REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 11 OF 2016

ROOT CAPITAL INCORPORATED...PLAINTIFF/APPLICANT

VERSUS

TEKANGU FARMERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT/RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED……...............……INTERESTED PARTY

RULING

On the 11th July, 2016 the applicant filed in this Court a suit against the respondent seeking for the following prayers:-

> ***"a) A Declaration that the plaintiff is entitled to a cash cover for a minimum sum of US$292,190.96;***
>
> ***b) A freezing order binding the funds held by Co-operative Bank of Kenya Limited, Karatina Branch in Account Nos. 01120059745100 and 01120059745101 and/or any other or further funds held in any other bank accounts held by the defendant as may be directed by the honourable court pending assessment of the sums payable under prayers c),d)and e);***
>
> ***c) Special damages in the sum of US$ 292,190.96;***
>
> ***d) Interests thereon at the rate of 16.5% per annum from 05/07/2016 until payment in full;***
>
> ***e) Cost of the suit together with interests at court rates from the date of judgment until payment in full."***

Alongside the suit, the plaintiff also moved this Court by way of a motion dated 21st July, 2016 seeking several interim orders initially pending the hearing and determination of the motion itself and subsequently pending the hearing and determination of the suit in which the motion has been filed. On 22nd July, 2016 I issued an *ex parte* interim order pending the hearing of the motion *inter partes* and therefore when the motion came up for hearing *inter partes* on 27th July, 2016 all that the court was concerned with was primarily the prayer for an interim order pending the hearing and determination of the substantive suit. This prayer is couched in the following terms:-

> ***"3. That pending the hearing and determination of this suit, the honourable court be pleased to issue a freezing order binding the funds held by the Co- operative Bank of Kenya Limited, Karatina Branch in account Nos. 1120059745100 and 1120059745101 both in the name of the defendant to a sum equivalent to US$ 292, 190.96 or the total of such lesser sums as may be***

available in the said accounts;"

The motion is supported by two affidavits sworn respectively on 21st July, 2016 and 26th July, 2016 by Peter Onguka who has described himself as the Regional Risk Manager of the Plaintiff.

What I gather from the affidavits in support of the applicant's motion is that sometimes in May, 2013 the applicant and the respondent entered into a loan agreement according to which the applicant disbursed the sum of US$ 229, 235.00 to the respondent for purposes of construction of coffee factories. The loan was to be repaid in five instalments between the 1st January, 2014 and 1st July, 2014 at the rate of 11% interest per annum on simple reducing balance basis but subject to an additional 5.5% interest in the event of default.

In the meantime the loan was secured by a first ranking fixed and floating charge over the assets of the defendant.

An additional sum of US$ 40,000.00 was advanced to the defendant in the course of implementation of the defendant's project and so a supplementary agreement on similar terms was executed between the two parties on 29th November, 2013.

It is the plaintiff's case that the defendant has breached the two agreements, and defaulted in repayment of the agreed instalments on the dates due and thus rendering the entire principal sum of US$ 229,235.00 due and payable plus the sum of US$ 62,955.96 made up of accrued interest as at 5th July, 2016.

According to plaintiff, the option of realising its security through the appointment of a receiver manager is untenable since the leadership of the defendant is hostile and chances are that farmers will not deliver their produce to the defendant if it is placed under receivership; it is for these reasons that it has sought the order of this Court for what it has described as a "cash cover" to freeze the defendant's bank accounts pending the hearing and determination of the suit herein.

The defendant opposed the motion and filed a replying affidavit and grounds of objection to that effect; it is sworn by Eliud Maina Gatimu who has described himself as the secretary manager of the respondent. The affidavit has largely dwelt on matters of law which ordinarily ought to be raised in the grounds of objection and in the submissions by counsel.

