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

NIC BANK LIMITED..4TH INTERESTED PARTY

RULING

Introduction

1. In my ruling dated 31st day of March, 2016 (hereinafter referred to as the earlier ruling), I declined to grant conservatory orders which were sought by the Applicants herein which were inter alia intended to restrain 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**
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> 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**
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> 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**
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> 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.**

2. In arriving at the said decision, this Court after considering the rivalling contentions of the parties to these proceedings pronounced itself *inter alia* as follows:

> **"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. 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."**

3. The Court however hastened to emphasise that that 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. This view is informed by the recognition that the doctrine of *res judicata*, as based on section 7 of the ***Civil Procedure Act***, may not be invoked in judicial review proceedings since the provisions of the ***Civil Procedure Act***, save for Order 53 thereof are ordinarily not applicable to judicial review proceedings. *Res Judicata*, strictly speaking is provided under section 7 of the ***Civil Procedure Act*** which in the preamble to the Act is "*An Act of Parliament to make provision for procedure in civil courts*". However, it is now well settled that judicial review applications are neither criminal nor civil in nature.

4. In **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1** and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. I must however add that with the enactment of the ***Fair Administrative Action Act, 2015*** which is meant to effectuate and operationalise Article 47 of the Constitution, the common law principles guiding judicial review must now be considered alongside the provisions of the said ***Fair Administrative Action Act***. Therefore strictly speaking section 7 of the ***Civil***

Procedure Act does not apply to judicial review proceedings. In fact in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that *res judicata* does not apply to judicial review. See also **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.**

5. This, however, does not mean that the Court is powerless or helpless, where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of the cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the ***Civil Procedure Act*** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

> **"It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional." See *The Reform of Civil Procedure Law and Other Essays in Civil Procedure (1982) By Sir Isaac J H Jacob*** and **WEA Records Limited vs. Visions Channel 4 Limited & Others (1983) 2 All ER 589; R vs. Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No. 1183 of 2004.**

6. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**:

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".**

7. I associate myself with the holding in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235** that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.

8. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* would be applicable.

9. However, even in cases where *res judicata* applies, a distinction must be made between reviewing a concluded matter and the commencement of a fresh litigation resulting from state of affairs which hitherto did not exist. This position was appreciated in **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

“However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

“The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.”.

10. In those circumstances the applicant does not approach the Court with a view to reviewing the earlier decision but based on new set of circumstances. In other words the second application is a new application based on its own facts. When that is truly the state of affairs, *res judicata* cannot be successfully invoked.

Applicants’ Case

11. In this case, the orders which are material to this ruling sought by the Applicants are as follows:

1. **Pending the hearing and determination of the Notice of Motion dated 9th February 2016, conservatory orders do issue barring and restraining 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. **Implementing or performing the joint agreement referred to in the 1st Respondents Press Release dated 21st June 2016, which agreement has been made between the 2nd Respondent and the 4th Interested Party with the endorsement of the 1st Respondent.**

   f. **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.**

2. **An Order do issue compelling the 2nd Respondent and the 4th Interested Party to produce and deliver up to the Applicants the joint agreement made between them with the endorsement of the 1st Respondent as reported in the Press Release on the 21st June 2016.**

12. There is no gainsaying that apart from payer (2) above, the prayers sought in prayer (1)(a) to (f) above were the subject of the earlier application. However, it is not just the similarities in the prayers that determine whether or not the application ought to be entertained but, rather, it is the circumstances giving rise to the fresh application that are to be considered.

13. According to the Applicants, whose case was presented through their learned counsel **Hon. Paul Muite, SC** and **Mr Kioko Kilukumi**, following the dismissal of the earlier application for conservatory order, the main Motion came up for hearing on the 21st day of June 2016. However while waiting for the said hearing, a Press Release was issued by Central Bank of Kenya in

which it announced that an agreement had been entered into between Central Bank of Kenya (hereafter “the CBK”), Kenya Deposit Insurance Corporation (hereafter “the Corporation”) and NIC Bank Limited (hereafter “the NIC”) in which it was agreed that NIC was appointed as Asset and Liability consultant for Imperial Bank Assets; NIC was to effect the payments of Kshs. 1,500,000/= to the depositors; subject to a due diligence and contract review and negotiations, the Corporation would dispose of and NIC would assume a portion of the remaining verified deposits with certain assets and liabilities; KDIC would retain the management and control of the Bank assets that have not been disposed of; and investigations would be complete in the near future.

14. To the Applicants, the said agreement was made without their involvement and they had no site of the same. It was the Applicants’ view that this act by the Respondents was an enhancement of the exclusion and transfer process commenced by them, which process is to ultimately culminate in the liquidation of the Bank. In the view, to allow the continuity of this transfer and exclusion process means the inevitable liquidation of the Bank hence they were apprehensive that come the unspecified date, various irrevocable steps could have been undertaken by the Respondents, NIC Bank and Interested Parties to the irreparable detriment of the Applicants.

