REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS, COMMERCIAL DIVISION)

CIVIL SUIT NO. 642 OF 1998

KAMLESH MANSUKHLAL PATTNI.....1ST PLAINTIFF

WESTMONT HOLDINGS SDN.BHD.....2ND PLAINTIFF / APPLICANT

VERSUS

CENTRAL BANK OF KENYA..... DEFENDANT

TITLE BY WAY OF COUNTERCLAIM

CENTRAL BANK OF KENYA.....PLAINTIFF

VERSUS

KAMLESH MANSUKHUL PATTNI.....1ST DEFENDANT

WESTMONT-HOLDINGS SDB.BHD.....2ND DEFENDANT

UHURU HIGHWAY DEVELOPMENT LIMITED.....3RD DEFENDANT

JUDGMENT

NAIROBI HCCC NO. 642 OF 1998; COMMERCIAL DIVISION

JUDGMENT

Introduction

1. This case is an offshoot of the infamous hydra-headed *Goldenberg scandal* of the early 1990's. That is disclosed in some of the documents filed by the parties which I shall later refer to. They show that the first plaintiff's hotel, the Grand Regency Hotel, was seized and put into receivership by the Central Bank of Kenya, the Defendant herein, in an attempt to recover *Goldenberg*-related money from the first plaintiff. The scandal and some of those overt actions spawned a veritable concatenation of events, including arrests, a commission of inquiry, and a slew of suits too numerous to list.

2. The present suit has a long and chequered history. Eighteen years have passed since it was filed on 26th October, 1998. It, unfortunately, reflects a litany of the admixture of things that can go wrong in the management of a suit: it has passed through the hands of more than 10 judges – six now retired –

including Justices Mulwa, Khamoni, Mbaluto, Mwera, Ringera, Khaminwa, Kariuki, Musinga, Kimaru, Kamau, and I.

3. At one point, the suit was dismissed under Order XVI Rule 6 of the old Civil Procedure Rules for failure of any party to move the court in the six year period between December, 2002 and April 2008; an application for reinstatement was dismissed by the court; then the suit was reinstated by the Court of Appeal; it has been subject to a multitude of other applications necessitating numerous rulings; the nature of the suit has mutated substantially over the years with the pleadings undergoing substantive amendments; counsel acting for some parties have changed on a round-robin basis; witnesses have become unavailable over the years due to delay in completion. This is the sort of litigation whose run in this court must now, finally, come to an end without further delay if the pillars of expedition and conclusion in the administration of justice are to be respected.

4. The reinstatement of this suit as ordered by the Court of Appeal invoked directions for expedited hearing *"based on the plaint dated 26th October, 1998, as amended on 18th October, 1999 with further amendments if necessary"* ***[1]***. When the file came before me after reinstatement orders, I noted that there had been numerous subsequent pleadings on the record which the Court of Appeal had made no mention of. As such there was un-clarity as to the status of parties and pending pleadings and applications. Accordingly, by consent, I directed the parties to submit on that question.

5. After hearing and considering the parties' submissions, I made a determination by a ruling dated 3rd October, 2015, that the proper parties in the claim and counterclaim are those shown in the title of this judgment. By the ruling, and wary of mismanaging the case, I also determined that all pending applications in the suit had abated. Parties were granted liberty to complete filing their respective pleadings. Liberty to apply was also granted, but remained un-utilized as at the close of hearing, and no appeal was filed against the ruling either.

6. By a notice of preliminary objection dated 8th May, 2015, Central Bank of Kenya argued that the 2nd Plaintiff, Westmont Holdings SDN had no capacity as a party to file the appeal in the Court of Appeal, since it had been wound up on 21st May, 2002; that the failure to amend the suit party on time falls afoul of the Limitations of Actions Act. This Court decided that the preliminary objection would be determined together with the merits in the main suit. Hearings on the said objection and on the merits of this matter were held between 4th June, 2015 and 29th June, 2016. All parties thereafter filed written submissions in respect of both the objection and the merits, which were highlighted in court on 20th September, 2016.

The Parties

7. The 1st Plaintiff is Kamlesh Mansukhlal Pattni ("Pattni") a businessman carrying on business in Kenya, and at the material time having interests the hotel industry. He is also sued as the 1st Defendant in the counterclaim. Mr Pattni was represented by Mr Kalove whose brief was generally held by Mr Adala.

8. The 2nd Plaintiff, Westmont Holdings SDN.BHD ("Westmont") described itself in the plaint as a company registered in Malaysia. It seeks a refund of a deposit it alleged it paid the Defendant Central Bank of Kenya for the purchase of the Grand Regency Hotel (GRH). It is also the 2nd Defendant in the counterclaim. Counsel acting for Westmont are Mr Paul Muite SC and Mr Muriithi.

9. The Defendant in the claim is the Central Bank of Kenya ("CBK"). By Section 3(3) of the then Central Bank of Kenya Act, it was empowered to exercise all Central Bank functions and prerogatives as the regulator of the banking sector in Kenya. Its objects were to, inter alia, assist in the development and maintenance of a sound monetary, credit and banking system in Kenya conducive to the orderly and balanced economic development of the country and the external stability of currency. It also served as the banker and financial adviser to the Government.it was re-established under the Constitution, 2010. It is the defendant in the claim and the plaintiff in the counterclaim. CBK was represented by Mr Murgor and Mr Ouma.

10. Uhuru Highway Development Limited ("UHDL"), the 3rd defendant in the counterclaim is a company registered in Kenya and was at the material time proprietor of the hotel business known as the Grand Regency Hotel ("GRH"). It is represented by Mr Ngacha and Mr Ibrahim.

The Preliminary Objection

11. CBK's Preliminary Objection, which was argued at the main hearing, is dated 8th May, 2015 and states:

> **"(a)** ***That pendency of this suit offends the mandatory provisions of the Limitations of Action Act Cap 22 of the Laws of Kenya, and Order 24 Rule 3(2) of the Civil Procedure Rules.***
>
> ***(b) The purported Suit by the 2nd Plaintiff, WESTMONT-HOLDINGS SDB.BHD has abated and non-existent ab initio;***
>
> ***(c) The 2nd Plaintiff having been wound up is non-existent incapable of donating any powers, appointing any agent, or continuing any suit;***
>
> ***(d) LYNWOOD DEVELOPMENT LIMITED is not, and cannot be a party herein and is an imposter in this purported suit.***
>
> ***(e) This Honourable Court lacks jurisdiction to adjudicate over this suit in the absence of leave to extend the limitation of time.***
>
> ***(f) The Plaintiff's claim is scandalous frivolous, vexatious and an abuse of the process of the court."***

12. I have carefully considered the six grounds raised in Mr Murgor's preliminary objection. Paragraphs (a) and (b) are grounded upon Order 24 Rule 3(2) in that failure of Lynwood to apply to be enjoined as a party within one year after the alleged winding-up of Westmont, resulted in the abatement of the suit. Paragraph (c) depends upon the veracity of the statement in the affidavit of Jasmine See where she avers that Westmont was wound up. Paragraph (e) is underpinned upon extension of time to file suit under the Limitations of Actions Act. It seems to me that all these grounds are only sustainable if full reliance is had on the veracity of the affidavit of Jasmine See, that Westmont was in fact wound-up.

13. Ever since the **Mukisa Biscuit**[2] case, it has been trite law that a preliminary objection must be on a point of law on agreed or undisputed facts. It cannot be raised if any fact has to be ascertained. In the present situation, the affidavit of Jasmine See, not being part of the pleadings, must first be introduced by her in evidence and verified. I do not think that affidavit evidence that is yet to be introduced by the witness satisfies the rule under **Mukisa Biscuit** as to agreed facts, for purposes of founding a preliminary objection.

14. I also take cognizance of the fact that whereas in paragraph (b) of the preliminary objection reference is made to the abatement of suit for failure of substitution of parties within time, the case cited by Mr Murgor of **John Mwangi Chege** [3] concerns an individual party who died and substitutory action was not taken in time. There the court held that the suit had *"abated in law and was dead and non-existent"*. In the present case it is a company, Westmont, that is alleged to have been wound up, and there is no provision in the Civil Procedure Rules on the requirements for substitution upon winding up.

15. I am therefore open-minded to treat all the objections as normal objections in the course of the proceedings, although when referring to a specific objection, I shall refer to it as a preliminary objection.

16. The parties made oral submissions on the Preliminary Objection that were concluded in their written closing submissions and authorities. Mr. Murgor submitted that the suit offends the Limitation of Actions Act since Westmont-Holdings SBD.BHD was wound up on 21st May, 2002. Westmont therefore couldn't

be substituted by any other party through a Power of Attorney as the power of attorney had terminated. In any event, he argued, any substitution should have been done within the one year statutory period provided under the Civil Procedure Rules. It was also Counsel's submission that that period lapsed in 2003, despite this issue being known to the party and its counsel. That the new situation was not brought to the attention of either the High Court or the Court of Appeal during the reinstatement proceedings was also in bad faith.

17. Mr Murgor's first argument was that because the **2nd Plaintiff was wound up on 31st May 2002,** the entire suit herein does not exist, as there is no person natural or statutory and or corporate in existence, or any entity in law properly and legally capable or substituted to take its place in this suit or for any other orders.

18. According to Mr Murgor the non-disclosure argument was founded on the principle discussed in **Rex v Kensington Income Tax Commissioners, Exparte Edmond De Polignac**[4] That case held that a party who fails to make full disclosure of all material facts within his knowledge cannot obtain any advantage from the proceedings, and will be deprived of any advantage he may have already obtained. This is because:

> ***"…he is expected to make full disclosure. He sieves any facts at his own risk because it is the court that determines what is material and not the party applying. The party must nonetheless act in utmost good faith without appearing to steal a march on the court or on the other party."***

19. Counsel submitted that **Section 4(1)(a)** and **(e)** of the **Limitation of Actions Act** imposes a duty on a party to file actions founded on contract, or those claiming equitable relief for which no other period of limitation is provided, to do so within six years. Bringing in Lynwood at this stage without leave, had no legal basis and the suit should be dismissed.

20. Mr. Murgor finally submitted that if the suit is intended to be in the name of the new entity, Lynwood Development Limited, then it collapses *ab initio,* as that entity was not only out of time, but also unknown in law. He thus asked the court to allow the preliminary objection and dismiss the suit.

21. Mr. Adala on behalf of Pattni argued in support of the Preliminary Objection. He stated that he fully supports the issues it raised as regards the cause of action raised by the 2nd Plaintiff being barred by the Limitations of Actions Act. Counsel submitted that by dint of the Civil Procedure Rules, the action, if any had abated on 1st June, 2003 when a non-substitution application was not filed to replace Westmont-Holdings SBD.BHD. He further submitted that the suit by the 2nd Plaintiff should be struck out and that the court lacks jurisdiction to deal with the claim by Lynwood.

22. Mr. Ngacha on behalf of UHDL, the 3rd Defendant in the counter-claim, opted not to argue the Preliminary Objection, and left the matter to the court.

23. Mr. Muite, opposed the preliminary objection submitting that at all material times, Westmont was an agent of Lynwood. Counsel drew the courts' attention to the Westmont bundle of documents filed on 18th May, 2015 and in particular a document dated 1st April 1997 [5] which shows that US $ 3,700,000.00 was remitted by Lynwood to the stakeholders named in the Agreement for sale of the Grand Regency Hotel, discussed later. Counsel also exhibited Lynwood's Bank Statement[6] which showed a debit amount of US$ 3,700,000.00. Counsel also produced a letter by Lynwood appointing Westmont as its agent and an acceptance letter to that effect[7], all supporting the case that Lynwood was the principal and Westmont, the agent in the transaction.

24. Mr. Muite argued that the 2nd Plaintiff amended its pleadings before the close of pleadings, on the strength of the Court of Appeal's ruling granting leave to the parties specifically to amend their pleadings. It was thus and as such, there can be no issue of limitation of time. Senior Counsel, a Principal is entitled to step in and litigate on its own. This had been done through paragraph 2 of the Re-Amended Plaint where agency had been pleaded as allowed under Order 9 Rule 2 of the Civil Procedure Rules.

25. On the issue of Westmont being wound up, Mr Muite submitted that there is no evidence filed in support of this assertion. Thus, since a preliminary objection properly so called proceeds on facts not in dispute, there are no such proved facts. It is for the party seeking to rely on a claim to so demonstrate the undisputed facts. Further, Senior Counsel argued that the Lynwood, as the principal, has naturally stepped in pursuant to the leave of the Court of Appeal. Senior Counsel urged the court to dismiss the preliminary objection, as it is based on a mere technicality.

26. It was further argued for Westmont that under Order 1 Rule 10 of the Civil Procedure Rules, the court has unfettered discretion, exercisable at its own instance, to substitute or add parties, including where there is a bonafide mistake. Counsel cited **James Ochieng Oduol t/a Ochieng and Company Advocates v Richard Kuloba [2008] eKLR** where the court pointed out that its power to order amendment is discretionary, and may be exercised to substitute a party, to correct names of parties or to allow the capacity of suing.

