to account for their fraudulent actions.

43. It was contended that deposit to equity conversion in the case if the Bank is a further burden to depositors whose deposits have been misappropriated, and no reasonable investor will invest in an institution with an admitted capital shortfall of 28 billion, resulting from fraud, without substantive shareholders capital injection. The Respondents disclosed that at all material times it was CBK's intention to reopen the Bank, at the earliest opportunity, subject of course, to compliance with the CBK's requirements on recapitalization, for the stability of the institution and protection of the depositors interest as the regulator and that the requirement to recapitalize is meant to protect the Bank's financial stability and public interest. Further section 2 of Cap 487C is clear that exclusion and transfer process means the process that commences when the 2nd Respondent is appointed receiver and or assumes control of a problem institution while the exclusion and transfer of the Bank's IR's assets and liabilities under Cap 487C, will be subject to the outcome of the ongoing forensic investigations, and in compliance with the law.

44. It was disclosed that the disbursement of deposits of up to Kshs. 1 million through the 1st and 2nd Interested Parties was informed by the knowledge that the over 40,000 of the Bank's customers who held such deposits require access to their money to sustain their daily needs and livelihoods and that the 1st and 2nd Interested Parties were simply disbursing agents, and were the only commercial banks willing to assist with the processing of the said disbursement. In any event, the disbursement of the said deposits of up to Kshs. 1 million was proposed in the recovery plan presented by the directors of the Bank, who represented the Applicants on the board of the Bank.

45. According to the Respondents, the Applicants' intentions are manifest; they have resorted to a sustained propaganda campaign against the Respondents, and allege contributory negligence on CBK's Staff, despite being requested by the Respondents through Advocates asking the Applicants to forward any new information on fraud against any person or institution, to record statements with the Director

Banking Fraud Investigations Department, for purposes of assisting with the ongoing investigations. The Respondents' case was that the Applicants are aware that an institution being placed in receivership is a statutory process, governed by Cap 487C, and the Receiver is empowered to conduct its functions including exclusion and transfer without the approval of shareholders and directors. Section 51 of Cap 487C on the autonomy of the 2nd Respondent as receiver provides that upon appointment as receiver pursuant to the Act, the Receiver shall not be subject to the direction or supervision of any other entity in the exercise of the its rights, powers, and privileges.

46. To the deponent, the contents of paragraphs 6,7,8 9, 13, 15, and 19 of the Supporting Affidavit sworn on 18th February 2016, cannot in any manner colour or form constitute new information as these are all events that occurred before 3rd February 2016, when the Chamber Summons application seeking leave was filed, and well within the Applicants' knowledge. It his view, it is ludicrous for the Applicants to even imagine that any employee of the Bank, now under receivership would not of their own free will look for alternative employment, and in the same industry in which they are trained and experienced in, after the Applicants' admission of a over 38billion shilling fraud at the Bank.

47. It was the deponent's view that the Supporting Affidavit sworn on 18th February 2016, removes any lingering doubt as to the Applicants' involvement in the fraud at the Bank, and self serving attempt at covering up their involvement in the said fraud, by an abuse of the court process.

48. The deponent then proceeded to deal with the substantive Motion and raised issues which are not pertinent to the instant application.

49. It was submitted by **Mr Chege**, learned counsel for CBK that there was no doubt that circumstances existed which justified the placing of the Bank under receivership since from the applicants' own investigation Kshs 30 Billion was lost in the Bank. He submitted that it was incorrect to contend that the applicants were not being listened since several meetings had taken place between the nominees of the applicants and the CBK but the applicants failed to meet the conditions for reopening the Bank. Although the applicants presented themselves as innocent shareholders, it was submitted that the applicants are in fact directors of the Bank hence were well represented in the Board before the Bank went into receivership and there was no way the Bank could have been run only by the MD. To the contrary the interests of the shareholders and the directors were interlinked and they were aware of the affairs of the Bank.

50. According to learned counsel, there was no evidence that **Nancy Ndungu** who was being linked to the former Governor of CBK was in fact the latter's wife. He however averred that upon the completion of the forensic audit action would be taken. It was submitted that if the receivers are prohibited from carrying out their duties, their operations would be paralysed yet the orders sought touch on public interest. According to him, the message that would be sent out by the grant of the orders sought herein would be that the directors can loot and plunder since the investigations shall have been stopped.

51. It was noted that several paragraphs in the supporting affidavit were misleading and since affidavit cannot be amended from the bar, the applicants must either live with the same or have the said paragraphs struck out.