15. It was therefore the Applicants’ view that it was necessary 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 them and that 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 would have been destroyed. 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 would have been defeated. It was therefore contended that 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. Not to do so, it was deposed, would mean that the Respondents would effectively have been allowed to continue with their illegal and irregular acts, thereby undermining the authority and dignity of this court and the fair administration of Justice.

1st Respondent’s Case

16. The position of the 1st Respondent, the CBK, was advanced through its learned counsel, **Mr Chege**. According to CBK, the instant application was prompted by a statement issued by the 1st and 2nd respondents on 21st June 2016. It was deposed following discovery of extensive fraudulent transactions within Imperial Bank Limited (In receivership) the 1st Respondent exercised its powers under section 34(2)(b) of the ***Banking Act*** and section 43 and 53(i) of ***Kenya Deposit Insurance Act 2012*** and appointed the 2nd Respondent to assume the management and control of Imperial Bank Limited (In receivership) for a period of twelve (12) months. Prior thereto and after the receivership of Imperial Bank Limited (In receivership) the 1st Respondent and the Applicants representatives held several consultative meetings but the Applicants were not in a position to raise the capital shortfall required to re-open the bank within the required timeframe as they stated that they needed to partner with unidentified investors who required to undertake due diligence and access to the Imperial Bank (In receivership) books of accounts which books were subject of forensic audit. In the said meetings, held and as part of the revival plan put forward by the directors of Imperial Bank Limited (In receivership) to the 1st and 2nd Respondents with a view to bridging the liquidity gap was a promise to obtain collateral security to cover part of the exposure due from **W.E. Tilley (Muthaiga) Ltd** who were according to the books of Imperial Bank Limited (In receivership) indebted in the sum of Kshs.34 Billion. It was however contended that, conveniently, the Applicants failed to disclose details of the various meetings up to and including the meeting on 15thJune 2016.

17. It was deposed that despite the notion the Applicants have given to this court that they are keen to revive the bank they have to date failed to put up Kshs.10 Billion from their undertaking to do so by March 2016 indeed as at the last meeting with the Respondents on Thursday 15th June 2016 they failed to come up with tangible and meaningful proposal let alone confirm that the said Kshs.10 Billion they had undertaken to inject had been paid into the IBL account at CBK or was otherwise available. It was disclosed that the Applicants confirmed at the said meeting on 15th June 2016 that they are no longer willing to inject the said Kshs.10 Billion and have now made it worse by proposing to raise Kshs.5 Billion by way of a rights issue which effectively would constitute a further fraud on the public, taking into account that the same shareholders/ directors had just before the bank was placed into receivership floated a bond for Kshs. 2 billion with the sole intention of defrauding the public.

18. It was confirmed that a meeting was held on 15th June 2016 apart from those held on various dates between shareholders and Respondents which are not less than eight (8) in number including the one of 15th June 2016 yet no meaningful proposal was given by the Applicants, and while making their proposals the shareholders received immediate feedback upon which they would go away and return with further proposals.

19. It was contended by the CBK that by the press release dated 21st June 2016 NIC will disburse on behalf of KDIC a maximum of Kshs.1.5 Million each to the remaining IBL depositors as soon as the High Court’s suspension of payments to IBL depositors is lifted and subject to account and identity verifications that were conducted previously. Once completed on this basis 45,700 depositors (equivalent to 92% of the depositors) will have been paid in full or not claimed their balances of less than Kshs.2.5 Million. The said ruling of the High Court ruling on the suspension of payments was expected in July 4, 2016. To the CBK, it supports and complies with the rule of law and is unwilling to take any steps and/or measures which are contrary to the orders and/or expectations of this Court.

20. To the CBK, the Plaintiff made a similar application dated 18th February 2016 seeking conservatory orders in which case the 1st Respondent had issued a press release dated 2nd December 2015 as a result of which 39,860 depositors (equivalent to 80% of depositors) have been paid in full or have not claimed their balance of less than Kshs.10,000/-. Notwithstanding this payment this Court found that the Applicants’ apprehension that the Respondents were likely to place the Bank into liquidation was

premature.

21. It was the CBK's case that in a further attempt to alleviate the suffering of depositors and as mandated by section 44 (2) (b) of Cap 487C of the Laws of Kenya, the 2nd Respondent in consultation with the 1st Respondent appointed NIC to disburse on behalf of KDIC a maximum of Kshs.1.5 Million each to the remaining IBL depositors as soon as the High Court's suspension of payments to IBL depositors is lifted and which payments will be subject to account and identity verifications. To CBK, in its endeavour to update the shareholders, creditors, depositors and general public it has continued to issue press release similar to the one dated 21st June 2016, and on 21st June, 2016, the Governor, Central Bank of Kenya between 2pm to 5pm held a meeting with depositors, with a view of engaging them and updating them on the steps taken to protect their interests and the financial system to prevent one bank failure resulting to that of several others thus endangering the wellbeing of the economy as a whole. It was its position that contrary to the allegations made by the applicants, the circumstances, as stated by this Honourable Court at paragraph 74 of its ruling delivered on 31st March 2016, have not changed to warrant the grant of the conservatory orders, and in the manner sought by the Applicants. According to the CBK, the present application is based on a complete misapprehension of the law, and attempt to intentionally mislead this Court. The CBK's position was that as per section 2 of Cap 487C, the process of exclusion of transfer commenced when Imperial Bank Limited (In receivership) was placed in receivership and a Receiver was appointed thereupon, both actions of which the Applicants do not contend were illegal and consequently the process of exclusion and transfer legally commenced on 13th October 2015 when the 2nd Respondent was appointed the Receiver of IBL. In this respect the CBK relied on regulation 2 of the Kenya Deposit Insurance Regulations which states that unless the context otherwise requires exclusion and transfer means the process that commences when the shareholders of an institution under receivership fail to provide the necessary resources to restore its financial condition or carry on the necessary management changes.