27. In his rejoinder, Mr. Murgor argued that there is an application for substitution of parties dated 21st March, 2014 seeking substitution of Westmont by Lynwood. In the supporting affidavit of Jasmine See as Attorney of Lynwood and previously as attorney of Westmont, she asserts that Westmont was wound up on 21st May, 2002. The said application was, however, not prosecuted. Counsel argued further, that the Court of Appeal did not permit, order or allow substitution but only allowed amendment of pleadings. According to counsel, substitution is not a mode of amendment by any stretch. This affidavit, coming from Westmont the applicant, contains assertions of fact by Westmont which no party has disputed, and being that party's own fact remains undisputed, one of the foundations upon which a preliminary objection can be premised.

28. The issues which the preliminary objection raises, and which are dealt with hereunder, are:

a. What is the effect of the Court of Appeal's order; and

b. Whether the suit before the court is competent.

29. In my view, the suit that was reinstated by the Court of Appeal was that in which the applicant/second plaintiff was Westmont Holdings SBD BHD. The reinstatement order was to the benefit of Westmont. When the matter was reinstated and came again before this court, I pointed out that there was un-clarity as regards who the parties were and what pleadings were the subject of the suit, as so much water had passed under the bridge after the 1998 pleadings. I specifically directed parties to address me on these issues.

30. In clarifying who the parties were in response to my directions, Counsel for Westmont submitted that Pattni, Westmont, and CBK were the parties in the claim, and the reverse in the counterclaim with the addition of UHDL. After the parties made submissions on that question, this court in its ruling of 3rd October, 2014 determined that the parties were as in the suit title, and that included Westmont as the second plaintiff.

31. It is trite law that for a court to have jurisdiction over a matter, and for a suit to be competently before a court, proper parties must be identified before the action can succeed. That is, the parties to the suit must be shown to be proper parties to whom rights and obligations arising from the cause of action attach.

> ***"The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit and, where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned" [8]***

32. The averment in the affidavit of Jasmine See referred to by Mr Murgor that Westmont was wound up on 21st May, 2002[9], in my view amounted to an admission of winding up only when Jasmine See actually took the stand and asserted the same and on cross-examination repeated the same. Thereafter, neither Westmont nor Lynwood coulddispute this fact because the deponent was the holder of powers of

attorney for both companies, and was therefore their mouthpiece. The two exhibits at pages 11-15 of the Westmont documents[10] show that Jasmine See was the attorney of Westmont from 23rd October 2001 and of Lynwood from 5th March 2014.

33. In my view, however, the admission of winding-up by Jasmine See at the point of testifying, does not aid the preliminary objection as a preliminary objection, although it may aid a normal objection in the course of the proceedings.

34. It must also be borne in mind that at the time when this Court directed the parties on 31st July, 2014 to make submissions in clarification of the parties to the suit, nothing was disclosed by Westmont concerning its status, and whether any winding up had occurred. The questions on which the Court sought answers at the time, included:

> ***"1) who are the parties in this suit?***
>
> ***2) [what are the] consequential implications thereon?"***

At that point during the pendency of this suit, the Application for Substitution had been filed but had not been heard. The Court in its aforesaid ruling, inter alia, determined all pending applications as having abated but granted liberty to apply.

35. Westmont's Counsel does not deny that Westmont was wound-up. In fact he admits or asserts in his final written submissions that:

> ***"…although Westmont was wound up at some undetermined point somewhere in the course of these proceedings, it was all the time merely an agent of a disclosed principal…"*** **[11]**

And in paragraph 10 of the notice of motion for substitution filed on 27th March, 2014, Counsel for Westmont stated that the agency relationship (with Lynwood):

> ***"…terminated after Westmont Holdings SDG. BHD was wound up hence the need to substitute the agent [Westmont] with Lynwood Development Limited"***

All this dovetails entirely with the assertion of Jasmine See on winding up referred to above. Ms Jasmine See's Affidavit, aforesaid, reads in relevant part as follows:

> ***"5. THAT Westmont Holdings Sdg. Bhd was wound up on 31st May, 2002***
>
> ***6. THAT this automatically terminated the agency relationship between Westmont Holdings Sdg. Bhd and Lynwood Development Limited"***

36. In addition, this is in tandem with what Jasmine See said during cross-examination, namely that :

> ***"…. I am certain that Westmont was wound up in 2002...."***

When shown the Memorandum of Appeal in Civil Appeal No 118 of 2013 she admitted:

> ***"…It has no disclosure of winding up of Westmont. [But] I had told Joe Nzioka and he said he will make disclosure in due course."***

She later also admitted:

> ***"….A receiver takes over a company in liquidation. Only a receiver has powers to pursue claims… I had no idea the company (Westmont) was in receivership"***

And again she said:

> ***"…in hindsight it looks like all I did for Westmont which was in receivership since 2002, was null and void. All the instructions I gave lawyers on behalf of Westmont if I had no capacity would be void.it would be without capacity…but …I did not know Westmont was wound up. The receiver never sent me any letter or notice to stop me from being a power of attorney holder…It is me who stated in my statement that Westmont was wound up in 2002"***

37. In light of all the foregoing, I am satisfied that there was material non-disclosure to this Court when Westmont maintained a studious silence concerning who the parties were, and the non-disclosure amounted to Westmont stealing a march against CBK and the other parties. It must be remembered that this Court in its ruling of 3rd October, 2014 determined that the pleadings on record were the plaint dated 26th October, 1988 and amended on 18th October, 1999. The next pleading would have been an amended defence. Instead, what followed was the 2nd plaintiff's Re-amended plaint. Further, I had granted liberty to parties to apply. No application to amend was received from the plaintiff.

38. The importance of establishing the *bonafides* of the parties cannot be over-emphasised in this case because there is a letter on record in the file by Pattni's counsel to the Deputy Registrar dated 26th February, 2015, copied to all the parties that puts to doubt the status of Lynwood as a principal. It states, inter alia :

> ***"…We propose seeking an extension of time by 21 days necessitated by the complexity created by an unknown party Lynwood Holdings Limited which has appeared on the scene 14 years after the close of pleadings in the suit, and which, without a Court Order has filed a Re-Amended Plaint substituting its name for that of Westmont Holdings SGN BDH the 2nd Plaintiff in the original suit. This has in turn necessitated the filing of a Re-Amended Defence and Counterclaim by the Defendant to which our client needs to file his Re-Amended Reply and Defence For Counterclaim…"[12]***

39. The above letter clearly shows that Pattni and Westmont, the above two protagonists who were at the centre of the dispute and collaborated on the sale and purchase of the GRH, stand on surprisingly different ground regarding the *bonafides* of the agency of Westmont for and on behalf of Lynwood.

40. Westmont argues that the Court of Appeal's direction that the suit be reinstated and heard on merits "*based on the plaints mentioned with further amendments if necessary"* was a carte blanche for them to introduce amendments willy-nilly. I do not think so. The Court of Appeal's order would have to be read in tandem with the then Order 8 Rule 1 which provided that: a party may, once, without leave of the court, amend any of his pleadings before pleadings are closed. In this case, Westmont having already filed an amended plaint, leave of the court was required for further amendments. It cannot be correct that a party may at any time, at will, file amendments to pleadings that may have consequences on other parties.

41. Does this failure to seek leave amount to a substantive error that would affect the entirety of the suit? I think the court can chastise Westmont, and require that it carries the costs of the amendment, but it seems to me it would be harsh to dismiss the suit on that count alone. In any event, the court has power on of its own motion to allow or refuse amendments of pleadings. In **Bullen and Leake and Jacobs Precedents of Pleadings[13]** it is stated that:

> ***"As a general rule, however late the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise, but of course different considerations will apply to different stages of the proceedings or to the different nature if the amendment sought".***

42. To prove the bonafides of its amendment, however, Westmont sought to demonstrate that it was the agent of a principal, Lynwood, by referring to its Bundle at pages 3-5 and 9-12 and **to Order 9 Rule 3**

(formerly Order 3 Rule 2) of the Civil Procedure Rules. This issue was, however, not explored in the suit since no application for substitution was heard.

43. The issue thus arising is whether there was a competent principal and agency relationship between Westmont and Lynwood, and if so, what does it portend or signify?

44. The agency arrangement between Lynwood and Westmont enabling Westmont to purchase the Grand Regency Hotel is said to be evidenced by and grounded in Lynwood's letter of 12th February, 1997. The letter reads:

> ***"Re: Grand Regency Hotel in Kenya***
>
> ***This to inform you that we have agreed to proceed with the purchase of Grand Regency Hotel in Kenya with the following arrangement with your Company:***
>
> *1.* ***Westmont Holdings Sdn. Bhd. (WHSB) is now officially appointed as the sole agent to represent Lynwood Development Limited in negotiating the purchase of the Grand Regency Hotel in Kenya,***
>
> *2.* ***WHSB is to sign the agreement for purchasing the said hotel and operate the hotel once the purchase is completed,***
>
> *3.* ***Lynwood Development Limited (LDL) will finance the purchase of Grand Regency including all expenses incurred therein and will take over the operation after one year set up time frame as agreed with WHSB,***
>
> *4.* ***WHSB is to provide quarterly financial statement to LDL and set up banking account in Kenya for operation of the hotel,***
>
> ***Lynwood Development Limited reserves the right to appoint our senior management staff to station in Kenya supervising the operation of the hotel is taken over from Mr. Kamlesh Pattni and Central Bank of Kenya in due course.***
>
> ***Signed***
>
> ***Lynwood Development Limited."*** (Underlining for emphasis)

45. By its reply dated 14th February, 1997, Westmont accepted to be Lynwood's agent in the purchase of the Grand Regency Hotel in Kenya and also to implement and carry out Lynwood's instructions as its agent. The agency letter clearly contemplated and intended to grant an authority comprehensive enough to include the negotiation, purchase, completion of purchase transaction and the operation of the GRH after purchase, and to hand over the GRH if required, to Lynwood or its staff .

46. Agency is itself a comprehensive word which is used to describe the relationship that arises where a person is appointed to act as the representative of another. **Cheshire, Fifoot & Furmston's, Law of Contract,** states that:

> ***"…when acted upon by the agent, it leads to the creation of privity of contract between the principal and the third party. A contract made with a third party by the agent in exercise of his authority is enforceable both by and against the principal. Thus the English doctrine is that an agent may make a contract for his principal which has the same consequences as if the latter had made it himself. In other words the general rule is not only that the principal acquires rights and liabilities, but also that the agent drops out and ceases to be a party to the contract." [14]***

47. The express authority to form the agency relationship in this instance was made through Lynwood's said letter to Westmont. What then is the implication of the agency relationship with regard to the

purchase of the Grand Regency Hotel?

48. The authors in **Cheshire,** state that the general rule in agency is not only that the principal acquires rights and liabilities, but also that the agent drops out and ceases to be a party to the contract. The authors continue:

> ***"The one exception is where the authority of the agent is to execute a deed on behalf of the principal, in which case the agency itself must be created by deed. The agent, in other words, must be given power of attorney. Instances of transactions for which a deed is necessary are conveyances of land, leases exceeding three years…So if an agent is authorized to execute a conveyance of land to a purchaser, he must be appointed by deed, but this is not necessary if his authority is merely to enter into a contract for the sale of land."[15]*** (underlining for emphasis)

49. Thus, if the agent's mandate requires or entitles him to execute a deed or to effect a conveyance, the agent must himself be appointed by deed. A ***"deed"*** is described in **Black's Law Dictionary[16]** as follows:

> ***"At common law, a sealed instrument, containing a contract or covenant, delivered by the party to be bound thereby, and accepted by the party to whom the contract or covenant runs"***

50. What was the scope of the agency in this case? As earlier noted, according to the aforesaid letter of Lynwood, it was to: negotiate the purchase of GRH, sign the agreement for purchasing the GRH and operate the hotel on completion of the purchase. The agency pleaded under paragraph 3A of the Re-Amended Plaint dated 17th November, 2014, in the name of Lynwood is as follows:

> ***"3A. At all material times Westmont Holdings Sdn Bhd the former 2nd Plaintiff was an agent of Lynwood Development Company contracted to conduct the exercise of the purchase of the Grand Regency Hotel sitting on LR No. 209/9514 situated in Nairobi County within the Republic of Kenya vide a letter dated 12th February, 1997".*** (underlining for emphasis)

51. The court in **Gerard Bizimungu v S.D.V. Transami (K) Ltd[17]** referring to instances where the principal is undisclosed by the agent, stated that:

> ***"The following quote from Bowstead at paragraph 8-073 page 345 further explains the disclosed and undisclosed principals concepts. 'What is an undisclosed principal? A more difficult question is that of the nature of the authority which must be conferred. Here two views can be justified from the cases. One view is that for the doctrine to operate the principal must have authorised the agent to bring him into contractual privity with the third party. If this view, which in some respects seems obvious, is correct, the application of the doctrine is confined to two types of case. The first occurs where the principal wishes to be a party to a contract, but wishes also to conceal that fact, perhaps because he does not wish it to be known that he has entered the market. The second is that where the agent does not disclose the existence of his principal, perhaps because he does not wish the third party on the next transaction to bypass him and go direct to the principal; and the principal either acquiesces in this or makes no inquiry as to the agent's practice. "***

52. In the present case, there was nothing to show that the agency relationship between Lynwood and Westmont had been disclosed. Lynwood was thus an undisclosed principal.

