REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HCCC NO. 644 OF 2005

KENYA AKIBA MICRO FINANCING LIMITED.....PLAINTIFF

VERSUS

EZEKIEL CHEBII.....1ST DEFENDANT

MOSES GITUMA.....2ND DEFENDANT

CHIEF INSPECTOR JOSEPH YEGON.....3RD DEFENDANT

CHIEF INSPECTOR BERNARD BARAZA.....4TH DEFENDANT

INSPECTOR CHARLES NJOGU.....5TH DEFENDANT

INSPECTOR MATHEW BETT.....6TH DEFENDANT

INSPECTOR DUNCAN MACHARIA.....7TH DEFENDANT

INSPECTOR GRACE NDIRANGU.....8TH DEFENDANT

INSPECTOR PETER NGANGA.....9TH DEFENDANT

SENIOR SEARGENT JOHN MWANGI……... ……10TH DEFENDANT

CORPORAL DAVID YEGON……..... ……. 11TH DEFENDANT

POLICE CONSTABLE FELIX ODUOR.....12TH DEFENDANT

POLICE CONSTABLE PHILEMON LAGAT.....13TH DEFENDANT

CENTRAL BANK OF KENYA.....14TH DEFENDANT

THE ATTORNEY GENERAL (on behalf of the BANKING FRAUD INVESTIGATION UNIT – KENYA POLICE).....15TH DEFENDANT

RULING

On 29th January, 2004 the Plaintiff was incorporated under the Companies Act and issued with a Certificate of Incorporation. Some of its objects were, inter alia, to carry on business in Kenya as financial operators, hire purchase and to finance or assist in financing sale of motor vehicles, cars, goods and articles. In all, the Plaintiff was a Micro finance institution which upon incorporation operated in Nairobi, Kitengela, Ongata Rongai and Voi. In order to carry out its business aforesaid, the Plaintiff obtained a Pin Certificate, Hire Purchase Licence No. HPB/350 under the Hire Purchase Act, Chapter 507, Laws of Kenya, Single Business Permit from the Nairobi City Council, NSSF and NHIF membership for its employees and above all membership to the Association of Microfinance Institutions on payment of the requisite registration fees.

Thereafter, the Plaintiff advertised for business in the daily newspapers, issued brochures as well as advertised in the electronic media. Customers were required to apply in writing. They would be required to complete application forms which would be appraised and if accepted, a letter of offer would be issued to them which on acceptance, a formal loan agreement between the Plaintiff and the customer would be executed. It is on execution of such agreement that the Plaintiff would then finance the customer to purchase specific assets. The Plaintiff operated three (3) bank accounts with the Kenya Commercial Bank, City Centre, Housing Finance Corporation of Kenya, Moi Avenue and Equity Bank, Mama Ngina Branch. All monies collected by the Plaintiff were banked in these accounts.

On 31st October, 2005, the 14th Defendant published a press statement in the local dailies to the effect, inter alia, that:-

"The Central Bank of Kenya would like to bring to the attention of the public that Section 3(1) of the Banking Act precludes unauthorized use of the terms "finance," or "bank" or any of their derivatives, or indeed any other word indicating the transaction of financial business as defined in the Act, except for institutions that are currently licensed and operate under the Banking Act and Building Societies Act. Secondly, Section 16 of the Banking Act, precludes any person or institution, not licensed under the Act, from soliciting, taking or accepting deposits.

It is to be noted that any persons or entities set up as a business through incorporation as companies bearing the names "finance" and related derivatives like "microfinance" and issues advertisements, brochures, circulars or other documents inviting persons to make a deposit, are in contravention of the Banking Act, and are liable to an offense punishable in accordance with the provisions of the Act.

All persons or entities in breach of the Banking Act are therefore given up to January, 31, 2006 to stop the use of the protected words and taking deposits from members of the public. Failure to do so will lead to appropriate legal action being taken against such entities or persons." (Emphasis supplied)

On 2nd November, 2005, police officers and members of the Banking Fraud Investigation Unit (BFIU) and other persons said to be from the Central Bank of Kenya, Bank Supervision Department, raided and descended upon the business premises of the Plaintiff, seized and carted away all files and tools of trade belonging to the Plaintiff including computers and their accessories, customers' and related files, original title deeds, certificates of lease, grants, motor vehicle log books, banking and financial records, company seal, rubber stamps, records, memos, tax records, everything and anything they could lay their hands on in those premises.