22. CBK therefore asserted that the conservatory orders sought are calculated to terminate the statutory receivership and appointment of the 2nd Respondent as the Receiver Manager and the present application is meant to ensure at whatever cost that the statutory protected rights of depositors are interfered with and/or extinguished. It was therefore of the view that the present application for conservatory orders does not lie in law and/or meet the legal threshold for this Honourable Court to exercise its discretion in granting the same.

The 2nd Respondent's Case

23. In opposing the application, the 2nd Respondent, the **Kenya Deposit Insurance Corporation**, through its learned counsel **Mr Murgor**, contended that both the 1st Respondent and the 2nd Respondent on 21st June 2016, issued press statements, which is the subject of the *ex parte* Applicants' renewed application for conservatory orders. It disclosed that the shareholders' proposals which included recovery and or securitization of 10 billion disbursements from **W. E. Tilley**, has subsequently been disowned by the shareholders and that the conversion of large deposits amounts is to further defraud the depositors and inviting a strategic investor to fill a 38 billion shilling hole without establishing the extent and culpability of the fraud is further perpetuate and cover up the fraud. The Corporation deposed that the **W.E. Tilley's** letter dated 10th October 2015 has been in the said entity's defense dated 15th February 2016, filed in HCCC No 522 of 2015 - ***Imperial Bank Ltd (In Receivership) -Vs- W.E. Tilley (Muthaiga) Ltd &19 Others*** – which at paragraph 41 & 42 was confirmed to be a "letter of comfort" intended to pacify CBK and cannot therefore form the basis of a recovery plan regarding the admitted fraud of 38 billion.

24. The Corporation contended that it is the applicants that have failed to honour their proposal/undertaking to make available the Kshs. 20 billion being their proposed Kshs.10 billion additional capital as well as recovery of Kshs. 10 billion irregularly disbursed to **W.E. Tilley**.

25. It was contended by the Corporation that any revival plan involving a failed bank is subject to many conditions including the eligibility of directors who will be subject to re-vetting and any funds injected will be from a legitimate source and not the proceeds of crime or money laundering. However, the applicants are nowhere near qualification for consideration as they have not taken any serious steps or made credible proposal to revive IBL and indeed, confirmed at the said meeting on 16th June 2016 that they are no longer willing to inject the said Kshs. 10 billion, and have now made it worse by proposing to raise Kshs. 5 billion by way of a rights issue. The Corporation's case was therefore that given the absence of a tangible and meaningful proposal from the shareholders, the 2nd Respondent has pursuant to its mandate under section 44(2)(b) of Cap 487C of the Laws of Kenya, appointed NIC Bank Limited to act as the Asset and Liabilities Consultant for Imperial Bank Limited (In Receivership) and that in this capacity, NIC will undertake on behalf of KDIC an assessment of the quality of IBL's assets and liabilities, support the recovery of IBL's loans, and provide guidance on other assets and on staffing. Similarly NIC will disburse on behalf of KDIC a maximum of Ksh.1.5 million each to the remaining IBL depositors, as soon as the High Court's suspension of payments to IBL depositors is lifted, and which payments will be subject to account and identity verifications.

26.The Corporation disclosed that IBLIR's loans which form part of its assets are currently not being serviced and since there is a need to have these activated and paid to provide funds to enable IBLIR make payments to depositors, it was for this reason and subject to a due diligence and contract review, and following negotiations, that KDIC will dispose of, and NIC will assume, a portion of the remaining verified deposits in order to reduce its liabilities, along with certain other assets and liabilities.

27. To the Corporation, it is expected that the engagement with NIC will grant the depositors access in a structured manner to about 40 percent of the remaining amount of verified deposits above Ksh.2.5 million, which would bring the cumulative pay-out ratio for all verified deposits to an estimated 59 percent. NIC will also assume the majority of IBL staff and branches, and announcements on the way forward will be made in the near future. It was contended that section 45 of Cap 487 C authorizes it to *inter alia* carry on the businesses and manage the assets, liabilities and affairs of a problem institution in the name and on behalf of that institution including disposal of assets until such appointment is revoked by the Corporation. To the Corporation, the said section 45 further provides that where control of an institution has been assumed under section 44(2)(b) as in the

current circumstances, the institution and its officers shall immediately submit its assets, liabilities, businesses and affairs to such control; and provide the Corporation and, if the control is assumed by the appointed person, to such appointed person, all such facilities as may be required to carry on the businesses and to manage the assets, liabilities and affairs, including disposal of assets, of the institution.