53. The next question that naturally arises is whether Westmont had authority as agent to institute legal proceedings? **Cheshire[18]** further states that:

> ***"For the principal could in equity compel the agent to lend his name in an action to enforce the contract against the contractor, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract."***

From the above, and having stated that the principal acquires rights and liabilities in an agency relationship, and further that the agent drops out and ceases to be a party to the contract, the agent can also institute legal proceedings on behalf of the principal in respect of a contract.

54. The above notwithstanding, the transaction in dispute herein clearly relates to the sale and purchase of Grand Regency Hotel sitting on L.R. No. 209/9514. According to Ms. Jasmine See's evidence, she had a Power of Attorney from both Westmont and Lynwood. A close perusal of the documentation availed in evidence by the plaintiff shows, however, that the power of attorney from Westmont to Jasmine See was executed on 23rd October, 2001. It was registered as No IP/A 50833/1 on 12th August 2008[19]. No power of attorney has been produced for any period prior to that date of 2001. Thus, at the time of entering into the Sale and Purchase and executing the agreement over the Grand Regency Hotel, neither Westmont nor Ms. Jasmine See appear to have been in possession of a power of attorney enabling the execution of the deed for sale of GRH.

55. As stated above, the formation of an agency relationship may be expressly done by writing. However, where the agent is to execute a deed on behalf of the principal, the agency itself must be created by deed. In other words, the agent must be vested with the appropriate power through a power of attorney where the act which is sought to bind the principal involves the execution of a deed. As has been stated above, deeds are necessary for conveyancing actions. In the instant case, there is no evidence that the Agreement for the Sale and Purchase of the Grand Regency Hotel dated 25th March 1997 was preceded by or premised upon a power of attorney given by Lynwood. In the documents on record, there is only a power of attorney from Lynwood to Jasmine See dated 23rd October, 2001, way after the suit was filed in court.

56. The argument against the above position is obviously that: what Westmont was given through Lynwood's letter of 12th February, 1997, was authority ***'to sign the agreement for purchasing the said hotel and operate the hotel once the purchase is completed'***. It is my view that what is envisaged in the letter of agency read together with what is pleaded by Lynwood itself, were powers of agency to ensure that the purchase of GRH on LR No 209/9514 was completed. To, legally, enable such completion I think it is evident that the said agency letter ought to have been accompanied by a power of attorney. The only power of attorney produced is the one referred to earlier which was executed four years after the sale and purchase transaction was commenced.

57. Whilst it is abundantly clear that there was an agency relationship between Lynwood and Westmont, the scope of the powers thereunder were in my view insufficient to bind the principal in the purchase of GRH to its completion, without a power of attorney. The upshot of the above is that Westmont, in the absence of a power of attorney, did not have the capacity to enter into the agreement for completion of the sale and purchase on behalf of Lynwood in the manner proposed therein.

58. I therefore find that where, as in this case, a letter of agency grants a person authority to enter into a sale and conclude the purchase of land and assets affixed to land, the agency letter must be complemented by a power of attorney to execute the necessary deeds. Westmont did not have such a power of attorney.

59. Accordingly, I hold that Westmont, in absence of a power of attorney, was incapable of entering into and concluding the agreement for the sale and purchase of the Grand Regency Hotel and thereby commencing operation of the Hotel. Under such imperfect agency arrangement, therefore, Lynwood cannot naturally be a proper party to this suit.

60. In light of all the foregoing, and having reached the conclusions I have indicated above, I find and hold that Lynwood is not competent to sue in this matter or to benefit from the Court of Appeal decision. The result is that the suit would stand dismissed, on the ground that there is no competent plaintiff *in situ*.

61. But in the event that I am wrong, and the suit should not be dismissed, I have decided to address the claim on its merits, so as to reach a final determination on the substantive merits. The merits of the suit are addressed hereunder.

Parties' Cases

Mr Pattni: 1st Plaintiff & 1st Defendant to the counterclaim

62. At the hearing of this case, Mr. Adala for Pattni took the following positions on behalf of his client: that Mr Pattni had opted not to be deemed as a plaintiff in this case; that Pattni's witness statement should accordingly be struck off; and that although he, Counsel, had previously indicated that Mr Pattni would give evidence in the counterclaim, he ultimately had decided not to tender any evidence as that tendered by UHDL would suffice to assist the court in arriving at a fair decision.

63. As a result, Pattni gave no evidence in this case, which meant that the Court would not benefit from any clarifications on the centrality of and the numerous documents in which Pattni featured and the activities carried out by him in the matter. Further, the effect of Pattni's withdrawal as plaintiff is that Westmont is left as the sole plaintiff. Further, as to the defence in the counterclaim, Pattni proffered no evidence at all.

Westmont: The 2nd Plaintiff & 2nd Defendant to the counterclaim

64. Westmont's case is essentially that sometime in 1996, CBK and its agents represented to it that the Grand Regency Hotel was up for sale. CBK was at the time in the process of exercising its statutory powers under a charge over the property on which GRH stood. That information, confirmed by advertisements placed in two newspapers, called for serious bidders to place their bids as per the tender requirements.

65. It is argued that at the time, Westmont was an agent of Lynwood Development Ltd (Lynwood) – an undisclosed principal – and had been appointed to enter into an agreement for the purchase of GRH. The second plaintiff filed a Re-Amended Plaint dated 17th November, 2014, substituting Lynwood for Westmont as second plaintiff, ostensibly pursuant to the Court of Appeal's decision which allowed ***"further amendments if necessary".*** The propriety of and procedure for this amendment was challenged by the CBK as part of the preliminary objection which issue I have determined. Nevertheless, since filing the Re-amended plaint, the second plaintiff has argued its case as Lynwood.

66. It is stated that, being interested in the property and having been involved in the pre-advertisement negotiations, Lynwood instructed Westmont to bid and carry on with the exercise till conclusion as its agent. Consequently, Westmont entered into negotiations culminating in a Sale and Purchase agreement for the Grand Regency Hotel dated 25th March, 1997 (GRH Agreement).

67. The aforesaid agreement, which was exhibited in the Westmont bundle of documents,[20] was entered into between Pansal Investments Limited, Hotel Enterprises Development and Management Limited and Mukesh Vaya as shareholders of Uhuru Highway Development Limited, the registered proprietor of the Grand Regency Hotel as the vendors and Westmont as the purchaser on behalf of Lynwood.

68. According to Lynwood, the GRH Agreement was entered into with the blessing, knowledge, participation, co-operation and concurrence of CBK. Further, that it was agreed that the deposit and indeed the entire purchase price, which to the knowledge of CBK was to be made made by Lynwood, would be paid directly to the CBK.

69. Under the GRH Agreement, Lynwood argued, the vendors would sell to the purchaser or its nominees the suit property free from all encumbrances. The agreed price was US $ 37,000,000.00, the equivalent of Kshs. 1,950,000,000.00. Further, a deposit of US$ 3,700,000.00 the equivalent of Kshs. 195,000,000.00 would be paid by the purchasers to CBK upon execution of the agreement. The balance of the purchase price of US $56,300,000.00 (sic) the equivalent of Kshs. 1,795,000,000/- would be paid within 90 days of the date of payment of the deposit. Thereupon, the suit premises including the complete hotel business would be handed over to Westmont.

70. Lynwood asserts that on 1st April, 1997, it transferred the sum of US $ 3,700,000.00 by way of telegraphic transfer to Citi Bank Nairobi Account No. 101582071 pursuant to the undertakings and

assurances given to Lynwood by CBK in the GRH Agreement. The account was in the names of D.V. Kapila & Co. and Bhailal Patel and Patel Joint Clients Account. Further, that Messers D.V. Kapila & Company Advocates were at the material time the advocates for Lynwood. On 12th May, 1997, D.V. Kapila & Company Advocates instructed its Bankers, Citibank Nairobi to make out a Banker's Cheque for Kshs. 185,000,000.00 drawn in favour of CBK issued from the aforesaid joint account. This, it was contended, effectively completed the payment of the agreed deposit of US $ 3,700,000.00. Further, that CBK acknowledged receipt of the funds from Lynwood in various forums and communications.

71. According to Lynwood, it was a condition precedent in the GRH Sale Agreement that upon payment of the deposit CBK would require or request the Receiver to permit Westmont into the premises to examine the Hotel's assets and records in the receiver's possession. Consequently, it appointed the audit firm of KPMG Peat Marwick to conduct the said due diligence audit on its behalf in accordance with the terms set out in the GRH Sale Agreement. Pursuant thereto, the firm of D.V. Kapila wrote to the CBK requesting it to facilitate the urgent audit on account of payment of the deposit.

72. It is Lynwood's case that in flagrant breach of the GRH Sale and Purchase agreement CBK mischievously and flatly refused to permit Lynwood, its agents and or its nominees to enter the premises so as to carry out the due diligence, give the undertakings as required under an out of court settlement in a matter relating to the Charge, and refused all authorized parties access to the premises, books, records, employees for purposes of conducting due diligence interviews, bank statements and other important and necessary documents.

73. Lynwood also states that, the completion date of 15th July, 1997 for the Sale and Purchase of the GRH was rendered impossible by CBK through its firm of Advocates, Messers Murgor & Murgor Advocates. It also asserts that the said advocates advised the CBK to go ahead and realize the security, notwithstanding the GRH Sale and purchase agreement. Lynwood also avers that, on 16th July, 1997, CBK issued a press release advising the Kenyan public that its proposed sale for the Hotel to the Mr. Kamlesh Pattni had failed and that the sale agreement to Kamlesh Pattni had lapsed. It is Lynwood's case that CBK knew that it was Lynwood that had paid the 10% deposit, and not Mr. Pattni, as the agreement did not involve Mr. Pattni. Further, that the failure by Lynwood to complete the sale was occasioned by CBK's prevaricating conduct.

74. Lynwood thus claims against CBK the refund of Kshs. 185,500,000.00 plus interest at commercial rates from 12th May, 1997 in terms of the the GRH Sale and Purchase agreement pursuant to the failure of the contract occasioned by CBK's conduct. The Interest calculation was done by Mr Onono (PW3) of the Interest Rates Advisory Centre, who stated in evidence that the total interest due was Kshs. 3,521,012,705.61 and the exchange rate loss was Kshs. 139,349,640.00.[21] Both of those amounts are claimed in addition to the deposit amount.

75. Lynwood also claims that in further flagrant breach of the terms of the said agreement and its obligations to retain the sum of Kshs. 185, 500,000.00 as stakeholder by way of deposit, CBK dishonestly and/or fraudulently misappropriated the said payments which is totally inconsistent with the deposit nature of the payment by the plaintiffs.

76. Lynwood relied on the principle of unjust enrichment as the basis for its claim for the return of the deposit allegedly paid and interest thereon. The English case of **Fibrosa Spolka**[22] was cited in support of the plaintiff's case in this regard. In **Fibrosa,** a contract for the supply by the respondents of special machinery to be manufactured by them but which suffered frustration by the outbreak of war, was treated as an ordinary contract for the sale of goods. Lord Wright in his holding restated the English language the maxim '*nemo debet locupletari aliena jactura* of the civil law:

> ***"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called***

quasi-contract or restitution.'