52. On the part of the Receiver, it was submitted by **Mr Murgor**, that there was no dispute that the Bank was under receivership and not under liquidation. Accordingly the provisions dealing with receivership were yet to be invoked. According to him, there was total rot within the Bank leading to loss of Kshs 38 Billion. To him the insolvency would immediate expose the Bank to the process of liquidation. He reiterated that there was a huge amount of documentation to be perused since the illegal transaction started 12-13 years back when all the applicants were represented in the Board hence it would be unbelievable that the applicants were unaware of the going-ons within the Bank.

53. According to learned counsel the present application is meant to prevent full investigations of culpability of the remaining directors hence amounts to a smokescreen.

54. It was submitted that he Bank is hopelessly insolvent and there is nothing to liquidate. Since fraud is admitted by the applicants, it was submitted that to grant the orders sought herein would only prejudice the ongoing investigations. According to him the Receiver cannot be expected to consult with those who are suspected of having been involved in the fraud since the Receiver is yet to determine who between the applicants and Tilley was involved in the fraud.

55. While the transfer and exclusion under section 2 of Cap 487C, begins on receivership, learned counsel submitted that the process was yet to take place since what was going on was simply a process by which the depositors could receive their monies as son as possible. It was contended that there was no evidence that the Bank's customers had opened accounts with the 1st and 2nd Interested Parties.

56. Learned counsel confirmed that there would be no liquidation until after the forensic audit was completed and when completed a report would be prepared to the CBK and only then can the applicant forward their proposals and it is at that stage that challenge can be taken hence the challenge that has been taken up herein is premature as the Receiver has proceeded strictly in accordance with the law. The Receiver is however not obliged to report to the applicants in light of their actions.

57. With respect to the Tilley case, it was submitted that the same was proceeding fast and was delayed by an application made by the applicants to be joined to the same..

58. Submitting on the alleged visits by the teams from the 1st and 2nd Interested Parties, it was submitted that there was no evidemnce of poaching any members though such members were free to join the 1st and 2nd Interested Parties whose role was simply to facilitate payments to depositors. Based on **Republic vs. The Chief Magistrate, Milimani & Another ex parte Tusker Mattresses Ltd & Others [2013] eKLR**, it was submitted that the application was unmerited and amounted to an abuse of the court process and was meant to perpetuate an illegality.

Interested Parties' Case

59. On behalf of the 1st and 2nd Interested Parties, the following grounds of opposition were filed:

1. The application is misconceived and bad in law as the 2nd Respondent has no commenced a transfer and exclusion process the interested parties are yet to be accorded access to Imperial Bank Limited (In Receivership);

2. The application is bad in law as the 2nd Respondent is empowered under the Kenya Deposit Insurance Act to conduct its functions including exclusion ad transfer without the approval of the shareholders and directors of the institution in receivership;

3. The application is misconceived and abuse of the process of the court as disbursements of deposits of up to Kshs 1 Million through the interested parties was undertaken by the 1st Respondent in good faith and in the best interests of the depositors of Imperial Bank Limited (In Receivership);

4. That the application is bad in law as the orders sought seek to terminate the statutory receivership of Imperial Bank Limited (In Receivership);

5. The application offends the provisions of section 45(3)(A) of the Kenya Deposit Insurance Act, 2012 which stipulates that during the control of an institution no director shall be involved in the activities of the institution;

6. The application is an abuse of the court process as the Applicants are attempting to circumvent the provisions of section 45(3)(a) of the Kenya Deposit Insurance Act, 2012;

7. The application offends the provisions of section 51 of the Kenya Deposit Insurance Act,

2012 which stipulates that the 2nd Respondent shall not be subject to the direction or supervision of any other entity in the exercise of its rights, powers and privileges;

8. The application seeks orders whose effect will be violation of section 45(6) of the Kenya Deposit Insurance Act, 2012 which amounts to a criminal offence;

9. The application is an abuse of section 45(2) of the Kenya Deposit Insurance Act as it seeks to divest the 2nd Respondent of its powers in relation to Imperial Bank Limited (In Receivership);

10. The application has not been made in the public interest and seeks to inhibit a process that was undertaken so as to instil confidence in the banking sector; and

11. The application as filed and the prayers as sought have no merit and the application should be dismissed with costs.

60. It was submitted by **Mr Ohaga** on behalf of the 1st and 2nd Interested Parties that from the applicants' submissions, the trigger of the application was the discovery of the unhealthy interests in the assets of the depositors of the Bank. According to learned counsel, the 1st and 2nd Interested Parties are banks run on sound principles of banking with healthy asset base and profitability as opposed to the Bank which is Kshs 38 Billion in the red. He reiterated that the 1st and 2nd Interested Parties only stepped in to assist the depositors after the Bank closed its doors without ability or facility to disburse funds to its own customers. To him the 1st and 2nd Interested Parties acted in public interest as they were the only ones willing to alleviate the suffering of the depositor.