28. It was the Corporation's case that whereas the conservatory orders sought requires this Honourable Court to exercise its discretion, and that he who comes to equity must do so with clean hands, the Applicants while attempting to portray the Respondents as irrational, unreasonable and inconsiderate, are guilty of material non-disclosure in that as late as Thursday 16th June 2016, they met with the Applicant's directors, who once again were unable to provide a tangible and meaningful proposal, on the revival of the IBLIR. The Corporation further deposed that the ongoing forensic audit continues to reveal information, documents and emails that indicate that at all times the allegations contained in the so called whistle blower emails were well known to directors representing the Applicants.

29. The corporation's view was that no new evidence, had been presented to warrant the grant of the wide conservatory orders sought by the Applicants. Further, the initial payments having been successfully made through the interested parties IBL's liabilities need to be managed and where possible reduced and or eliminated without delay as expenses continue to eat into the resources available to the Receiver.

30. The position taken by the Corporation was that section 2 of Cap 487 C which provides interpretation and meaning of the terms used in the act provides that exclusion and transfer process means the process that commences when the Corporation is appointed receiver and or assumes control of a problem institution, which therefore means that exclusion and transfer process commenced on 13th October 2015 when the 2nd Respondent was appointed the receiver of IBL. Accordingly, to grant the orders sought herein, would be to reverse the unchallenged decision of the 1st Respondent to appoint the 2nd Respondent as the Receiver Manager, and to place IBL in receivership. Further reliance was placed on regulation 2 of the ***Kenya Deposit Insurance Regulations*** which states that unless the context otherwise requires, exclusion and transfer means the process that commences when the shareholders of an institution under receivership fail to provide the necessary resources to restore its financial condition or carry on the necessary management changes.

31. The Corporation asserted that it was evident that the shareholders of IBLIR had failed to provide the necessary resources, or even plan to restore the financial condition of IBLIR, to which end the Respondents proceeded exercise their statutory mandate and proceed with the assumption, exclusion and management of IBLIR's assets and liabilities. However, the exclusion and transfer process does not mean liquidation, which can only take place as prescribed under 54 and 55 of Cap 487 C, and part V of the ***KDI Act*** and Regulations. The Corporation added that given the failure by the shareholders to provide a viable recovery plan it was only a proper audit, due diligence, and management of the IBL's assets and liabilities that will enable it meet its obligations while under receivership, to prevent the coming into existence of the circumstances provided at section 54 (1).

32. It was contended that the depositors had endured terrible hardships since the date of receivership and in need of their money hence in the absence of massive capital injection, only the assumption and management of the assets and liabilities of IBLIR by another solvent and well-managed institution will at this point ensure the depositors continue to receive their money. It was however quite evident from the application and the prayers sought that the shareholders of IBL are intent on preventing the depositors from receiving their money.

33. To the Corporation, these Judicial Review proceedings, and the conservatory orders sought herein are an attempt to pre-empt, and possibly influence the decisions of the Respondents at the conclusion of the forensic audit, indeed to hold them ransom by securing orders the effect of which would be to direct the Respondents on how to exercise their statutory mandate, which amounts to an abuse of court process. The Corporation therefore urged the Court to dismiss this application with costs, to allow the Respondents complete their investigations.

The 1st interested party's Case

34. The 1st interested party, **Diamond Trust Bank Limited**, through its learned counsel **Mr Ochieng Oduol**, it was submitted hat the shareholders are only entitled to attend annual general meetings, appoint directors and auditors and to be paid dividends. However, there is no law that entitles a shareholder to the assets or liabilities. It was contended that upon appointment of receivers, the management is vested in the receiver to the exclusion of everybody.

35. It was submitted that in the earlier ruling this Court found that the staff of IBLIR were free to look for greener pastures. Further according to learned counsel the provisions of the KDI Act prevail over those of the regulations hence the process of transfer and exclusion must be deemed to have commenced on the appointment of the receiver. This Court was therefore urged to dismiss the current application.

The 3rd Interested Party's Case

36. The third interested party herein, **Josephine Awino Ogweno,** on her part averred that pursuant to the ***Advocates (Accounts) Rules***, she operated a client account at IBLIR hence was a customer and a depositor of the said bank. At the time that the bank was placed under receivership, she had deposited thereat a sum of approximately **Kenya Shillings Thirty Two Million (Kshs.32,000,000/-)** being various client funds which she was holding as stakeholder pending completion of various matters. However in the 9 months that Imperial Bank Limited has now been in receivership, the 3rd interested party averred that had immense difficulty running her Law Firm and had to constantly explain the issue of the client money deposited with the bank.