On his part, Viscount Salmon held that:

> ***"…when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled.' and 'In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act . . . but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise…. In English law an enforceable contract may be formed by the exchange of a promise for a promise or by the exchange of a promise for an act … but when one is considering the law of failure of consideration and the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise that is referred to as the consideration but the performance of the promise."***

Lord Porter held that:

> ***"The true view is, I think, expressed by Brett LJ. (as he then was) in Wilson v. Church (1879) 13 Ch. D. 1 at p. 49, a case in which he refused to find fraud. His words are: "The principle of law seems to me to be identical with what it would be if the money were paid to the borrowers for a consideration which is to be accomplished after the payment of the money, and by the most ordinary principle of law, where money paid for a consideration which is to be performed after the payment, if that consideration wholly fails, the money becomes money in the hands of the borrowers held the use and for the benefit if the lenders, and must be returned. The decision in that case affirmed in your Lordships House under the title National Bolivan Navigation Coy. v. Wilson (1880) 5 App. Cas. 176, and the language of Brett L.J. was (1913) AC 283 at p. 296. It may be urged that these were cases of borrowed money that there was fault though not fraud in the borrower. I do not think the decision turned upon so narrow a ground, but in truth the principle may be illustrated by the law which is now codified in Sects. 6 and 7 of the Sale of Goods Act and was formerly illustrated by Rugg. v. Minett (1809) ii East 2010."***

77. The case of **Samuel Kamau Macharia** [23] was cited as the basis for a restitutionary claim wherein the Court of Appeal adopted the principle of unjust enrichment and gave part of its history locally where the Court applied the **Fibrosa case** and stated:

> ***And, indeed, as a remedy attracting wrong, unjust enrichment was well-known in our courts fairly early. Thus, as far back as 1957, we see it spoken of by the then Court of Appeal for Eastern Africa comprising of Judges of eminence, namely, Sir Newnham Worley, P, Sir Ronald Sinclair, V-P, and Briggs, JA, in the case of Saleh bin Ghaleb v Hussein al Qu'aiti, [1957] EA 55, at p 73, where one finds this passage, vis, "so far as the allowances are concerned, this was a clear case of unjust enrichment" leading to a suffering of wrongful loss of which equity would provide a remedy.***
>
> ***Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice…"***

78. In conclusion, Lynwood's case is that the consideration for the payment of the deposit sum of Kshs. 185,500,000/= wholly failed. The fact that CBK received the said sum and appropriated it, resulted in Lynwood losing the benefit of the said agreement, and it has thus suffered loss and damage.

79. In the circumstances, therefore, Westmont / Lynwood seeks judgment against CBK for:

1. ***The principal sum of Kshs. 185,500,000.00 to be refunded to the 2nd plaintiff.***

2. ***Interest at the commercial rates.***

3. ***Damages for repudiation of the agreement between the second plaintiff and the defendant.***

4. ***Cost of this suit plus interest on costs.***

5. ***Any other or further relief this Honourable court may deem just and fit to grant.***

Central Bank of Kenya: The 1st Defendant, and Plaintiff in the Counterclaim

80. At the hearing, CBK availed one witness, Mr Kennedy Abuga (DW1), the Director, Governor's Office. Mr Abuga admitted that his evidence was based on matters he had read in the records of CBK as he had not been at CBK at the material time to personally experience or be involved in the transactions the subject matter of the suit.

81. In their Re-Amended defence and counterclaim, CBK denied the averments made by Lynwood/ Westmont in its Re-Amended plaint. CBK's case is that it has no knowledge of Lynwood and Westmont and put the plaintiff to strict proof.

82. CBK's contention is that the charge instrument over GRH was an agreement only between itself and Mr. Pattni. Further, that by an agreement dated 7th May, 1997 between CBK and Mr. Pattni on his own behalf and as agent of UHDL, Shareholders and Directors of Pan Africa Group (now in liquidation) and Pansal Investments Limited it was agreed *inter alia* that UHDL shall pay CBK the value of the Grand Regency Hotel. This was an amount of Kshs. 2.1 Billion less credit of Kshs. 145 Million being the amount paid to CBK by the Receiver of UHDL. The balance of Kshs. 1,955,000,000.00 was to be paid by UHDL as follows:

a. 10% deposit being Kshs. 195,500,000.00 to be paid on or before 15th May, 1997

b. The balance of the purchase price of Kshs. 1, 759,500,000/- to be paid on or before the 15th July, 1997

c. Each party in HCCC No. 29 of 1995 to bear its own costs.

83. According to CBK, it did not at any time expressly or otherwise have any dealing with Westmont and/or Lynwood, and avers that Mr. Pattni on behalf of himself and UHDL agreed with CBK that:

> ***"…in consideration of payment of the deposit of 10% aforesaid, Central Bank of Kenya agrees to instruct the Receiver of Grand Regency Hotel to permit a purchaser authorized by Uhuru Highway Development Limited in writing to examine the assets of the hotel and any records kept by the Receiver."***

84. It was CBK's case that the said deposit was paid by UHDL and that CBK rendered full consideration for it, in that *inter alia*, UHDL was authorized to nominate a purchaser and sell to such a purchaser the GRH at the price agreed with such purchaser based on the valuation carried out by Tysons Limited and Lloyd Masika Limited.

85. CBK contended that a deposit was received directly from Pattni on behalf of himself and UHDL in accordance with the agreement, but not from Lynwood or Westmont. CBK also denied that it was ever a party to any negotiations whatsoever with Lynwood or Westmont on the sale of the GRH, neither was the Agreement for the sale of GRH entered into with its blessings, knowledge, participation, co-operation or concurrence. With further regard to the deposit, CBK contended that it was never agreed at any time that the deposit or any money at all would be paid directly to CBK by Westmont or Lynwood, and at no time was it made aware of the source of the alleged monies.

86. As for the deposit of Kshs. 185,500,000/-, CBK argued that the amount was paid as consideration for allowing UHDL to procure the sale of GRH to any party of its choice. Further, that the said deposit was paid in part satisfaction of the charge and the debt due to CBK. Accordingly, there was no agreement express or implied or any other basis for it to hold the said amount as a stakeholder. CBK also denied that it was aware of any terms of the agreement between Westmont and UHDL as proprietor of the Grand Regency Hotel. As such, the plaintiffs had no claim whatsoever in respect of the said deposit or any monies paid to CBK whether singularly or jointly. CBK asserted that it was not possible for it to have flagrantly breached a sale agreement which it was not even a party to.

87. CBK stated, in the alternative, that it was ultimately entitled to a general lien over the said deposit. CBK further contended that Mr. Pattni and UHDL are in breach of the contract dated 26th February, 1997 and 7th May, 1997. Finally, CBK sought the following prayers:

a. ***'The Plaintiffs' suit to be dismissed with costs.***

b. ***A declaration that there is no agreement and/or contract between the 2nd Plaintiff and the Defendant.***

c. ***An order that CBK is entitled to a general lien over the amount paid by the UHDL as a deposit and in part payment of the Debt due to CBK.***

d. ***Further or in the alternative CBK is entitled to exercise an unpaid vendors lien over the said payment.***

e. ***A declaration the Kamlesh Mansukhlal Pattni and Uhuru Highway Development Limited are in breach of contract aforesaid.***

f. ***General damages.***

g. ***In the alternative specific performance of the contract aforesaid by payment of the balance of the purchase price together with interest thereon at bank rates.***

h. ***Costs of this suit.***

i. ***Any other or further relief as this Honourable Court may deem fit.'***

UHDL: 3rd Defendant in the counterclaim

88. Like Pattni, UHDL also decided not to call their witness, Mukesh Vaya, to give evidence during the hearing. Counsel, Mr Ngacha, sought that Mr Vaya's witness statement be expunged, and the Court obliged. In the result, there was no cross-examinable evidence at all proffered by UHDL, although it did file a Bundle of Documents dated 11th June, 2015.

89. UHDL's case is that, at all material times, CBK knew the identity of Westmont, and that it was a condition precedent of the proposed sale and purchase of the Grand Regency Hotel that CBK had to approve and did approve the buyer of the suit property as per the agreement.

90. UHDL contended that the Charge dated 21st October 1993 is invalid, null and void, and is unenforceable as a security for a charge for the repayment of the sum of Kshs. 2.5 Billion. UHDL argued that it had neither borrowed from, nor did it owe CBK any such amount. Further, that the said charge instrument contravenes the provisions of the CBK Act and the Transfer of Property Act.

91. According to UHDL, CBK authorized Mr. Pattni to enter into negotiations to settle the dispute between itself and Mr. Pattni. As a result of such negotiations, a foreign investor, namely Westmont agreed to purchase the 3rd defendant's right title and interest in the Grand Regency. It is UHDL's case that although Mr. Pattni and Westmont fully abided by their obligations under the bargain, CBK on the other hand through its advocates Messrs. Murgor and Murgor wrongfully repudiated the settlement with ulterior motives notwithstanding that Westmont had paid a sum of Kshs. 185,500,000/- to CBK in part performance of its obligation under the said settlement.

92. It was contended by UHDL that CBK through its advocates declined and/or refused to provide an in-depth audit and necessary legally binding undertakings. As a result of this refusal, the settlement was thwarted. UHDL averred that, at all material times, Westmont and Mr. Pattni were ready and willing to consummate the settlement later repudiated by CBK and its advocates. In effect, CBK's actions frightened off Westmont.

93. UHDL denied that it paid the deposit to the CBK in accordance with any agreement or at all, neither was the payment made towards redemption of the purported charge. UHDL asserted that the payment of Kshs. 185,500,000/- was made by Westmont, and it was not in part satisfaction of the charge as alleged, but for the purchase of the Grand Regency Hotel.

94. According to UHDL, and contrary to CBK's allegation, an undertaking acceptable to the CBK was in fact given by an advocate nominated by UHDL under the purchase agreement.

95. In their Re-Amended Defence to the Counterclaim, UHDL sought the following prayers:

a. ***"The CBK's Re-Amended Defence be struck out.***

b. ***The CBK's Re-Amended Counterclaim be struck out***

c. ***In the alternative that the CBK's Re- Amended Defence and Counterclaim be dismissed.***

d. ***Costs***

e. ***Any other or further relief as this Honourable Court may deem fit and just to grant."***

Issues for determination

96. Without questioning the *bonafides* and right of Mr Pattni and UHDL to conduct their cases according to their discretion, I found it curious that neither he nor Mr Vaya opted to give evidence and be subjected to cross-examination. This made it all the more difficult for the Court as it had to carefully scour through masses of documentary evidence to assess or corroborate the pleadings and analyse the oral and other evidence presented, noting that the events in issue took place over eighteen years ago.

97. The parties did not present an agreed list of the issues for determination. Instead, each party listed the issues it felt were in dispute. In all, the parties set out thirty-two issues and sub issues for determination. In my view, and taking into account the parties' cases, the issues for determination may be neatly clustered in the following manner:

a. ***Whether Kamlesh Pattni and Central Bank agreed through a tripartite agreement to jointly sell the Grand Regency Hotel to Westmont in settlement of a charge secured by Central Bank over the hotel.***

b. ***Whether CBK received the sum of Kshs.185,500,000.00 from Westmont as 10% of the purchase price and part payment for the redemption amount, and if so, in what capacity was the same received?***

c. ***Whether Central Bank of Kenya failed to deliver on its contractual role by failing or refusing to allow due diligence and what are the implications of refusal to allow such due diligence.***

d. ***Who, if at all, is obligated to refund the sum of Kshs.185,500,000.00 paid to Central Bank of Kenya as deposit for the purchase of the Grand Regency Hotel upon failure of the whole transaction?.***

e. ***Whether Central Bank can maintain a suit against Uhuru Highway Development Limited****.*

Analysis and Determination

98. Having heard the parties' witnesses, their counsel, and having read their submissions and the documents and authorities availed in support of their respective cases, my analysis of the suit is as set out hereunder. I commence this analysis by seeking an understanding of the case as a whole, which will answer the first issue in the case, namely:

Whether Kamlesh Pattni and Central Bank agreed through a tripartite agreement to jointly sell the Grand Regency Hotel to Westmont in settlement of a charge secured by Central Bank over the hotel.

99. There are two critical facts that are not in dispute. They tell the story of the dispute in chronological sequence. It is important to appreciate this chronology in order to understand the prevailing position in relation to this suit at the material times; it prefaces an appreciative background to this case. The first fact is the existence and place of the Charge over Land Reference Number 209/9514, Nairobi where the Grand Regency Hotel is situated. The second fact is the existence and nature of the Agreement for sale of the GRH (the GRH Agreement).

LR No 209/9514, Nairobi, the piece of land housing the Grand Regency Hotel

100. I have included, herein, a fairly detailed background on how the charge came about. I think the contextual environment is important in appreciating the dispute, and the actions and roles of both Pattni and CBK in the sale of GRH. It is also important in understanding the nuances of the Charge and its redemption relative to the key parties in the said sale.

101. On 11th October, 1993, five years before this suit was filed in 1998, UHDL, who were the proprietors of the Grand Regency Hotel, had entered into an agreement with the CBK pursuant to which they charged to CBK the land on which the GRH was housed. The amount involved in the charge to CBK was 2.5 billion shillings, securing only the immoveable property, as there was no complemental debenture.

102. The parties to the charge are only UHDL and CBK[24]. At recital 2, the charge points out the basis of its consideration in the fact that an amount was owed by Exchange Bank Limited and Kamlesh Pattni, who are both referred to as the borrowers of Shillings 2,500,000,000/-. So that, in fact, this charge created a third party security to secure the borrowing by both Pattni as an individual and also the borrowing by Exchange Bank Limited. I will come to these details later.