The defendant does not outrightly deny the loan agreement between it and the applicant; however, it is its position that being a co-operative society, the defendant is governed by the provisions of the **Co-operative Societies Act, Cap 490** in all its operations including the exercise of its powers to borrow. Besides the substantive law, the defendant is also governed by its by-laws. The defendant contends that the loan agreement was contrary to certain provisions of the parent law and the defendant's by-laws and to that extent the agreement is illegal and unenforceable.

The loan, according to the respondent was only meant to fleece innocent coffee farmers and the terms of the agreement were in any event unreasonable, oppressive and unconscionable.

A perusal of the rival affidavits does not reveal any major contention on what I think are the essential facts; for instance, there is no dispute that there is an existing contract executed between the parties; there is also no dispute that the plaintiff deposited certain amounts of money in the respondent's bank account in accordance with its instructions. At least this is what I gather from the uncontroverted exhibits attached to the supplementary affidavit of Peter Onguka advising where the money should be deposited and the remittances by the plaintiff to the specified bank account. It does not appear to be in dispute that the money advanced was not repaid as agreed.

Two major questions arose when the application came up for hearing inter partes and in my humble view it is the answers to these questions that are in contention and on which this application turns. The first of these questions is whether the plaintiff is a juristic person capable of suing and being sued; secondly, is

the question whether the contract between the appellant and the respondent is void for illegality and therefore unenforceable.

As for the first question the plaintiff is described in the plaint as *" a not for profit corporation incorporated in the commonwealth of Massachusetts in the United States of America and operating a branch office in Nairobi Kenya."* I understand this statement to mean that the plaintiff is a foreign company operating in Kenya; however, from the available material before me, there is none that demonstrates that the plaintiff is registered as a company either in a foreign company or in this country.

The only proof that a company is duly registered and it is a body corporate capable of exercising all the functions of an incorporated company including the power to sue is a certificate of incorporation given under the hand of the registrar of companies; this certificate was initially issued under **section 16(1)** of the now repealed **Companies Act, Cap. 486** of the Laws of Kenya for companies incorporated in Kenya. Under **section 17** of that Act, a certificate of incorporation issued by the registrar in respect of any association was conclusive evidence that all the requirements of the Act in respect of registration and matters precedent and incidental thereto had been complied with and that the association was a company duly authorised to be duly registered under that Act.

As far as foreign companies are concerned, **section 366(1)** of the repealed Act required such companies which established a place of business in Kenya to deliver certain documents to the registrar of companies in proof of the fact that they are duly registered as such in their countries of their origin; amongst the documents required were a certified copy of the charter, statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of the company.

Once delivered the registrar would under **section 367** of the Act certify under his hand that the company has complied with the provisions of the Act and more importantly for our purposes, the certificate issued would be conclusive evidence that the company is registered here as a foreign company for the purposes of the Act. A certificate issued by the registrar to a foreign company under **section 367 (1)** of the Act had the same legal effect as that issued to a locally incorporated company under **section 16(1)** of the Act in the sense that it would operate as if it was a locally registered company.

I have had to make reference to the repealed Companies Act because it was the law in force when the contract in issue was executed. The current law is the moment is the **Companies Act, 2015** which came into force on 15th September, 2015. **Sections 16 and 17** relating to issue of a certificate of incorporation and the effect of registration of a company in the repealed Act have been retained as **sections 18 and 19** of the new **Companies Act 2015**.

The registration of foreign companies is now captured under **Part XXVII of the Companies Act, 2015**; section 974. (1) thereof is to the effect that a foreign company shall not carry on business in Kenya unless it is registered under this Part. The procedure for registration is prescribed under **section 975.(1)** of the Act; amongst the documents an applicant for registration must produce is a certified copy of a current certificate of the foreign companies incorporation or registration in its place of origin, or a document of similar effect. (**See section 975. (3)(a**)). Once the company has been registered the registrar issues to the company with a certificate of registration **(section 975. (4)(b)).** And under **section 975(7),** the certificate of registration is conclusive evidence that the requirements of the Act have been complied with and that the company is duly registered as a foreign company under the Act.