37. However, subsequent to communications from Central Bank of Kenya and Kenya Deposit Insurance Corporation to lodge a claim for payment of the sums held at Imperial Bank (In Receivership) at either Diamond Trust Bank or Kenya Commercial Bank, she confirmed that she lodged her claim at Diamond Trust Bank and was paid a total of **Kenya Shillings One Million Only (Kshs.1,000,000/-)** out of all her outstanding deposit available with Imperial Bank Limited (in Receivership) which sum, she deposed was a huge relief to her as it enabled her to offset certain claims. Further, on Tuesday 21st June 2016, the 1st and 2nd Respondents issued press releases, which contained proposals on payment to depositors, including a proposal to disburse, through NIC on behalf of KDIC a maximum of Ksh.1.5 million each to the remaining IBL depositors, as soon as the High Court's suspension of payments to IBL depositors was lifted, and subject to account and identity verifications that were conducted previously.

38. It was disclosed that further to the press release, the 3rd interested party together with other depositors attended a meeting between 2pm to 5pm on Tuesday 21st June 2016, convened by the Governor Central Bank together with Receiver Manager IBLIR, at the Inter-Continental Hotel in Nairobi, and confirmed that all depositors would get an additional payment of their deposits of up to Kenya Shillings One Million Five Hundred Thousand (Kshs.1,500,000.00) immediately the plan with NIC was implemented and subsequently, subject to further implementation of the agreement with NIC Bank on asset management loan realization, an additional payment of the depositors of about 40% of deposits stuck at IBLIR.

39. According to the 3rd interested she was, as a depositor happy and relieved to know that there was progress, with a plan in place that would ensure that she gets my money back even if not all at once, but progressively. It however came as a disappointment to her when she read in the media that the Court had blocked the said scheme.

40. To the 3rd interested party, the so called proposals filed in court by the applicants make no mention of the time and/or manner in which payment of depositors funds will be made, while the applicants proceed to block any chance of the depositors being paid part of their deposits as early as next month. In the 3rd interested party's view, the proposal to pay the Depositors of IBLIR as agreed with NIC was not a process to liquidate the applicant Bank as alleged but a process within the confines of receivership in law and the applicant's cannot at this stage oppose the receivership process which has been ongoing for nearly nine months now. To her, there was no any new information or action by the 1st and 2nd Respondents that remotely suggests that IBL was under liquidation or was at the risk of liquidation. To her, shareholders still have a chance to pump in money and provide an avenue for an amicable settlement of the issue of IBLIR.

41. It was contended that the purpose of receivership is primarily to protect the depositors funds under the circumstances they found ourselves in, and it was not a process designed to punish the depositors and a further delay in payment of the depositors funds as proposed will further escalate the suffering of innocent depositors like herself hence she strongly supported the payment of depositors funds. In her view, the latest proposal by the shareholders of IBLIR is one that may further defraud the public and is only intended to waste time as it does not provide for a possible payout plan for depositors since a rights issue for IBLIR is not a feasible option under the circumstances taking into account the fact that the directors of Imperial Bank have ongoing cases against all the government agencies from whom they require approvals to enable a rights issue.

42. The 3rd interested party therefore fully supported the decisions made by the Respondents as communicated by the press statements dated 21st June 2016, and at the meeting with IBLIR depositors at Inter- Continental Hotel the same afternoon, as it was backed by a statutory mandate, it is based on available resources and it is within the confines of the law. According to her, customer deposits are always a liability to a bank, and therefore if the same are paid or transferred to a well run and stable institution, IBL's balance sheet will show less liabilities, and this payout of depositors will provide residual value in the books of IBLIR and improve the financial health of IBLIR. She was therefore of the view that the decision to appoint NIC bank to act as the Asset and Liabilities Consultant for Imperial Bank Limited (In Receivership), in which capacity it will undertake on behalf of KDIC an assessment of the quality of IBL's assets and liabilities, support the recovery of IBL's loans, and provide guidance on other assets and on staffing was most likely informed by the fact that NIC Bank's niche and standing in the banking industry with regards to asset financing and management, hence NIC Bank is highly competent and experienced in this regard.

43. The 3rd interested party maintained that this court had pronounced itself on the matters raised in this application as there is nothing new in the receivership process which should warrant a re-examination of the decision of this court earlier issued regarding a stay of the receivership process hence this application is vexatious, an abuse of the court process primarily intended to further escalate the suffering of depositors and delay any payments that would ease her pain as a depositor and, indeed, the pain of other depositors. She urged the Court to treat the application with the contempt it deserves and be dismiss it with costs.

4th Interested Party's Case

44. The 4th interested party, **NIC Bank Limited**, also opposed the application through its learned counsel **Mr Ohaga**. According to NIC, it is duly licensed as a banking financial institution to carry on banking business under the provisions of the ***Banking Act***, Chapter 488 and is regulated by the Central Bank of Kenya. It contended that it has an extensive branch network throughout the country and serves numerous customers which include large businesses, SMEs, NGOs, government bodies and institutions as well as individuals from all walks of life and has been in existence since 1959 during which period it has grown from strength to strength and now has a regional presence and is very well respected in the financial services market.