103. The documents contained in the CBK Bundle of Documents[25] describe how the charge over LR 209/5914 came about, which was essentially, and ultimately, as a result of a whistleblower's action. It came into public notoriety that a company known as Goldenberg International Limited, of which Mr Pattni was Chairman, was engaged in the export of gold from Kenya and was receiving export compensation from public funds. It was alleged at the time that the scheme was a scam as gold did not exist in Kenya, and the monies were being routed through a web of companies and banks, most prominent

of which was Exchange Bank Limited, whose board of directors Mr Pattni also chaired. The matter was of such interest it was discussed in the Parliament in 1992[26]

104. With the national spotlight and public pressure focused on Goldenberg, the CBK as a regulator and protector of the nation's financial system, the banking sector, and of public funds, had been drawn in. For contextual background only, it is noted that disputes arose concerning the Goldenberg export scheme and the various companies associated with Mr Pattni, some of which resulted in litigation. These are matters which it is not necessary to inquire into here. However, by a consent dated 2nd August, 1993, entered into between Exchange Bank and CBK and the Deposit Protection Fund Board[27], the CBK was appointed Manager of the Exchange Bank Limited.

105. Consequently, by a letter dated 10th August, 1993[28], to the Governor of the CBK, Mr Pattni, as Chairman of Exchange Bank Limited admitted or stated that Exchange Bank Limited was indebted to CBK in the amount of Kshs 9,931,115,400/- as at 30th June 1993. Further, Mr Pattni, took personal responsibility for the indebtedness confirming as follows in the letter:

> ***"….3. I hereby undertake to fully repay and discharge the said amounts …as follows…"***

and he highlighted several actions he would take, including that:

> ***"(e) I undertake to pay the balance of the debt presently amounting to Kshs 1, 977,623,171/- through the sale to Central Bank of Kenya of US $ 20,000,000…"***

106. Mr Pattni further stated in his approval that the monies identified as debt to CBK *"shall be secured by a first charge over LR No 209/9514 otherwise known as Meridian Hotel"*. He concluded his letter as follows:

> ***"On settlement of all the above sums payable to the Central Bank of Kenya, the Central Bank of Kenya shall release their charge on the said L.R No 2019/9514."*** [29] (Underlining for emphasis).

107. As noted in the letter aforesaid, Mr Pattni offered the GRH land as security for the indebtedness of Exchange Bank Limited. Earlier, it was noted that the GRH land was owned by UHDL, a company which Pattni also chaired. In these positions, he thus so intricately intertwined his personal affairs with those of UHDL and Exchange Bank Limited that the corporate distinctiveness of the companies is unhinged. A certified extract of a resolution of a meeting of UHDL held on 9th August, 1993[30] shows that UHDL resolved:

> ***"to create a charge over the Title of LRNo 209/9514 to be provided as a security to the Central Bank of Kenya for a guarantee of a sum of not exceeding Kshs. 2,500,000,000/- for a loan or accommodation granted to Kamlesh Mansukhlal Pattni and Exchange Bank Limited and to file the necessary returns with the Registrar of Companies and other appropriate authorities…"***

By the said resolution, Mr Mukesh Vaya was authorized to witness affixation of the common seal of UHDL and *"to take all steps necessary and possible to arrange for alternative finances."*

108. On 22nd October, 1993, Mr Pattni issued a notice[31] stating that Exchange Bank had resolved to voluntarily wind up; and Gazette Notice No 5325 of 22nd October 1993[32] was published notifying the public of the Creditors Voluntary Winding Up.

109. The Charge over LR No 209/9514, securing the debt to CBK was executed on 21st October, 1993 and was registered against the title on 31st December 1993 as IR No 36755/17. The amount secured was Shillings 2.5 billion stated in recital 2, thereof as "owing by Exchange Bank and Kamlesh M. Pattni (the Borrowers)". The Redemption Date is stated as "21st November, 1993", and the Charge is attested by Dinesh Kapila, Advocate. A copy of the charge instrument was produced in evidence[33], as was the land title Grant No IR 36755 [34]. The existence of the charge is admitted by Westmont in paragraph 3A of the

Re-amended Plaint filed on 16th November, 2014, and the position further stressed in the Westmont submissions at page 9.

110. By a letter dated 3rd March 1994[35] from CBK to Pattni, under the reference: *"Debt Due to Central Bank"*, CBK reiterated the existence of the legal charge over Meridian Hotel and agreed to Pattni's request to:

> ***"…discharge the Legal Charge unconditionally over Meridian Hotel subject to the following terms and conditions:***
>
> ***The arrangement is without prejudice to our existing rights under the charge***
>
> ***Payment will be made on the following dates:***
>
> ***4th March 1994 - 100,000,000=***
>
> ***31st March 1994 - 2,000,000,000=***
>
> ***15th April 1994 - 400,000,000=***
>
> ***Total - 2,500.000,000=***
>
> ***The Central Bank will be given post-dated cheques drawn on your account with reputable domestic or foreign banks….If any installment is not paid on due the date then the total balance of the outstanding amount of KShs 2.5 billion will become immediately due and payable and the Central Bank will be at liberty to sell the Hotel.***
>
> ***Liquidation of Exchange Bank to be fully completed by 31st March, 1994"***

111. The letter was signed by the CBK Governor Micah Cheserem and Director Foreign Exchange Department Job Kilach. Mr Pattni also signed the letter accepting the terms, indicating the three post-dated cheques he was therewith handing over. His signature was witnessed by Mr Dinesh Kapila, Advocate, who also signed. Copies of the three cheques attached were produced by CBK.[36]

112. It was specifically pleaded by UHDL in Paragraph 7 (iv)-(vi) of their Re-Amended Plaint filed on 24th April, 2015, that the said agreement and charge were the result of ***"unlawful and overbearing pressure",*** and that the charge was ***"invalid, null and void"*** and that it never owed any such sums to CBK. However, in the absence of evidence by Pattni or Mr Vaya, or any other confirming evidence in that regard, no finding as to the alleged unlawful pressure and invalidity of the Charge can be made. I so find and hold.

113. The above-referred agreement for payment of the CBK debt by Pattni was not honoured as of 29th March, 1994[37]. Thus, Mr Pattni sought extension of time to 15th April, 1994 for presentation of both of the cheques due on 31st March and 15th April. In reply[38], CBK agreed to the extension but warned that it would realize the sale of the hotel if the cheques were not then honoured.

114. On 14th April, 1994[39] Pattni again requested time until 15th July, 1994, to present the two remaining cheques. CBK's next action was to present the said two cheques – both drawn on Kenya Commercial Bank, Moi Avenue – for payment and copies thereof show they were both returned unpaid marked ***"'refer to drawer"*** on 15th April, 1994[40]. Accordingly, CBK immediately appointed a receiver of Title No IR 36756 by an instrument of appointment dated 15th April, 1994, signed by the Governor of the CBK[41]. The result was a foreclosure on the charge over Grand Regency Hotel, a huge event that broke the headlines in all the dailies on 16th April, 1994[42].

115. By a letter dated 29th September, 1994,[43] written by CBK and signed for CBK by the Governor and the Banking Manager, and also signed by Pattni, he admitted owing Kshs 19.308 billion to CBK, of which Kshs 2.522 billion was still outstanding. He also accepted:

> ***"… to assign and transfer the following companies and their assets and liabilities to Central Bank towards the settlement of the above debt:-***
>
> *i.* ***Pan African Bank Nairobi and Karachi***
>
> *ii.* ***Pan African Finance***
>
> *iii.* ***Uhuru Highway Development Limited which owns Meridian Hotel (the Grand Regency Hotel)***
>
> *iv.* ***Safariland Club Hotel Ltd together with 150 acres it owns***
>
> *v.* ***Plaza Investments together with 20 acres in Embakasi which it owns..."*** (Underlining added)

By another letter to Pattni also dated 29th September, 1994, CBK agreed that:

> ***"As regards the Grand Regency Hotel, we confirm that we will give you the first option to redeem as per the legal charge."[44]***

116. Subsequently CBK and Pattni entered into an out of court settlement, most particularly in respect of HCCC No 29 of 1995.

117. At the date when this suit was filed in 1998, the charge had not been redeemed, and the Grand Regency Hotel was still in receivership.

The Agreement for Sale of Grand Regency Hotel

118. The agreement for sale of the GRH (GRH Agreement), which is at the centre of the dispute herein, is dated 25th March, 1997[45]. It is made between Pansal Investments Limited (Pansal), Hotel Enterprises Development and Management Limited (HEDAM), Mukesh Vaya, all as shareholders of UHDL, as the Vendors, and Westmont Holdings SDN. BHD, as the Purchaser.

119. It is asserted by Westmont that this Agreement for sale of GRH somehow also bound the CBK. This is stated in paragraph 5C of their Re-Amended Plaint where Westmont asserts that the GRH Agreement was entered into ***"with the blesssings, knowledge participation, co-operation and concurrence"*** of the CBK. However, it should be evident that, as charge, CBK would in any event have had to discharge its charge and transfer the GRH property to the chosen purchaser.

120. A close perusal of the GRH Agreement shows that it in fact actually and primarily concerns the sale and purchase of shares in UHDL. One of the assets of UHDL was the GRH. The GRH Agreement also recognized the existence of the charge over GRH as belonging to UHDL in paragraph 4 of the recitals. Thus, it is clear that the parties understood and recognized, or must be presumed to have known, that the sale of GRH as an asset standing on LR No 209/9514 would necessarily involve either redemption of the secured property; or that a transfer of the property through some other means such as an assignment or novation of the charge would have to occur.

121. From the GRH Agreement, the nature of the parties and the character of the transaction are made clear. Paragraph 7 thereof, shows that each of the vendors was transferring all the shares they respectively held in UHDL. That is, Pansal was transferring 919,819 shares; HEDAM was transferring 80,180 shares, and Mukesh Vaya was transferring his one share. The vendors as shareholders agreed to sell and the purchaser (Westmont) agreed to purchase the shares in UHDL free from encumbrances.

122. It appears that these vendor companies, namely Pansal and HEDAM each simultaneously on 25th March, 1997, also agreed, as part of the arrangement of selling their respective shares in UHDL, to issue separate powers of attorney to Kamlesh Pattni[46] authorizing him to act on their behalf. The identical board resolutions of each vendor company granting the said powers of attorney – as set out in the last paragraph of each company's signed resolution – authorized and appointed Pattni to:

> ***"…finalise the transaction and to utilize and disburse the funds as instructed or as per his discretion and that whatever action is taken by him is and shall be acceptable to the company and the negotiations already conducted and action already taken by him are hereby ratified and are adopted as actions of the company."[47]*** (Underlining for emphasis)

123. On the strength of the said powers of attorney, therefore, Pattni was in essence acting in this transaction entirely in his unfettered discretion on behalf of both Pansal and HEDAM in the sale of shares to Westmont. Equally, as earlier seen in respect of the debt to CBK, Pattni was also acting as personal guarantor of Exchange Bank – having undertaken to settle the said debt before release of the charge – and in his personal capacity as a borrower under the charge secured by the CBK over UHDL.

124. It is abundantly clear from the above, therefore, and I so find, that CBK was dealing directly with Pattni in respect of the sale of Grand Regency Hotel, and did not enter into any justiciable agreement with Westmont. Thus, anything Pattni did in respect of the transaction for the sale of GRH, could and would be deemed as done both in his personal name and authoritatively also on behalf of his companies. In my view, therefore, any aspect of CBKs role in facilitating the sale was done in furtherance of its fiduciary role as protector of public funds and *qua* its relationship with Pattni, wherein he was an acknowledged debtor.

The separate Agreement between Pattni and Central Bank of Kenya – the Pattni/CBK Agreement

125. A far more contentious agreement was the third agreement simultaneously in play in this dispute. I will refer to it as the Pattni/CBK Agreement to distinguish it from any other agreement. It is entirely between Pattni and CBK and relates to the way in which Pattni would pay off his debts with CBK.

126. Westmont/Lynwood contends that, because of the existence of this Pattni/CBK Agreement and its role in ensuring that the CBK *facilitated* the sale arrangement with Westmont, there was a ***"tripartite agreement"*** between Westmont, CBK and Pattni. As regards Pattni, it was submitted that he entered into that agreement on his own behalf and on behalf of his companies including UHDL[48].

127. I have already noted that Pattni was all along in direct close communication with Westmont when discussing the out of court settlement with CBK prior to the entry of the GRH Agreement. This is also the position of Westmont stated in their submissions[49]. Indeed, according to those submissions:

> ***"Westmont relies on correspondence between Ms Murgor & Murgor Advocates the firm of Advocates for CBK and Mr Kamlesh Pattni dated 26th February, 1997 and 14th March, 1997 together with the evidence of CBKs Mr. Kennedy Abuga the gist of which was that there were several outstanding issues between Kamlesh Pattni and his several companies that parties were working to settle them all once and for all"[50]***

128. This agreement between Pattni and the CBK clearly emanates from an out of court settlement in relation to HCCC No 29 of 1995. That is stated in the reference in CBKs letter of 26th February, 1997, which consummated and concretised the final agreement of those two parties.