61. It was submitted that from the applicants' own affidavit, they knew of the role that was being played by the 1st and 2nd Interested Parties more than two months before the application was filed so they cannot alleged discovery of fresh facts. Learned counsel therefore saw nothing wrong with the actions of the 1st and 2nd Interested Parties who were mandated to pay 1 million shillings. He also saw nothing wrong with congratulatory Christmas visits as long as there is no allegation of ill-motivation. As for the employees of the Bank, it was his position that they would naturally be motivated to look for stable employments elsewhere and there was no evidence of soliciting for employees of the Bank and if they sought employment from the 1st and 2nd Interested Parties that was in the exercise of their democratic rights to earn a living.

62. According to learned counsel there was absolutely no warrant for the filing of this application as there was no discovery of new facts or circumstances.

63. It was submitted that the process of liquidation is detailed in the ***KDI Act***.

3rd Interested Party's Case

64. According to the 3rd interested party, she was an account holder with the Bank who operated a client's account with the Bank. At the time the Bank was placed into receivership, she had deposited a sum of Kshs 32,000,000/- belonging to various clients which sum she was holding as a stakeholder.

65. Upon advice from the CBK she lodged her claim for payment of the said sums with the 1st and 2nd Interested Parties and was paid Kshs 1,000,000/= by the DTB.

66. She submitted that if the effect of granting the orders being sought herein would be to sop the depositors of the Bank from receiving their money then the same ought not to be allowed as there is no other cushion for them. Since the receiver manager is mandated to facilitate the payment of her money, she objected to any process that would lead to the delay in the resolution of the said process. Without any other viable alternative in sight, the 3rd interested party urged the Court to dismiss the application.

Determination

67. I have considered the issues raised herein. As indicated hereinabove, when the application came up for hearing of the grant of leave, the Court declined to grant the stay on the basis that the challenged action was due to take effect at the end of March. In other words the Court, rightly in my view, appreciated that at that stage there was no imminent danger of the proceedings being rendered an academic exercise.

68. However, Order 53 rule 1(4) of the ***Civil Procedure Rules*** provides:

> ***The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.***

69. In my view, even where the Court grants orders of stay under the aforesaid provision, it has wide powers to do so on such terms as are just including the period for which the stay is to last.

70. This Court has similarly held that as opposed to the grant of leave which a party is entitled once a *prima facie* case disclosing grounds for judicial review are established, the grant of direction that the leave operate as a stay is an exercise of judicial discretion which must be based on the prevailing circumstances. It may be granted at any stage of the proceedings and may similarly be varied, set aside or vacated all together depending on the circumstances of the case. It follows that an application for stay of the proceedings or decision in question can be made at any stage of the proceedings in a judicial review application as the determination of an application for stay must necessarily depend on the prevailing circumstances and where the circumstances change, the court is perfectly entitled to grant stay. In other words a decision made with respect to stay is not necessarily caught up by the doctrine of *res judicata* though the same may amount to an abuse of the process of the court if made with the intention of overturning an earlier decision or as a means of haranguing the court.

71. In this case, the Court declined to grant the stay since at that point in time, it was not necessary. Stay of proceedings or the questioned decision being discretionary ought only to be granted where the same is necessary and not as a matter of course. Therefore if the applicants were to convince the Court that circumstances had mutated in a manner that necessitated the grant of stay, the Court would still have the jurisdiction to consider the same.

72. The issue that this Court has to deal with is whether in the circumstances of this case, circumstances that existed when the Court granted the leave have since been altered.

73. However before dealing with the issue it is important to retrace the principles guiding the grant of directions in the nature of stay.

74. The parties herein seem to have spent a lot of energy in gauging the strength or otherwise of their respective cases. Whereas the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a *prima facie* case has been made out and ought not to be granted as a matter of course. See **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR.**

75. Therefore as leave had been granted in these proceedings and as no application has been made to set aside the said leave, it is my view that it would be an exercise in futility for this Court to embark on an investigation at this stage whether or not the applicants' case is arguable since to arrive at a decision in the negative would impact negatively on the leave already granted. Consequently I do not intend to embark on that futile, absurd and potentially embarrassing exercise. I will therefore ignore the issues raised herein which go to the merits of the orders intended to be sought in the substantive Motion.