45. NIC contended that it had closely the developments relating to Imperial Bank Limited-In Receivership ('EBLIR') following the unfortunate events of October 2015 after the sudden death of the Group Managing Director and the revelation of the improper banking practices culminating to it being placed under receivership by the Central Bank of Kenya in terms of the ***Kenya Deposit Insurance Act*** ('KDI Act') under which the Corporation was appointed as receiver of IBLIR in terms of sections 43 for a period not exceeding twelve months as provided under section 53 of the ***KDI Act***. According to it, the objects and purpose for

which the Corporation is established is *inter alia* to provide a deposit insurance scheme for customers of member institutions; the Corporation also has power to act in such manner as may be necessary to reduce or avert risk to the financial system.

46. NIC disclosed that like all *bona fide* players in the financial services industry, it is interested in the maintenance of a stable financial market and will play its part in promoting a conducive environment towards this end. It further stated that following discussions between the Central Bank, the Corporation and NIC Bank, an Agreement appointing NIC as Asset and Liability Consultant for Imperial Bank Limited-In Receivership was entered into dated 21st June 2016. The said agreement, it was entered into in recognition of NIC's expressed ability to undertake an assessment of IBLIR's assets and liabilities in order to identify the quality of the assets and liabilities and any risks attendant thereto and on the basis of NIC's expressed willingness subject to due diligence and contract to enter into negotiations with the Corporation with a view to making an offer to acquire such assets and assume such liabilities of IBLIR as would be agreed.In addition, NIC has expressed an intention of the IBLIR leases for branches that it will identify and assuming such staff of IBLIR as it may require in the event that it acquires the assets and assumes the liabilities of IBLIR; also NIC was able and willing to assist the Corporation to disburse payment of such amounts of deposits as may be determined by the Corporation as Receiver to the depositors of IBLIR on such terms and conditions as may be agreed.

47. It was disclosed that from the agreement, it was clear that none of the matters contemplated by the appointment of NIC as an Asset and Liability Consultant include the disposal, transfer or take-over of any of the assets of IBLIR.

48. To NIC therefore, the agreement is *bona fide*, is for a *bona fide* purpose and there are no surreptitious or under-hand intentions and the primary purpose of the agreement is to allow the Corporation to utilize NIC's knowledge and resources to facilitate and inform a proper decision making with respect to the potential fate of the assets and liabilities of IBLIR.

49. NIC however contended that under the provisions of the ***KDI Act***, the Corporation is not required to notify or obtain the approval of shareholders (the Applicants herein), or creditors of the institution or any other person notwithstanding any rule of law, contract or anything in law or anything in the constituent documents of IBLIR in respect of the manner in which its powers as Receiver are exercised and the insistence by the Applicants that they ought to have been consulted prior to the execution of the agreement has no proper foundation. The fear that IBLIR's assets will be disposed of as the result of the appointment of NIC as the Asset and Liability Consultant is therefore misplaced and no assets or liabilities will or can be disposed of until NIC has conducted a proper due diligence and determined the viability of IBLIR and NIC does not anticipate that it will be able to establish this before the expiry of the first term of the agreement which is not until 13th October, 2016. According to NIC the Applicants' fears were based on the sensational reporting appearing in various print and electronic media but which do not accurately reflect the matters set out in the agreement entered into between the Corporation and NIC. After setting out what was to be undertaken under the said agreement, NIC stated that in the intervening period it may, subject to the decision of the High Court sitting in Mombasa expected to be delivered on 4th July, 2016 disburse on behalf of the Corporation to depositors of IBLIR. However, the money to be paid out to depositors does not constitute any assets of IBLIR but is a drawing from the Deposit Insurance Fund established under section 20 of the ***KDI Act***. It was therefore contended that none of the matters set out in the Agreement appointing NIC as Asset and Liability Consultant prejudice the Applicants in any way or otherwise seek to alter the present status of IBLIR which is in any event already under receivership.

50. It was on the foregoing basis that NIC urged the Court to dismiss the application with costs.

Determination

51. I have considered the issues raised herein.

52. In making a determination whether or not to grant the conservatory orders, the Court must place the respective cases of the parties before it in a legal scale. It must balance the competing interests in order to arrive at a just decision. Where the Court has found, as **Korir, J** no doubt did when he granted leave to commence judicial review proceedings, that there are issues in the suit which deserve further investigations, the Court is enjoined to preserve the substratum of the suit so that at the conclusion of the case, its decision will not be merely an academic exercise. The Court therefore has a duty to ensure that its proceedings are geared towards the achievement of a meaningful determination otherwise litigants who come to Court to seek redress therefrom will lose faith in the judicial system if the Courts cannot, during the pendency of the dispute preserve the subject of litigation. In my view the Court must have the power to guard against actions by some of the parties to the suit which are geared towards the dissipation of the subject matter before it before a determination is made one way or the other with respect to the rivalling issues placed before it. In other words, the Court must be in a position to ensure that whatever decision it finally arrives at, the proceedings before it are not seen to have been a circus.