129. Some of the out of court settlement negotiations leading to the settlement are attached in the CBK Bundle[51]. These all predate the final Pattni/CBK Agreement reached on 27th February, 1997 and the Agreement for Sale of GRH dated 25th March, 1997. The negotiations are basically between Pattni himself, and Murgor and Murgor Advocates on behalf of CBK. Although these letters are marked ***"strictly without prejudice"***, the objection by Mr Adala to their production was overruled when it was

pointed out and confirmed that the negotiations had succeeded and resulted in an agreement.

130. From these negotiations, it is clear that Pattni was acting on his own account. And where his companies were involved, he acted as their sole spokesman as attorney. For example, in his letter[52], he says

> ***"I would like to settle the above and all my matters";*** at page 1339, and he says:
>
> ***"I would like to exercise the option to buy back the Grand Regency Hotel….I will be agreeable to accept the valuation report"*** at page 1340; (underlining for emphasis)
>
> and:
>
> ***"…to settle the long outstanding matter, I make the following proposals to fully and finally settle all the disputes between Central Bank of Kenya and Treasury on one hand and myself and the following companies on the other hand"*** [and he proceeded to name his companies], at page 1358.

There is no doubt in my mind from the manner in which the letters are framed that Pattni was acting essentially in his own behalf, even if formally he had some form of authorization from his companies.

131. In the said without prejudice letter by Pattni dated 22nd October, 1996, the amicable settlement of HCCC 29 of 1995, and settling his admitted shillings 19.308 billion debt with CBK, was the key force driving Pattni in this transaction. He discloses his determination that:

> ***"(g) The final balance of the Grand Regency Amount and the Safariland Amount shall be paid within 30 (thirty) from the date of payment of 10% ….and Central Bank shall simultaneously execute a discharge of the charge"[53]***

132. Further, according to his said proposal, the hand-over of GRH was to be effected to the Purchasers who he considered to be his:

> ***"…co-investors and ensure that the said Hotel shall be free from all and any encumbrance, liens, pledges and all charges whatsoever at the completion of the hand-over to my co-investors…"*** **[54]** (underlining added)

133. In his without prejudice letter dated 24th January, 1997[55], Pattni introduced Westmont Land (Asia) Berhad (not the second plaintiff) and or its nominees as the company which would purchase GRH and pay directly to CBK. He made a large number of proposals on how the settlement should be worded, including installment payments of 10% deposit; 45% installment; and another 45% final payment. All of these payments, it was proposed, would be paid to CBK *"as stakeholder"*.

134. His proposal resulted in the agreement dated 26th February, 1997, from Murgor and Murgor Advocates for CBK, but that agreement does not incorporate all the provisions proposed by Pattni, although a number of the terms found their way into the final Agreement for Sale of Grand Regency.

135. So, from these without prejudice letters, which resulted in the Pattni/CBK agreement, one gleans the circumstances and environment under which the agreements between Pattni and CBK were reached. It is clear that Pattni was essentially acting on his own account; that he was seeking to settle the debt he accrued with CBK; that he sought to *re-purchase* or reclaim the GRH through his co-investors (whom he introduced); that he sought CBK to be a "stakeholder" in the settlement arrangements; and that the discharge of the charge over GRH was key to the arrangement he sought to be achieved.

136. The ultimate outcome of the negotiations was the final Pattni/CBK Agreement reached between Pattni and CBK. The final agreement did not provide for CBK to act as a stakeholder; it however provided that Westmont Land (Asia) Berhad be replaced by Westmont as purchaser of GRH; it adjusted

the deposit and payment installments and it provided for certain undertakings and other conditions. The contentious ones will be discussed separately. The letters forming the core of this agreement between Pattni and CBK are not in dispute as all parties refer to them liberally.

137. That exchange of letters, evidencing the Pattni/CBK Agreement, are summarised as follows:

i. Letter of Pattni to CBK dated 24th January, 1997, marked without prejudice proposing settlement on specified terms [56]

ii. Letter by CBKs counsel to Pattni of 26th February, 1997 referenced "Out of court settlement" and which sets out the terms of the agreement on the out of court settlement[57]. It indicates that it is in answer to Pattni's without prejudice letter of 24th February 1997.

iii. Letter of 20th March, 1997 by Pattni to CBK requesting amendments – a letter that was not exhibited.

iv. Letter of CBK's counsel to Pattni dated March 21, 1997 accepting amendments to the agreement of 26th February, 1997[58]. Further it extended the payment period to ninety days from sixty days. It also discloses that CBK was aware of the agreement between the parties for sale of GRH.

v. Letter of CBKs Counsel to Pattni dated 7th May1997[59] which was a result of a meeting between Pattni and CBK where the parties agreed to review Clause C and G (iii) of the letter of 26th February, 1997. In it the two parties agreed:

- to be bound by the terms of the letter of 26th February, 1997 unless varied by any terms varied by this letter

- the value of GRH was fixed at Kshs 2.1 billion with Kshs 145 million being received from the Receiver:

- the balance of Kshs 1,955,000,000/- to be paid as follows:

-10% deposit to be paid on 15th May 1997

- the balance of the purchase price of Kshs 1,759,500,000/- shall be paid on or before 15th July 1997

- Each party to bear its own costs in HCCC 29 of 1995

- Pattni was requested to countersign the letter and did

vi. A signed acknowledgement by Pattni dated 7th May, 1997 in which he confirmed that the letter of 26th February, 1997 constituted the full agreement between the parties. This acknowledgement is important enough to be quoted, hereunder:

" I, Kamlesh Mansukhlal Pattni on my own behalf and on behalf of Uhuru Highway Development Ltd, Shareholders and Directors of Pan Africa Group (now in liquidation) and Pansal Investments Limited who have appointed me to act on their behalf in connection with all the matters contained and/or connected with HCCC No 29 of 1995 hereby confirm that I fully understand the contents herein and of the letter dated 26th February 1997 which terms I acknowledge and confirm to be constituting the full agreement between the parties" [60]. (Underlining added for emphasis)

139. In summary, based on these letters, the content of the Pattni/CBK Agreement, starts with the letter of

26th February, 1997 from Murgor, which accepted some of the terms of the without prejudice letters from Pattni. It agreed, *inter alia*, to Pattni's proposal to transfer the UHDL shares; to UHDL paying CBK the value of the GRH in the manner specified in Clause C; it agreed that payment of 10% deposit would constitute consideration for CBK's agreement to permit UDHL or the purchaser authorized by it to examine the assets of the Hotel and any records kept by the Receiver; it undertook to discharge the charge and cancel any guarantee in respect thereof upon receipt of a written advocate's undertaking to pay the balance of the value of GRH.

139. Did this Pattni/CBK Agreement constitute a "tripartite agreement" as argued by Westmont and UHDL?

A **"tripartite"** agreement is defined as one:

"…made between or involving three parties; or having or divided into or composed of three parts; having three corresponding parts or copies" *– Black's Law Dictionary*

"…shared by or involving three parties" *– Concise Oxford Dictionary*

140. Given the evidence and the documents availed, the Pattni/CBK Agreement is, in my view, a separate and disparate agreement from the GRH Agreement. It is related to aspects of the GRH Agreement only to the extent that it was essential for CBK and Pattni to agree on how the GRH charge would be redeemed via the sale. Accordingly, I am unable to agree with Westmont and UHDL that there was a "tripartite agreement" between Pattni, his companies, Westmont and CBK.

141. In my view, unless CBK had signed the GRH Agreement, and Westmont had signed the Pattni/CBK Agreement, it is impossible to define or characterize the agreements – even read together – as tripartite. There are too many specificities distinct to each pair of parties, and too many specific conditions in each agreement that apply to and bind the different parties individually. It is trite that each agreement stands on its own. As such, under the trite principle of privity of contract, each contract binds only the parties that subscribed to it. In this case, I so found and so hold.

142. From the foregoing, I am not satisfied that there was an agreement that can be labeled or described as a "tripartite agreement" between Pattni, his companies and CBK in this transaction. Accordingly each agreement and the terms therein must be construed to bind only its own makers.

Whether CBK received the sum of Kshs.185,500,000.00 from Westmont as 10% of the purchase price and part payment for the redemption amount and if so, in what capacity was the same received?

143. Lynwood submitted that it did indeed pay the amount of Kshs 185,500,000/- directly to CBK through its agent Westmont and M/s. D.V Kapila & Company Advocates. In his oral evidence, Mr. D. Kapila stated that his clerk and not Mr. Kamlesh Pattni delivered the deposit cheque. He added that by the time the letter dated 12th May, 1997 was being written in his office and delivered, the money was already at Central Bank. It was Lynwood's submission that it matters little who in fact delivered the cheque. What matters and is critical to the suit before the Court is: where the money came from and for what purpose it was being paid. The documents placed before the court along with the evidence adduced in court are all clear on these questions. Lynwood alleged that it directly paid CBK Kshs. 185,500,000.00 being a deposit for the purchase of the Grand Regency Hotel; that the amount paid was a condition precedent to being allowed to conduct due diligence, prior to payment of the balance of the purchase price. Due diligence, Lynwood argues, was a condition precedent to payment of the balance.

146. In response to the proposition by CBK that the monies were paid as a deposit towards a "Redemption" amount effectively making it unrecoverable, Lynwood submitted that nothing could be further from the truth. Its reasons were as follows: Lynwood paid the money directly to Central Bank of Kenya; there was no prior relationship between Lynwood or its agent Westmont that would have warranted payment of a redemption amount to the Defendant; and redemption amounts, properly so called, have no deposits.

147. According to Lynwood there is no doubt that the money was being paid as a deposit towards a purchase price, and that the party making the payment was a purchaser of the Hotel as shown in CBK's Advertisement of the Hotel for sale[61]. Lynwood thinks it was comical that in the alternative prayers in CBKs Counter-claim against Westmont, CBK made a prayer for specific performance of the contract seeking payment of the balance of the purchase price. Further, as the purchaser was purchasing the hotel free from all encumbrances; it naturally follows that the purchase price would go towards "redemption" of the encumbrances.

148. Lynwood argued that the money was paid on 12th May, 1997[62] by D.V. Kapila & Company Advocates who forwarded to CBK a bankers' cheque for Kshs. 185,500,000.00 on behalf of the purchaser. They simultaneously gave an undertaking to pay the balance of purchase price in the amount of Kshs. 1,795,500,000.00. In the communication, the word "purchaser" is repeated 4 times. On 20th May, 1997[63] Murgor & Murgor acknowledged receipt of the 10% and demanded payment of the full purchase price.

147. Accordingly, Lynwood argued, CBK cannot at this late stage purport to turn around and deny that there was a sale of GRH to Westmont with its concurrence and blessings having benefited from the deposit. The fact that there was something else going on between CBK and Pattni does not negate the Agreement for Sale entered into with its very own concurrence and for its benefit.

148. UHDL's position was in support of Westmont. They argued that under the tripartite agreement there was no clause for forfeiture of the deposit paid by any nominated purchaser because the nominated purchaser was not a party to the disputes between CBK and UHDL. Thus, in the event that the transaction did not succeed CBK was legally and factually required to refund the deposit to the nominated purchaser. Only then could CBK seek to exercise their statutory power of sale.

149. According to UHDL, CBK does not dispute the amount paid, and in fact acknowledged and accepted the deposit paid by Westmont pursuant to the Agreement for the sale of GRH. Further, CBK having accepted the nomination of Westmont as the authorized purchaser, there was no doubt that the amount was received as a purchase deposit in furtherance of the sale.

150. CBK's answer is simply that in the absence of any agreement between it and Westmont, UHDL and Pattni, it could only receive money in terms of what was owed to it by Pattni, the only party with whom it had an agreement.

151. CBK further argued that it is not disputed that Westmont or Lynwood was sourced by Pattni. As such, the two parties had their own dealings, held their own meetings, exchanged direct correspondence and entered into agreements with Pattni, UHDL and his other companies. CBK did not have any dealings, discussions, correspondence and or agreements with either of Westmont or Lynwood, and had no contractual relationship whatsoever with them.

152. CBK submitted that it is proved from Pattni's letter dated 12th May 1997[64], and the last paragraph of the letter by CBKs lawyers dated July 11, 1997[65] that the cheque for Kshs. 185, 500,000.00 was delivered by Pattni himself. Such delivery was pursuant to the agreements dated 26th February 1997, and 7th May 1997 in order to redeem the Charge over GRH.

153. As earlier noted, there is no doubt in my mind that CBK was fully aware of the GRH Agreement. Indeed, I would go as far as stating that CBK facilitated that agreement as part of the attempt at settling HCCC No 29 of 1995. However, as also earlier noted, CBK was not a party to the GRH Agreement under which the payment of Kshs 185,500,000/- was made. There was the separate Pattni/CBK Agreement which was also running parallel with the Agreement for sale of GRH. Under these concurrent agreements, different parties had different obligations and rights.