It is clear from both the repealed Act and the new Act that for a company to carry out the functions of an incorporated company it must be registered either under the repealed Act or under the new Companies Act, 2015; the need for registration applies to foreign companies as much as it applies to local companies. Irrespective of whether a company was registered under the repealed Act or the Companies Act, 2015 the only conclusive proof that either of the Acts has been complied with and a particular company has been duly registered and thus empowered to perform the functions of a duly registered company is a certificate of registration.

When the applicant's legal capacity was contested, a certificate of registration issued by the registrar of

companies showing that the applicant is duly registered in this country as a foreign company would have sufficed to show that the provisions of the repealed Companies Act, Cap 486 or the Companies Act, 2015 were complied with and that the applicant has been certified as a juristic person with legal capacity to perform such tasks as can only be performed by duly registered companies such as filing suits.

I did not hear counsel for the applicant submit that such certificate exists or that the provisions of the law have been complied with in this regard; instead, the learned counsel for the applicant referred me to a copy of a "letter of authority" from the applicant and which was attached to the supplementary affidavit of Peter Onguka authorising him to swear affidavits and execute all documents relating to the current suit as a proof that the applicant is an incorporated company. With due respect to the learned counsel, such a letter cannot be deemed to be conclusive evidence that the applicant is duly registered here as a foreign company and has complied with the Act either as it was before repeal or as it now stands. The Act is clear as to what conclusive evidence of incorporation of a company is and hence its very existence. In the absence of such evidence, the only inference I can draw, based on the material before me, is that the applicant is not what it alleges to be; it is not a company duly registered either under the repealed **Companies Act, Cap. 486** or under the **Companies Act, 2015**; accordingly, I am not satisfied that it has the legal capacity to institute the present suit.

The second question which preoccupied the rival submissions by the learned counsel for the applicant and the respondent is the legality or lack thereof of the contract executed by their respective clients.

In his submissions, counsel for the respondent made reference to several Acts of Parliament which, in his view, were flouted by the parties to the contract in issue; he proceeded on the premise that being a co-operative society, the respondent is governed in its operations by the **Co-operative Societies Act, Cap. 490** and the rules made thereunder and failure to observe the provisions of that Act rendered the contract illegal and unenforceable. To be precise, counsel referred to **sections 44** and **49** of the Act and clause 24 of the respondent's by-laws.

Section 44 of the Act falls under **Part X** of the **Act** which deals with property and funds of co-operative societies; it says:-

> ***44. Restriction on borrowing***
>
> ***A co-operative society may receive loans from persons who are not members only to such extent and under such conditions as may be prescribed by its by-laws or by rules under this Act, and for the purposes of this section a deposit of money under a hire-purchase agreement shall be deemed to be a loan.***

Clause 24 of the respondent's by-laws is in tandem with this provision of the Act; apart from authorising the respondent to accept loans from members and non-members, part (b) of that clause says that the respondent may charge its assets to secure the loan except that the authority to charge can only be granted in a general meeting of the Society.

Section 49 of the Act is more specific that in order for a Society to charge its assets it must secure a special resolution from the general meeting; it states:-

> ***49. Creating charge over society's property***
>
> ***A co-operative society may from time to time, charge the whole or any part of its property, if its by-laws expressly empower it to do so, subject to a special resolution by the general meeting.***

Counsel for the respondent urged there is no evidence to demonstrate that a general meeting was convened or that a special resolution was obtained from such meeting to obtain the loan and charge the societies assets.