53. That task is easier when the only interests to be considered are those of the protagonists before the Court. However where third party interests are involved, as in this case, the task is more onerous and requires a delicate balancing of the same in order not to unduly protect and promote the interests of one or some of the parties to the prejudice of the others. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** this involves:

> **"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds…there would be no return to the status quo."**

54. It is therefore important for the Court to first identify the competing interests before it in order for it to apply a proper balance.

In this case there are the interests of the shareholders. Whereas the Respondents' have adopted the view that the shareholders, who are the applicants herein do not deserve the Court's indulgence due to what the Respondents perceive to have been their actions or inactions, before the Court arrives at its final determination on the matter, it must presume that the shareholders have an interest, based on their shareholding in the manner in which the Company is being run. Consequently, whatever property they have in the Company ought to be protected as far as the circumstances of the case permit.

55. The second interest is that of the persons or entities whose assistance have been enlisted by the receiver to keep the Company afloat. In this case, these are the interested parties herein with whom the Respondents have entered into an arrangement to facilitate the payment of sums of money to the depositors. In order for them to undertake this venture, they ought to have some measure of assurance that in the event that they pump in their own resources such resources will be recouped. In this case however the fear of pumping resources has been allayed by NIC itself which was emphatic that the money to be paid out to depositors does not constitute any assets of IBLIR but is a drawing from the Deposit Insurance Fund established under section 20 of the ***KDI Act***. Even if some expenses were to be incurred, NIC of course would have to account for the same since its role under the agreement is that of an agent hence it would be under a fiduciary duty to account to the principal. It therefore cannot be contended that in the event that it incurs some expenses the applicants will have no recourse.

56. The third interests are those of the depositors whose savings are stuck in the process which they have nothing or little to do with. In this case, steps ought to be taken to ensure that as much as possible, their suffering is alleviated so that they are not kept in an indefinite suspense as to whether and when their savings will be paid to them.

57. The fourth interest is the public interest. The public must be assured that those tasked with the regulation of the banking sector are undertaking their mandates appropriately in order to instil confidence in them that wherever they deposit their savings, the same are safe.

58. It therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

59. In this case the Applicants, while appreciating that the IBL unless urgently propped up was in a state of sinking into oblivion, contend that the manner in which the Respondents and the interest parties are conducting themselves do not lend themselves to principles of transparency and accountability and is in fact geared towards achieving the very purpose which they had set out to avoid in the first place. That is however an issue that will await the determination of the Motion. Pending that determination this Court must however ensure that the substratum of the Company will be in the place when the hour of reckoning comes to pass.

60. The role of a receiver, generally, is to enter into the management of the company under receivership, assess its viability and determine whether the Company can be salvaged or in beyond redemption. It is however my view that contrary to the experience of receivership in this country where the tendency is to milk the Company dry before hurriedly jumping ship, a prudent receiver ought to start from the premise that everything ought to be done in order to facilitate the company being resuscitated. Therefore whereas the receiver is empowered to take whatever appropriate steps necessary to sure that the Company does not degenerate further into the state of abyss, it ought as much as possible manage and run the company as a going concern. This in my view, and this is supported by the Corporation's position, is the principle behind section 45 of Cap 487 C which authorizes the Corporation to *inter alia* carry on the businesses and manage the assets, liabilities and affairs of a problem institution in the name and on behalf of that institution until such appointment is revoked.

61. In this case the Respondents have identified NIC as the entity with the competency to undertake these steps on its behalf and advice it accordingly. In my view, such an action cannot unless otherwise shown be faulted. The question that the Court has to deal with is, at this stage of the proceedings, how far should NIC undertake such mandate in order not to render these proceedings superfluous?

62. During the hearing of the earlier application for conservatory orders, the Respondents position was 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*."**
> [Emphasis mine]

63. It was therefore clear that the exclusion and transfer of the assets and liabilities of the IBL would await the outcome of the forensic investigations and that the same would be in accordance with the law. Whereas the Respondents did not reveal the exact nature of the investigations that were being undertaken the impression created was the said investigations were a tedious exercise that would not be completed easily and not within a time frame that was capable of being determined with precision. This Court, of course cannot surmise as to whether the time lapse between the date of the earlier ruling and 21st June, 2016,

the said investigations had been substantially conducted in order to enable the Respondents decide to embark on the exclusion and transfer of the Bank's IR's assets and liabilities proper as opposed to just signalling the commencement of the process.

64. The question that forms the crux of the instant application is whether vide the press release dated 21st June, 2016, the Respondents signalled that there was a move towards the actual exclusion and transfer of the assets and liabilities of the IBL in order to signify a change in circumstances from those that prevailed at the time of the delivery of the earlier ruling.

65. I have on my part gone through the said press release and all paragraphs of the same seem to be in tandem with the circumstances prevailing at the time of the delivery of the said ruling save for the last paragraph of page 1 of the said press release. The material part of the paragraph states as follows:

> ***"Subject to a due diligence and contract review, and following negotiations, KDIC will dispose of, and NIC will assume, a portion of the remaining verified deposits along with certain other assets and liabilities."***

66. The position adopted by the Respondents and interested parties is that the assumption of the said portion of assets and liabilities is not in the offing and that it is subject to due diligence, contract review and negotiations. The Applicants however contend that in the press release of 31st March, 2016, it was expressly stated that a due diligence review had already been undertaken. That statement however was to the effect that the due diligence that was undertaken was on deposits and loans. Whereas it did not expressly mention other assets, the press release of 21st June, 2016 itself is also silent on the other assets. Whereas, NIC contends that it has to carry out its own due diligence, the press statement is silent as to who is mandated to carry out this due diligence.