154. In the Amended Plaint dated 18th October 1999[66], and which the Court of Appeal determined to be one of the pleadings which were to apply to the reinstated suit herein, at paragraph 8 the plaintiff stated

that the payment was made through the First plaintiff, Pattni:

> ***"…by bankers cheque No 1231322 dated 12th May 1997 issued by Citibank, Nairobi in favour of the defendant (CBK) and paid through the First Plaintiff to the defendant as stakeholder of the said deposit pending compliance with the full terms of the said agreement and completion of the transaction"*** (Underlining for emphasis)

155. The Re-amended Plaint dated 4th April 2001, at paragraph 10 states that:

> ***"…the Plaintiff paid the sum of Kshs 185,500,000/- by personally delivering to the First Defendant (CBK) a bankers cheque no. 0231322 dated 12th May, 1997 issued by Citibank, Nairobi in favour of the First Defendant as stakeholder of the said deposit pending compliance with the full terms of the said agreement and completion of the transaction"***

From these, it appears that Pattni himself personally delivered the cheque in question to CBK, although it is pleaded in the final Re-amended Plaint that the deposit cheque was "*forwarded directly to the Defendant (CBK) by the law firm of D.V. Kapila &Co Advocates under cover of an even dated letter…"* ***[67]***. Whilst that may be so the varying positions of the plaintiff do not lend credibility to their latter position.

156. I refer to these documents because they were included in the Memorandum of Appeal at pages 30-42 of the record before the Court of Appeal, and were produced before that court to enable it to come to its decision to reinstate the suit.

157. I have taken cognizance of the fact that Mr Dinesh Kapila, in his witness statement on behalf of Westmont, stated that his firm paid the deposit amount via a letter to CBK. In cross examination he said he paid the deposit:

> ***"…to Murgor and Murgor with conditions in my letter of 12th May, 1997".***

Mr Murgor then showed him that letter of 12th May, 1997 forwarding the cheque and pointed out that it had not even been copied to Murgor & Murgor.

Further, when shown Pattni's letter to CBK of 12th May, 1997 on which CBK signed acknowledging receipt of the cheque, he changed his position saying:

> ***"…we issued the cheque and Mr Pattni asked CBK to acknowledge the cheque".***

158. When pressed in further cross-examination, Mr Kapila stated:

> ***"Our letter went to CBK with the cheque. Maybe Pattni chased after it for delivery to confirm the cheque had been received…. Our letter reached CBK with the cheque. This man Pattni then went to CBK to get confirmation….I don't know if Pattni held my messenger's hand and went with him. Nobody has said the cheque was not accompanied by my letter of 12th May, 1997."***

159. Mr Pattni's letter of May 12th 1997 to the Governor of CBK states:

> ***"I refer to your lawyer's agreement letter dated 7/5/97 and confirm having paid the 10% deposit of the redemption amount as deposit amounting to Kshs 195,500,000 as per condition C(i) of the said agreement letter in the following manner:***
>
> > *i.* ***Kshs 10 million vide Kenya Commercial Bank cheque No W454529 dated 7/5/97 paid to Central Bank of Kenya by the Receiver of the Hotel***
> >
> > *ii.* ***Kshs 185.5 million paid vide Banker's chequeNo 0231322 dated 7/5/97 issued by***

CitiBank in favour of Central Bank of Kenya

iii. ***Therefore the total paid Kshs 195.5 million being the 10% deposit as agreed***

iv. ***The balance of the purchase price being Kshs 1,759,500,000/= (less any further amount that may be received from the Hotel Receiver after 7/5.07 up to 15/7/97) shall be paid on or before the 15/7/97 as per condition c(ii) of the abovementioned agreement letter.***

Kindly acknowledge receipt and confirm that you have received the 10% deposit of Kshs 195.5 million as stipulated in your lawyers agreement letter dated 7/5/97 by signing below. [68]

160. Mr Kapila, who was acting as one of the joint stakeholders in respect of monies to be paid to CBK by Westmont, also surprisingly denied in cross-examination that he had ever seen the GRH Sale Agreement:

"I maintain I have never seen the Agreement dated 25th March 1997, until I came to court. At the time only the letter from my instructing clients had been referred to me".

And later, when it was put to him that he was fully aware of the GRH Sale Agreement, he said:

"I reject the suggestion that I was aware of the Sale Agreement or that the other parties were my instructors"

161. Mr Kapila's position is inconsistent with the evidence in the witness statement of Jasmine See who stated at paragraph16 as follows:

"The Plaintiff appointed the firm of DV Kapila to act for it in the transaction and pursuant to the GRH Agreement and the undertakings and assurances given to the 2nd Plaintiff by the defendant, the 2nd Plaintiff on 1st April 1997…." (underlining added for emphasis)

162. Mr Kapila's position is also at variance with a letter dated 3rd April, 1997[69] addressed to DV Kapila & Co and Bhailal Patel & Patel signed by Pansal Investments Ltd, HEDAM, Mukesh Vaya and Westmont which states:

"We hereby instruct you as joint Stakeholders that the Vendors are authorized solely to instruct you to make payments …. in respect of the abovementioned sale and purchase transaction out of any balance amount from the US Dollars Three Million Seven Hundred Thousand (USD 3,700,000.00) already paid by the Purchaser into the Stakeholder's Account after paying the ten percent (10%) deposit to Central Bank of Kenya." (underlining for emphasis)

163. Further, Mr Kapila's position is also at variance with a letter on DV Kapila & Co letterhead dated 25th March 1997 [70] to Westmont, Pansal, HEDAM and Mukesh Vaya which states, inter alia as follows:

"As per your instructions we confirm we have opened joint stakeholder accounts with Citibank….

The said accounts are to be operated jointly by one of the partners of DV Kapila & Co (namely either Omesh Kapila or Dinesh Kapila) and Mr Bhailalbhai B Patel"

What is important to highlight is that DV Kapila & Co were apparently engaged by or in communication with not only Westmont, the Purchaser, but also with Pascal, HEDAM and Mukesh Vaya, the Vendors, too.

164. From all the foregoing, I am persuaded that the stakeholders were acting in *concert* with the

purchaser, Westmont, and also with the vendors of the GRH Agreement. And as earlier noted, Pattni was in fact acting directly for the vendors in the GRH Agreement under powers of attorney, and was a co-investor with the Purchaser Accordingly, it stands to reason that he would be the one who would deliver the cheque to CBK. I therefore think it more plausible, and am persuaded by the content of the letter written by Pattni personally to CBK[71], that he is the one who delivered the said cheque to CBK and obtained the written and signed acknowledgement of CBK's Mr Marambii on the bottom of that letter.

165. In my view, it is clear that although CBK was no doubt fully aware of the GRH Sale Agreement and had facilitated it by agreeing to Pattni's offer to buy back the GRH, they treated, and were entitled to treat, the amounts received as part of the wider debt of Pattni to CBK. This may explain why they chose to be free from, and not be a party to, the GRH Agreement, and in particular, why CBK opted not to be a stakeholder in any agreement although that had been mooted in the "without prejudice" communications by Pattni leading to the settlement.

166. In light of all the foregoing evidence, I have no doubt at all, and I so find, that whilst the purchaser, Westmont, was making payment for the GRH under the GRH Agreement, the CBK was receiving the money as part of the redemption money from Pattni under the concurrent Pattni/CBK Agreement and the charge.

167. The next issue is:

Whether Central Bank of Kenya failed to deliver on its contractual role by failing and/or refusing to allow due diligence and what are the implications of refusal to allow due diligence.

168. As earlier noted, the issue of due diligence first emanated from Pattni's without prejudice communications which resulted in the out of court settlement. This culminated in the Pattni/CBK Agreement earlier discussed. A similar provision also found its way into the GRH Sale Agreement, also already discussed herein at length.

169. Westmont in its submissions appreciated that the provision for due diligence was that which was contained in Murgor & Murgor's letter of 26th February 1997, at paragraph D as varied by their letter of 21st March, 1997. According to Westmont, the scope of due diligence was:

> ***"…wide, unqualified and unfettered and referred to examination of assets of the hotel and any records kept by the receiver. There being no other reference of the due diligence allowed, the argument that the request for due diligence went beyond the scope of the agent does not have a leg to stand on and the reasons offered are merely excuses to avoid meeting the terms permitted. 'Assets and records' is what constitutes due diligence." [72]***

170. Paragraph D in the aforesaid letter of 26th February, 1997, reads as follows:

> ***"In consideration of payment of the deposit of 10% aforesaid, Central Bank of Kenya agrees to instruct the Receiver of Grand Regency Hotel to permit a purchaser authorised by Uhuru Highway Development Limited in writing to examine the assets and any records kept by the Receiver"***

In my view this provision is very loosely worded. It merely indicates the payment of the deposit as consideration for the examination. It gives no starting trigger for that action or the end timeframe within which the examination was to be effected.

171. On its part, the GRH Agreement required at Clause 5.1:

> ***"That upon payment by the Purchaser of 10% of the Redemption Amount to the Central Bank of Kenya, the Central Bank of Kenya shall upon Vendors request instruct the Receiver to allow the Purchaser to examine the assets of the Hotel and any records kept by the Receiver."*** (underlining for emphasis)

Clearly, under this clause the trigger for the start of the examination process is the "*Vendors request*". However, this clause having not been acceded to and signed by the CBK, could not bind CBK.

172. The Pattni/CBK Agreement was mutually varied by CBKs letter of 7th May, 1997. It indicated the purchase price for GRH as Ksh 2.1 billion and required :

> ***"c) The balance [of the purchase price] being Ksh 1,955,500,000/= shall be paid as follows:***
>
> ***(i) 10% deposit being Shs 195,500,000/= shall be paid on or before 15th May, 1997.***
>
> ***(ii) The balance of the purchase price being Kshs 1,759,500,000/= shall be paid on or before 15th July, 1997***
>
> ***(iii) Each party in HCCC No 29 of 1995 shall bear its own costs"*** (Underlining for emphasis)

173. With timelines and deadlines set, the deposit was paid on 12th May, 1997, just three days before the deadline. In their letter of 12th May, 1997[73] forwarding the cheque, Ms Kapila gave their professional undertaking to pay the balance of the Redemption Amount of Kshs 1,955,000,000. They also reminded CBK:

> ***"That in your letter to us of acknowledgement of receipt of the said deposit, you will authorise immediate permission to the purchasers to examine the assets of the Hotel and the records kept by the Receiver"*** (underlining for emphasis)

174. Of course, CBK had not bargained with Pattni to do as proposed by Kapila, nor with the immediacy desired by Kapila. Their bargain was that once consideration of 10% had been paid they would be open only to instructing the Receiver to permit a purchaser authorised by UHDL to examine the assets and records kept by the Receiver'; and payments must be according to the timelines agreed.

175. Back to the letter of 26th February, 1997 which formed the core of the Pattni/CBK Agreement. The payment having been made on 12th May, 1997[74], the consideration for the authority for the examination process to begin had been fulfilled. On 15th May, 1997,[75] Kapila wrote to the CBK confirming payment of the 10% redemption money, and sought authority to:

> ***"…confirm to the said auditors that they can now go ahead with their urgent assignment which will in turn enable early payment of the balance of the redemption amount by our clients Westmont…"***

176. Murgor replied on 20th May, 1997,[76] stating that the issue of redemption was not relevant under the agreement of 26th February, 1997. His letter further indicated that the mode of due diligence suggested by KPMG, was not that provided for by the agreement. In particular, the letter pointed out that:

> ***"Clause (d) does not permit due diligence as suggested in your letter of May 15, 1997 addressed to yourselves by KPMG Peat Marwick. In addition the payment of the balance of the purchase price is not conditional upon the examination of the assets and records in Clause (d) of the aforementioned letter".***

177. The KPMG letter was not exhibited to show the content and full extent of the purchaser's preferred due diligence. However, it appears to have been the source of the standoff between CBK and the purchaser.

178. It is not very clear how long the standoff remained. And that may be an intrigue that will remain unresolved until Pattni and Mukesh Vaya give evidence to clarify the situation. I say this because, despite

the alleged standoff, a letter from UHDL to Murgor & Murgor dated June 17, 1997[77] seems to clearly indicate that examination and inspection by the auditors was proceeding. The letter states:

> *" **Re: Out of Court Settlement of HCCC NO 29 of 1995***
>
> ***We have already given to your clients, Central Bank of Kenya, relevant authority in our letter to them of 9th May, 1997 and do hereby further authorise and request as follows:***
>
> ***In view of the fact that it has already been agreed in your letter of 26/2/97, could you please for the sake of clarification and assurance confirm to the Purchasers 'that at the time of completion your client will hand over possession of the Hotel, duly freed from receivership, to the Purchasers'***
>
> ***Also in view of the fact that it has already been agreed that a settlement is to be recorded in Court in line with the terms as in your letters of 26/2/97 and 7/5/97, could you please, for the sake of clarification and assurance confirm to the Purchasers 'that at the time of completion your clients will enter a consent order in the High Court making (sic) the Civil case No 29 of 1995 as settled with each party bearing its own costs in confirmation that they and/or their advocates and agents do not have nor will have any claims whatsoever against the company its business or its assets'***
>
> ***Could you please as a matter of urgency let the Purchaser's advocates have the above undertakings as this will enable the Purchasers to hasten the arrangements for payment of the balance as the examination and inspection by the auditors is moving satisfactorily and will hopefully be concluded shortly"*** (underlining for emphasis).