Whether a general meeting was convened and a special resolution to borrow funds passed is largely a

question of fact and therefore it is necessary to go back to the affidavit of Peter Onguka and consider his depositions on this question. I have found two paragraphs of that affidavit to be pertinent; in paragraph (6) Mr Onguka swore that the respondent's officials presented extracts of minutes of the management committee dated 23rd April, 2012 in which a resolution to borrow the money was passed. A copy of the resolution is exhibited to his affidavit. The relevant minute was couched in these terms:-

> ***<u>"MIN 87/04/2012 APPLICATION FOR LOAN FROM ROOT CAPITAL KSHS 17,000,000/=</u>***
>
> ***The committees were informed of the above orgarnization (sic) which can loan the society the above amount for construction of Mutathi-ini Factory. The committee unanimously agreed that the application of the above loan be filled and forwarded to the said institution. This was proposed by Mr Githae Gathika and seconded by Mr Patrick Kiberenge."***

In paragraph (7) of the affidavit, Mr Onguka deposed that the resolution was backed by "*a members (sic) resolution passed at the annual general meeting of the society held on 23rd January, 2013.*" Here again he attached to his affidavit a copy of the notice of the general meeting dated 2nd January, 2013 and a copy of the minutes of the annual general meeting in support of his contentions.

The resolution referred to in the meeting of 23rd January, 2013 is captured as follows:-

> ***<u>"MIN: 8/1/2013 CONSTRCUTION OF MUTATHIINI FACTORY</u>***
>
> ***There were 2010 members present.***
>
> ***The members approved the construction of Mutathi-ini coffee buying centre to a factory. The members were very happy for the issue of transportation of coffee to Tegu factory will be history. This will also increase membership to our society. This was proposed by M/no 602 Kinyua Munyi and seconded by M/no 454 Agnes Wambui."***

What I gather from the minutes of the two meetings is that the so-called management committee either applied for the loan or resolved to apply for the loan prior to the convening of the respondent's members' general meeting. The resolution to borrow and subsequently charge the respondent's assets emanated from a committee and not from the general meeting.

Although Mr Onguka deposed that the general meeting subsequently backed the resolution taken by the management committee to borrow the loan, I do not read such ratification in the relevant minute; all I can see is that the members approved the construction of either a coffee buying centre or a factory. There is no suggestion whatsoever that they approved the borrowing of a certain amount of money from the applicant or from any other institution. Indeed the notice calling for the meeting did not include, as one of the items in the agenda for the meeting, the borrowing of Kshs 17,000,000.00 or the sum of US $ 229, 235.00 or any other sum.

The conclusions that I can reasonably make out of Mr Onguka's depositions and exhibits attached to his affidavit are first, there was no resolution by the general meeting of the respondent authorising the respondent to borrow and second, there was no special resolution to charge the respondent's assets.

It follows that when the applicant and the respondent proceeded as if the latter had been authorised to borrow by its members in a general meeting and that a special resolution to charge its assets had been taken when none of these things took place, they thereby breached **sections 44** and **49** of the Co-operative Societies Act and **clause 24** of the respondent's by-laws.

The question that then follows is what was the net effect of this breach? Was the ensuing contract thereby rendered illegal and therefore unenforceable? To answer this question I have to consider the law on what amounts to an illegal contract and in so doing I have to ask myself whether by breach of the statutory and regulatory provisions, the contract between the two parties was so vitiated to the extent that it was

rendered illegal and unenforceable.

An aspect in the contracts considered illegal is that of being contrary to public policy. Ordinarily, and based on the doctrine of *laisser faire*, when entered into freely and voluntarily, contracts must be held sacred and enforced by courts which, ordinarily, would proceed on the assumption that their duty is to implement the reasonable expectations of the parties. (See the **Law of Contract by G.C. Cheshire and C.H.S Fifoot, 5th Edition, at page 278);** however, because of public welfare considerations, not every contract that has been freely and voluntarily entered into is enforceable. According to **Fifoot and Cheshire (page 278)**, public policy will be served not by enforcing but by denouncing such contracts. The particular aspects of public welfare to which the Courts have paid attention in this regard are the safety of the state, the economic and social well-being of the state and its people as a whole, and the administration of justice. Any contract which injures or which has a direct tendency to injure any one of these public interests is deemed illegal and void. **(See Fender versus John-Mildman (1938) AC 1 at pages 12-13.)**