76. However the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and hence like any other judicial discretion must be exercised judicially and not capriciously or whimsically.

77. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

78. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

79. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

80. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited…The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."**

81. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability as opposed to the possibility of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.

82. Back to the matter at hand, if I understood the applicants correctly, the facts of this case did exist as at the time when the leave was being granted. What they contend is that the same were not within their knowledge. These proceedings were commenced by way of a Chamber Summons dated 3rd February, 2016 which Summons were heard on 4th February, 2016. The crux of the applicants' discovery seems to be contained in paragraphs 6 to 16 of the supporting affidavit. However, the said paragraphs are not particularly specific as to the time when the alleged discovery did take place. Apart from vaguely deposing that the discovery was "subsequent to the filing of the subject Judicial Review Application"

there is lack as specificity when it comes to the actual time of the alleged discovery. In my view where the Court has declined to grant stay and a subsequent application is made to in effect vary the same based on changed circumstances, the application ought to satisfactorily explain to the Court when exactly the discovery took place in order for the Court to determine whether it was not possible for the applicant to have discovered the same despite exercise of due diligence. Negligence or failure to exercise due diligence cannot be a basis for seeking to have the Court exercise favourable discretion which earlier on the Court had declined.

83. The only paragraph where there is attempt to specify the period of discovery is paragraph 14 where it is deposed that:

> ***This week, the 2nd Interested Party's Senior Management have been at Bank's Head Quarters evaluating the Assets of the Bank.***

84. Whereas that may or may not be true, the mere fact that one Bank decides to evaluate the assets of another Bank which Bank is admittedly undergoing a not too minor financial crisis cannot necessarily amount to an imputation that "plans for the Interested Parties to Cherry Pick the Bank's assets are at a very advanced stage" as alleged by the applicants.

85. In my view even if the employees or former employees of Imperial Bank were trooping to the 1st and 2nd Interested Parties, that would not necessarily warrant ill-motive being imputed. Employees are entitled to look for greener pastures if in their view rightly or wrongly, their employer is undergoing a financial crisis. This Court cannot stand in the way of the said employees to look for alternatives. In other words there is nothing compelling the said employees to flog what in their view, again rightly or wrongly, is a dead or a dying horse when they can simply hike a ride on another horse. As already stated herein above, in order to justify the grant of stay, the Court must be satisfied that the probability as opposed to the possibility of the Court's decision being made long after the decision sought to be quashed has been implemented are high. Therefore stay ought not to be granted on mere suspicion but must be based on probable factual basis. In this case the foregoing matters do not in my respectful view amount to anything higher than suspicions.

86. That the Respondents, it is agreed, are exercising statutory duties is not in doubt and in fact the applicants have made it clear that it is not their intention to hinder or interfere with the said exercise. In circumstances where a body is exercising statutory obligations it requires more than just speculations and conjectures for the Court to grant order whose effect would be to incapacitate it in undertaking its statutory obligations.

87. Whereas not much can be read into most of the accusations levelled against the 1st and 2nd interested parties, this Court is however concerned about the alleged more than gratuitous moves by the said interested parties to shower the employees of the Bank with Christmas gifts. In my view that is not part of the package that the said interested parties are reasonably expected to undertake in the attainment of their so called "sound principles of banking". In my view the applicant were no doubt justified in raising eye-brows with respect to the rather unusual interest that the said interested parties seem to have been taking in people who were not their employees. Whereas such conduct is highly suspicious, it however remains just that – suspicion.

88. Having considered the applicants' case it seems that their apprehension is that the Respondents are likely to place the Bank into liquidation prematurely. The Respondents however contend that such action is not in sight and there is no foreseeable intention to do so though such an eventuality cannot be ruled out considering the financial status of the Bank which according to then is tittering on the brink of collapse.

89. Having considered the material placed before me I am not satisfied that there is an imminent danger that unless the stay is granted, these proceedings may well be rendered superfluous.