179. The letter is copied to the Governor, CBK, and D.V Kapila & Co Advocates. The letter bears the signature of Mukesh Vaya – as seen in other documents exhibited and signed by him. The above letter gives a new twist to the issue of examination of the assets and records kept by the receiver, on which no further comment is now necessary.

180. In any event, by a letter dated July 11, 1997[78], Murgor & Murgor wrote to Kapila reiterating the contents of the agreement in the letters of 26th February, 1997, and the variation thereto in their letter dated May 7, 1997. Murgor also pointed out that CBK had given every undertaking required therein. Finally Murgor alluded to the UHDL letter of 17th June quoted herebefore, without identifying it explicitly, and chided:

> ***"…Similarly, Messrs UHDL cannot request or draft undertakings not agreed upon between our client and Mr Kamlesh Pattni on their behalf." [79]***

This letter also gave notice that CBK expected to receive the balance of the purchase price of Kshs 1,759,500,000/= on or before 15th July, 1997, as agreed between them and Pattni, noting that time was of the essence.

181. By a letter dated 15th July, 1997[80], to Murgor & Murgor Advocates, CBK's lawyers, D.V Kapila set out the undertakings they desired to receive. In reply, Murgor indicated that they saw the letter as merely an attempt to avoid discharging their undertaking towards CBK. Consequently, payment of the balance of the purchase price having not been made, CBK on 16th July, 1997 issued a press release stating, inter alia:

> ***"…The first instalment of 10% was to be paid on or before 15th May, 1997. We confirm that this instalment was paid by the due date. The balance of Kshs 1, 759,500,000.00 was agreed to be paid on or before 15th July, 1997.***
>
> ***Mr Kamlesh Pattni has failed to pay the balance as agreed. Accordingly, the sale agreement has***

lapsed.

The Central bank wishes to inform the public that it shall now exercise its statutory power of sale over the charged property.…"[81]

182. Taking into account the above chronology of events which are well documented, I am unable to agree with the plaintiff that CBK failed to deliver on its obligations in the Pattni/CBK Agreement to allow due diligence. I find that what the plaintiff sought in terms of due diligence was not entirely in accord with the Pattni/CBK Agreement. Instead, the plaintiff seemed to have conflated the obligations and expectations under the GRH Agreement with those in the Pattni/CBK Agreement. In the result, the Plaintiff failed to pay the balance of the purchase price within the contractual time resulting in the collapse of the transaction.

Who, if at all, is obligated to refund the sum of Kshs.185,500,000.00 paid to Central Bank of Kenya as deposit for the purchase of the Grand Regency Hotel upon failure of the whole transaction?

183. I begin by reiterating my earlier finding that there were two distinct and separate agreements. They were simultaneously in play in this matter, each having specific terms and conditions and different parties. The idea that there was a tripartite agreement is a misconception, as there was no such instrument.

184. The Pattni/CBK Agreement, created through correspondence between the two parties, had no provisions for a stakeholder, indemnity or for refund of any monies paid to CBK. The GRH Sale Agreement, on the other hand, had clear provisions for stakeholders, refund and indemnity. It is therefore to the GRH Sale Agreement that recourse by the Vendor must be had.

185. By Recital 6 of the GRH Agreement, stakeholders were identified, and by Clause 4.2 they were expressly authorized to release the ten percent (10%) of the Redemption Amount to CBK.

186. Clause 3.2 provides for refund, in the following terms:

"In the event any of the said conditions precedent set forth in Clause 3.1 above is not obtained within the said 90 days not due to the default or omission of any of the parties hereto, then this Agreement shall be void and of no effect and the Vendors shall refund to the Purchaser free of interest any sums of money paid by the Purchaser under the terms of this Agreement"

187. Clause 10.3 provides, for refund to the Purchaser by the Vendor in the event of termination of the agreement:

"…of all moneys paid by the Purchaser under this Agreement <u>including the Deposit</u> and / or other payments to the CBK, and thereafter this Agreement shall be void and neither the Vendors not the Purchaser hereto shall have any claims against the other"

188. Clause 10.4 provides for forfeiture of the Deposit:

"If the Purchaser fails through no fault of the Vendors, the Vendors may, without prejudice to any of the rights or remedies available to them, forfeit and retain the Deposit paid herein"

189. Clause 11.3 provides for indemnity as follows:

"The Vendors will indemnify and keep indemnified the Purchaser and the Company from and against all actions, claims, demands and proceedings suffered, made or brought against the Purchasers and the Company in respect of any of the matters relating to the said business prior to the Completion Date"

190. All these provisions gave the only safety net for the Purchasers in the event of failure of the transaction.

191. Finally, there is a letter from Lynwood dated 18th March 1997[82] to Westmont by which Lynwood allowed Westmont to sign the GRH Agreement. In the last paragraph of the said letter it is stated:

> ***"In our phone conversation, you mentioned that Mr Pattni requested to have the deposit released to Central Bank of Kenya in order to expedite the sale of Grand Regency. We are however, rather skeptical about releasing the 10% deposit to Central Bank of Kenya since Central Bank of Kenya is not a party involved in the sale agreement; unless Mr Pattni himself will give us a personal guarantee to refund us the deposit if we are not satisfy (sic) with the due diligence audit later"*** (underlining for emphasis)

192. In light of all the foregoing, I can only say that if at all there was any party liable to compensate the Purchaser in any way, it would on a contractual basis clearly be the Vendors. Otherwise, this is a case in which the proposition that "the loss lies where it falls" would apply. I so find.

193. Having found, as I have, that the principal amount is not payable, likewise, no interest is payable in this matter.

Whether Central Bank can maintain a suit against Uhuru Highway Development Limited.

194. The counterclaim by the Central Bank of Kenya, sought the following reliefs against UHDL:

> *1. A declaration that Kamlesh Mansukhlal Pattni and Uhuru Highway Development Limited are in breach of contract aforesaid.*
>
> *2. General damages.*
>
> *3. In the alternative specific performance of the contract aforesaid by payment of the balance of the purchase price together with interest thereon at bank rates.*
>
> *4. Costs of this suit*

195. As I have already found, the only agreements in this matter are, first the GRH Agreement, and second, the Pattni/CBK Agreement. In both of the agreements, there was no privity of contract between the CBK and UHDL. The only means by which CBK would have a valid claim against UHDL, would be through the Charge instrument between CBK and UHDL. That issue was, however, not the subject of this suit, and CBK had no basis for mounting a claim against UHDL.

Disposition

196. The upshot of all the foregoing is that the plaintiffs' case fails in its entirety, and is hereby dismissed.

197. Equally, the counterclaim fails in its entirety and is hereby dismissed.

Costs

198. Costs follow the event. I note that the 1st Plaintiff withdrew as plaintiff during the course of the hearing, and therefore cannot escape liability for costs. The Defendant CBK shall have the costs of the claim, and shall pay the costs of the counterclaim.

199. Orders accordingly.

200. Finally, I wish to thank counsel for their diligence and the effort they displayed in arguing their respective cases. I have referred to relatively few of the authorities they cited. This is not out of disrespect, but rather out of recognition that this suit revolved extremely heavily around the pithy and well documented factual aspects of the case which are self-expressive.

Dated At Nairobi This 16th Day of December, 2016

_____

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1. Mr Adala and Mr Kalove……..……..……for Mr Pattni

2. Mr P Muite, SC and Mr Muriithi …….…….for the Plaintiff

3. Mr P Murgor & Mr Ouma.……..…….....for the Central Bank of Kenya

4. Mr Ngacha……for Uhuru Highway Development Limited

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[1] Court of Appeal Judgment at Page 20-21 in Civil Appeal No 118 of 2013

[2] Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd (1969) EA 696

[3] John Mwangi Chege & 3 Others v Obadiah Kiritu Methu [2012] e KLR

[4] [1917] 1 KB 486

[5] Westmont Bundle page 47

[6] Westmont Bundle pages 42-46

[7] Ibid pages 3-5

[8] Goodwill and Trust Investment Ltd and Anor . v Will and Bush Ltd, a Nigerian Supreme Court case quoted in Apex International Limited & Anglo-Leasing & Finance International v Kenya Anti- corruption Commission [2012] eKLR

[9] Paragraphs 5-6 of Supporting Affidavit deponed by Jasmine See on 21st March 2014 in support of Application for Substitution dated 21st March, 2014 and filed on 27th March, 2014.

[10] Westmont Bundle Volume 1 pages 11-15

[11] Westmont Submissions page 6, last paragraph

[12] Westmont Mention Letter-642/98 from Kalove & Company Advocates to Deputy Registrar date stamped 26th February 2015, page 1

[13] Twelfth Ed, I.A. Jacob, 1975, page 126

[14] 16th Edition, at page 594

[15] Ibid at page 597

[16] 6th Edition 1990

[17] [2013] eKLR

[18] Ibid, at page 615

[19] Westmont Bundle Vol 1 page 12. There is, however a discrepancy in the date on the front cover of the document which is of no immediate consequence.

[20] Volume 1 pages 17-34

[21] Westmont Bundle Vol 1 pages 265-266

[22] Fibrosa Spolka Ackcygna v Fairbairn Lawson Combe Barbour Ltd [1943] AC

[23] Samuel Kamau Macharia v Kenya Commercial Bank Limited [2003]eKLR

[24]CBK Bundle Volume 2 Pages 246-271

[25] Ibid Pages 586-623 and pages 652-666

[26] Ibid page 652 ff – Statement of the Vice–President and Minister for Finance in Parliament referring to a debate that had taken place in Parliament resulting in the Minister for Finance promising 2nd June 1992 to make a statement to the House on Goldenberg International Limited

[27] CBK Bundle Volume 2 page 626

[28] Ibid pages 618-619, Letter on Exchange Bank Limited letterhead

[29] CBK Bundle Volume 2 page 619

[30] CBK Bundle Volume 2

[31] Ibid page 614

[32] Ibid page 615

[33] CBK Bundle Volume 1 pages 246-271

[34] CBK Bundle Volume 1 page 667-672

[35] CBK Volume 2 page 611-612

[36] CBK Volume 2 page 613

[37] Ibid page 606

[38] Ibid page 605

[39] Ibid page 604

[40] Ibid page 701

[41] Ibid pages 602-603

[42] Ibid pages 595-600

[43] CBK Bundle Vol 1 page 1336-7

[44] Ibid page 1338

[45] Westmont Bundle of Documents Vol 1 Page 17-34

[46] Westmont Bundle Vol 1 pages 127-132

[47] Ibid pages 127 and 128

[48] Para 2.3 Westmont Submissions

[49] Para 2.2 Westmont Submissions, page 9

[50] Para 2.2 Westmont Submissions, page 9,

[51] CBK Bundle Volume 3 pages 1339-1349 and 1358-1361

[52] Ibid; without prejudice letters of October 1996- January 1997

[53] CBK Bundle Vol 3 Page 1358

[54] Ibid page 1342-3

[55] Ibid page 1359

[56] CBK Bundle Vol 3 page 1339

[57] Ibid Page 1362; Westmont Bundle Vol 1 pages 6 &69

[58] Westmont Bundle Vol 1 page 57

[59] CBK Bundle Vol 2 page 897

[60] CBK Bundle Vol 3 page 1370

[61]Lynwood's documents Vol 1 Pg. 16.

[62] Plaintiff's Bundle Vol 1 pg. 50.

[63] Plaintiff's Bundle Vol 1 pg. 54.

[64] CBK Bundle Vol 3 page 1353

[65] Ibid page 1377

[66] Page 18-29 of the Court of Appeal Record contained in the file

[67] Re-Amended Palint dated 17th November, 2014, at Paragraph 6F

[68] Westmont Bundle Vol 1 page 72; CBK Bundle Vol 3 page 1353

[69] CBK Bundle of Documents Vol 3 page 1355

[70] Ibid Page 1357

[71] See Pattni's letter dated May 12th 1997 Westmont Bundle Vol 1 page 52

[72] Westmont submissions Paragraph 2.5 (1)

[73] Westmont bundle Vol 1 page 91

[74] Westmont submissions para 2.4 page 13

[75] Westmont Bundle Vol 1 page 54

[76] Westmont Bundle Vol 1 page 55

[77] CBK Bundle Vol 3 page 1352

[78] CBK Bundle Vol 3 page 1376-1379

[79] Ibid page 1378, penultimate paragraph

[80] Ibid page 1381-1382

[81] Westmont Bundle Vol 1 Page 143

[82] Westmont Bundle Vol 1 page 5