> ***"The doctrine by which contracts are held to be void on the ground of public policy is based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals." (As per Farrel LJ in Wilson versus Carnley (1908) 1KB 729 at pages 739-40).***

The principal was again captured by Lord Truro in **Egerton versus Brownlow (1853) 4HL Cas** at page 196 where he stated:-

> ***"Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good-which may be termed the policy of the law, or public policy in relation to the law"***

These passages have been cited by Cheshire and Fifoot in their book at page 279. According to these authors illegal contracts are usually divided into two classes-those illegal at common law and those prohibited by statute; both offend public policy and there is a bit of literature on this classification but the category we are most concerned with at the moment is that class of contracts prohibited by statute, having come to the conclusion that the contract in issue appears to be contrary to certain provisions in the Co-operative Societies Act.

According to **Halsbury's Laws of England (Contract) Volume 9(1) (Reissue) at paragraph 867** many contracts are affected by statutory provisions, (and for this purpose statutory provisions would include regulations made under statutory powers) but the effect of such provisions varies from one statute to another.

In some cases, the statute may on its proper construction prohibit the creation or enforcement of rights under the contract; in other cases the statute may not directly prohibit the contract, but may affect it indirectly by virtue of the principle that a contract with a criminal purpose (including criminality by statute) is illegal at common law; and in some cases statute expressly makes a contract 'void'.

Certain contracts not complying with statutory provisions are usually described as unenforceable. The loan agreement entered into by the parties would fall into this category for the sole reason that it is contrary to **section 44** and **49** of the **Co-operative Societies Act** which by and large control or regulate the powers of the respondent to borrow by prescribing explicitly the conditions precedent for entering into loan agreements such as the one executed between the applicant and the respondent. While the Act does not prohibit the applicant from borrowing, it prohibits it, by implication, from borrowing contrary to those provisions that regulate the manner in which borrowing powers may be exercised; it is from this perspective that I am persuaded that the loan agreement, the subject of this suit, is prohibited by statute and therefore unenforceable.

One of the local cases in which this question of enforcement of illegal contracts has been addressed is the case of **Patel versus Singh (No.2) (1987) KLR 585**. In this case, the appellant and the respondent while

resident in Kenya entered into a contract of lending money in foreign currency in India. The respondent failed to repay the amount, prompting the appellant to file a suit in the High Court. The High Court dismissed the suit on the ground that the claim was unenforceable as it was tainted with illegality as being in contravention of the **Exchange Control Act (Cap. 113).** The appellant appealed on the ground that the funds invested in India by residents in Kenya were exempted from the operation of the Exchange Control Act and therefore the contract was not tainted with illegality.

The Court of Appeal (Nyarangi, Gachuhi and Apaloo JJA) dismissed the appeal and held that the contract entered into by the appellant and the respondent was illegal and contrary to the provisions of **section 3(1)** of the **Exchange Control Act** and was therefore illegal *ab initio* and it was unenforceable. Nyarangi JA cited with approval Devlin LJ in **Archbolds (Freightage Ltd versus S Spanglett Ltd (1961) 1QB 374** where he said at page 388 that:-

> ***"The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if inorder to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."***

Apaloo JA agreed but was at pains to dismiss the appeal; this is what he said in his judgment:-

> ***"Had I felt able to give judgment in favour of the appellant, I would have done so with complete satisfaction. There is, to my mind, no doubt that the sum claimed in the plaint was lent to the respondent by the appellant and had this matter not been affected by legislation, namely, the Exchange Control Act, judgment in favour of the appellant ought to have been a foregone conclusion."***

The principle has been followed in the High Court case (Githinji, J) in **Mohamed versus Attorney General (1990) KLR 146 and Nyeri Civil Appeal No. 40 of 2001, Nyeri County Council versus Monicah M. Mwangi (Kasango, J**) where it has been held that no court ought to enforce an illegal contract or allow itself to be made instrument of reinforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality.