90. With respect to prayer for involvement of the applicants in the affairs of the Bank by the Receiver and the need for consultation and furnishing of the information as sought in prayer 4 of the Motion, it is

important to first interrogate what the process of receivership entails with respect to the roles of the Board vis-à-vis the receiver. Once the receiver was appointed, the directors nolonger have free hand in deciding the manner in which the applicant Company's assets can be disposed of, though they retain some residual authority depending on the nature of the receivership. In **Flagship Carriers Ltd. vs. Imperial Bank Ltd. & 2 Others Nairobi (Milimani) HCCC No. 1643 of 1999, Hewett, J** expressed himself as follows:

> **"Notwithstanding the appointment of receivers of a company, directors have a residual authority as directors...A provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring an action and did not divest the Company's directors of their power to institute proceedings on behalf of the Company provided that the proceedings did not interfere with the receiver's function of getting into the Company's assets or prejudicially affect the debenture holder by imperilling the assets. Furthermore the directors are under a duty to bring an action, which is in the Company's interest because it is in the benefit of the creditors generally, and to pursue that right of action does not amount to dealing with the Company's assets so as to require the receiver's consent or concurrence. Since the plaintiff's action would not stultify the receiver's function of gathering in the assets the plaintiffs are not required to obtain his consent to bring the action...A company in receivership has the right notwithstanding the receivership to contest both the appointment of the receivers and the receivers' acts and defaults...While receivers do in general supplant the board of directors from the control, management and disposition of the assets over which the securities exist, the directors remain as directors within the domestic structure of the company and its shareholders. Their duties to the company continue although divested of their powers to carry out their duties in respect of the charged assets. They are still obliged to call meetings, make returns and keep accounts albeit that much of the information they will need will have to be obtained from the receivers. They have the right to deal with those parts of the company not the subject of the debenture...The directors are obliged to co-operate actively and fully with the receivers (although they may well be paid for their work); to allow the receivers full access to the property charged: to impart to the receivers whatever knowledge and expertise they have which will help the receivers in their primary duty to pay off the debenture holder: to help with the accounts and with whatever explanations and information regarding the pre-receivership business of the company, the receivers require...The directors' powers over the assets of the company, and their powers effectively to commit the company, will have ceased on the appointment of the receiver and will be necessary for him to consider their place in the future of the company under control...The effect of appointment of a receiver on the powers of the directors is to remove from their control all of the assets covered by the charge under which he has been appointed, other than any which may have been excluded by the instrument appointing him. In case of the normal floating charge debenture this will mean all the assets of the company. The corollary of this is that once the assets have been removed from the control of the directors, they have no access thereto and may only enter the company's premises with the permission of the receiver. They may take no action in relation to the business of the company, which could be construed by third parties as indicating control or ownership of that business...The appointment of the receivers relates solely to the assets and business of the company and in no way interferes with the statutory duties of directors who must continue to fulfil statutory duties such as maintaining the statutory books of the company and therefore they must retain possession of the company's statutory books together with the company seal which are not considered the assets of the company."** [Emphasis added].

91. As I have said however, these are general duties and may be modified by statute hence are subject to the relevant statute. It is clear that the receivers have the discretion as to the nature of information to furnish to the directors though such discretion must be exercised within certain legally recognised parameters. I am however not convinced that an application for directions in the nature of stay under Order 53 rule 1(4) is the correct procedure by which such exercise of discretion ought to be challenged since even in cases of *mandamus* the Court is precluded from directing the exercise of discretion in a particular manner. See **Kenya National Examinations Council vs. Republic ex parte Gathenji and**

Others [1997] eKLR.

92. Having considered the material placed before me I am not convinced that there is any substantial change in the circumstances to warrant the variation of the decision made by **Korir, J** on 6th February, 2016. Taking into consideration the allegations made against the applicant herein which allegations are still under investigations and which investigations the applicants do not challenged in these proceedings, without making a decision one way or the other at this stage, it is my view that the prayer for the furnishing of information is not warranted at this stage of the proceedings as to do so may interfere with the ongoing investigations and taking into account the public interests involved, such an order may not be proportionate to what the investigations are intended to achieve.

93. I have said enough to show that the application by way of Motion on Notice dated 18th February, 2016 lacks merit. Accordingly the order that commends itself to me and which I hereby grant is that the said Motion be and is hereby dismissed with costs to the Respondents and interested parties.

94. Orders accordingly.

Dated at Nairobi this 31st day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Hon Muite, SC and Mr Wandabwa for the Applicants.

Mr Chege for the 1st Respondent

Mr Murgor with Mr Ouma for the 2nd Respondent

Mr Ochieng Oduol for the 1st and 2nd interested parties

Cc Mutisya