67. Without making a definitive finding on the issue, from the press release of 31st March 2016 it seems that very little progress had been achieved by then. In fact the respondents estimated that in three months from then significant progress would have been made. Going by the contents of the press release of 21st June, 2016, in which it was stated that "progress has been made towards a resolution of IBL receivership" taken together with the said timelines of three months, it is clear that the circumstances prevailing at this point in time cannot be said to be the same as it was on 31st March, 2016 when the earlier ruling was delivered.

68. I have on my part perused the agreement entered into between Kenya Deposit Insurance Corporation and NIC Bank Limited dated 21st June, 2016 and from the contents of paragraph 1.2 thereof, there seems to be no mention of the intention by NIC to acquire the assets and liabilities of the IBL. This position was confirmed by NIC whose position is that from the agreement, none of the matters contemplated by the appointment of NIC as an Asset and Liability Consultant include the disposal, transfer or take-over of any of the assets of IBLIR. In fact according to NIC, the fear that IBLIR's assets will be disposed of as the result of the appointment of NIC as the Asset and Liability Consultant is misplaced and no assets or liabilities will or can be disposed of until NIC has conducted a proper due diligence and determined the viability of IBLIR. Further NIC does not anticipate that it will be able to establish this before the expiry of the first term of the agreement which is not until 13th October, 2016.

69. This agreement however is not completely in tandem with the press release dated 21st June 2016 where it is expressly stated that "*KDIC will dispose of, and NIC will assume, a portion of the remaining verified deposits along with certain other assets and liabilities".* This statement was silent with respect to the timelines for the intended action.

70. As stated hereinabove this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell. I associate myself with the holding of Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

> **"It is an affront to the rule of law to…render nugatory an order of Court whether real or anticipatory. Furthermore… parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."**

71. I therefore agree that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

> **"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."**

72. In my view, since there cannot be any serious challenge to the agreement between the Respondents and NIC aforesaid, and since NIC is given the mandate to analyse and assess the assets and liabilities of the IBLIR on behalf of the KDIC; to identify and assist KDIC in making an assessment of the quality and risk of the portfolio of IBLIR; advice KDIC on the activation, negotiation, restructuring and collection of certain assets of IBLIR; determine which part of the portfolio maybe disposed of by KDIC and assumed by NIC; determine and agree with KDIC a pay-out process and programme for depositors of IBLIR; review branch network and other assets of IBLIR; and disburse all IBLIR depositor funds on behalf of KDIC, it cannot be said that the assets of the IBLIR must be disposed of for NIC to undertake its obligations under the said agreement more so as it is expressly provided that the assumption of the agreement will contain indemnities by KDIC protecting NIC against any claims by creditors or shareholders of IBLIR or third parties. Further the position adopted by NIC is that the money to be paid out to depositors does

not constitute any assets of IBLIR but is a drawing from the Deposit Insurance Fund established under section 20 of the ***KDI Act*** hence none of the matters set out in the Agreement appointing NIC as Asset and Liability Consultant prejudice the Applicants in any way or otherwise seek to alter the present status of IBLIR which is in any event already under receivership. In other words, NIC's position was that it does not need to dispose of any of the assets and liabilities of IBLIR in order to fulfil its obligations under the said agreement.

73. Therefore in order to protect the interests of the parties herein and while resisting the temptation to trespass onto the merits of the substantive Motion whose hearing and determination is still pending, I make the following orders pending the hearing and determination of these proceedings and subject to any orders that may have been made by the High Court in respect of the transactions giving rise to these proceedings:

> **(1). That subject to the orders issued herein Kenya Deposit Insurance Corporation and NIC Bank are at liberty to continue with terms of the agreement entered into between them dated 21st June, 2016.**
>
> **(2). That subject to the orders issued herein, this Court declines to vary or stay the terms of contents of the press release dated 21st June, 2016.**
>
> **(3). That save for what may be realised from loan repayment that may be required for the purposes of paying depositors and defraying the expenses required for the implementing the said agreement the Respondents shall not dispose of other assets of IBLIR pending the determination of these proceedings or other orders of this Court.**

74. The costs of this application will be in the cause.

75. Orders accordingly.

Dated at Nairobi this 29th day of June, 2016

G V ODUNGA

<u>JUDGE</u>

<u>Delivered in the presence of:</u>

Mr Kilukumi and Wandabwa for the Applicants.

Mr Ouma for Mr Chege for the 1st Respondent

Mr Murgor for the 2nd Respondent

Mr Ohaga for the 1st, 2nd and 4th interested parties

Miss Kogweno for the 3rd interested party

Cc Muruiki