It is this clear that a contract that is illegal is not enforceable and it is a nullity or void *ab initio.*

The question that follows and which I think would be relevant to the applicant's suit is, would money paid under an illegal contract be recoverable? According to **Halsbury's Laws of England** (supra) **paragraph 883** a claim for the return of money paid over in these circumstances may take one of the four basic forms. It may be: (1) a personal action for a debt (for instance, on a loan); (2) a personal restitutionary claim for money had and received; (3) an action in tort for the return of identifiable coins or notes or their value; or (4) a proprietary claim in equity even where the money has been paid into a mixed fund. However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received.

Most importantly and for purposes of determination of this application, it has long been held that where a plaintiff seeks to recover money paid under an illegal contract the rule is that he may not do so unless he can make out his cause of action without reliance on the illegal contract **(see Berg v Sadler and Moore [1937] 2 KB 158)**.

But in an appeal urged in the Supreme Court of United Kingdom **in Patel versus Mirza (2016) UKSC**

42, and whose decision was delivered on 20th July, 2016, barely a week before this application was urged, the Court appeared to depart from this age-old principle and restricted the application of the maxim *ex turpi cause oritur non actio* only to those actions seeking enforcement of what would otherwise be illegal contracts. According to the Supreme Court, just as policy considerations would bar a claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefited from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is sustainable.

In the appeal before the Court, Mr Patel transferred sums totalling £620,000 to Mr Mirza for the purpose of betting on the price of RBS shares, using advance insider information which Mr Mirza expected to obtain from RBS contacts regarding an anticipated government announcement which would affect the price of the shares. Mr Mirza's expectation of a government announcement proved to be mistaken, and so the intended betting did not take place, but Mr Mirza failed to repay the money to Mr Patel despite promises to do so. Mr Patel thereupon brought this claim for the recovery of the sums which he had paid. The claim was put on various bases including *contract* and *unjust enrichment*.

The agreement between Mr Patel and Mr Mirza amounted to a conspiracy to commit an offence of insider dealing under section 52 of the Criminal Justice Act 1993. In order to establish his claim to the return of his money, it was necessary for Mr Patel to explain the nature of the agreement. The judge in the court of first instance dismissed the claimant's claim and held that Mr Patel's claim to recover the sum paid was unenforceable because he had to rely on his own illegality to establish it. He appealed to the Court of Appeal which allowed his claim and gave him judgment for £620,000 with interest. Mr Mirza appealed to the Supreme Court.

The Supreme Court considered the various decisions which have been given on this issue over the years and came to the conclusion that a defendant's enrichment is *prima facie* unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not), an event or a state of affairs, which failed to materialise.

Talking of policy considerations that inform the doctrine of illegality Lord Toulson who delivered the leading judgment said (at paragraph 99):-

> "***Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."***

The learned judge cited with approval Bingham LJ in **Saunders v Edwards [1987] 1 WLR 1116, 1134**, where he addressed this question and said:-

> "***Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct."***

While the Court agreed that the contract between Patel and Mirza was illegal, it was of the view that there was no logical basis why considerations of public policy should require Mr Patel to forfeit the moneys which he paid into Mr Mirza's account, and which were never used for the purpose for which they were paid; such a result, according to the Court, would not be a just and proportionate response to the illegality. The Court also cited with approval Lord Thurlow LC's passage in **Neville versus Wilkinson (1782) 1 Bro CC 543 at page 547** where he said that:-

"[I]n all cases where money was paid for an unlawful purpose, the party, though particeps criminis, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before."

That said and, subject to the concerns I have raised on the applicant's capacity to sue and proof of its claim, there is a glimmer of hope for the applicant's suit if only it can be put in its proper perspective; I am not satisfied, however, there is any possibility that it can succeed in its present state and for this reason I hold that the applicant's motion dated 21st July, 2016 is misconceived and without basis. It is hereby dismissed with costs to the respondent.

Dated, signed and delivered in open court this 19th August, 2016

Ngaah Jairus

JUDGE