The Plaintiff's business premises in Nairobi, Kitengela, Ongata Rongai and Voi were cleared clean and thereby shut down. Further, the Plaintiff's company accounts at KCB, Equity Bank and Stanbic Bank were frozen including all the other bank accounts of the Plaintiff in the country. Simply put, the Plaintiff was brought down on its knees and its operations were completely shut down. To date, the Plaintiff remains shut down.

By a Plaint dated 10th November, 2005 amended on 5th April, 2006, the Plaintiff brought these proceedings claiming, inter alia, special damages of Kshs. 930,000,000/-, damages including exemplary damages and costs, interests on cost and on damages. The Defendants filed their respective Defences thereto.

In the meantime, the Defendants instigated the arrest, arraigning in court and charging of the Plaintiff's Directors in the **Nairobi CMC Cr Case. No. 2474 of 2005 Republic –vs- Gedion Mwiti Irea & 3 others** (hereinafter "the criminal case") with the offences of carrying out banking business without the minister's approval contrary to Section 3(1) (a), (c) and 3 (2) and unlawfully accepting deposits without a valid licence contrary to Section 16(1) and 16(9) of the Banking Act Chapter 488 of the Laws of Kenya (hereinafter " the Act").

After hearing a total of 17 prosecution witnesses and the accused persons, on 23rd September, 2011 the Chief Magistrate's Court in its criminal jurisdiction acquitted the Plaintiff's directors of the offences charged. I shall later on turn on the findings of the criminal court in so far as they are relevant to these proceedings.

By a Notice of Motion dated 28th October, 2011 expressed to be brought under Orders 2 Rule 15(b), (c) and (d), 51 Rule 1, 36 Rule (5), 39 (2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, the Plaintiff have sought seven (7) orders, to wit:-

"1. THAT the defences filed herein by or on behalf of the Defendants and each of them be struck out.

2. THAT alternatively this Honourable Court be pleased to strike out the undernoted paragraphs in the respective defences, that is to say;

a) in respect to the Defence filed by Central Bank of Kenya dated 5th January, 2006, paragraphs 3,4, 5, 6, 7, 8, 9, 10,11,12,13 and 14 inclusive be struck out.

b) in respect to the Defence filed by the Honourable Attorney General dated 9th May, 2006, paragraphs 3,4,5,6,7,8,9 inclusive be struck out.

3. THAT as a consequence of the grant of Prayer No. 1 or 2 above, this Honourable court be pleased to enter interlocutory Judgment on liability and the matter to proceed for assessment of damages on priority basis.

4. THAT this Honourable Court be pleased to Order the 14th Defendant (Central Bank of Kenya) and the 15th Defendant (Hon. Attorney General) to release to the Plaintiff's directors all the items seized on 2nd November, 2005 from the Plaintiff's offices which items include;

a) computers, computer diskettes and other accessories

b) all customers and related files.

c) Original Title Deeds, Certificates of lease, Grants 2000 motor vehicle log books and other related security documents.

d) Banking and financial records

e) Company seal, rubber stamps, records and Memos

f) Tax records

g) All tools of Trade

In lieu thereof, the 14th and 15th Defendants be compelled by an Order of this Honourable court to give a suitable undertaking as to damages to the tune of Kshs.2,000,000,000/- (Kenya shillings two billion) or the value of the properties whose Titles they are holding.

5. THAT this Honourable court do strike out the 2nd Defendant (Moses Gituma) from the pleadings as he is now deceased.

6. THAT this Honourable Court be pleased to make any other or further orders necessary to meet the ends of justice.

7. THAT the Defendant be condemned to pay the costs of this application in any event."

I believe and hold at this stage that Prayer No. 5 cannot be granted since I believe the case against the 2nd Defendant has since abated.

In support of the application Gideon Mwiti Irea swore a Supporting Affidavit sworn on 28th October, 2011 and written submissions dated 8th February, 2012 were filed. In the Affidavit, the written submissions and oral hi-lights the Plaintiff contended that before it was incorporated its promoters had established that there was no legal regime or statutory framework governing microfinance institutions in Kenya, that micro finance institutions in Kenya operated under various regimes including the Companies Act, Co-operatives Act and the Hire Purchase Agreement, that the challenges facing the concept of micro finance in Kenya was challenging as shown in the Government Budget Speech for 1999/2000. Mr. Mwiti swore that he Plaintiff targeted borrowers who did not wish to be subjected to the rigours of the Banking Act, he set out the stringest measures the Plaintiff put in its operations to be able to comply with the requirements of Hire Purchase Licence under which the Plaintiff was operating. It was contended that the raid of 2nd November, 2005 on the Plaintiff's offices was led by Ezekiel Chebii and the late Moses Gituma both of the 14th Defendants banking supervision department, that the raid led to the closure of the Plaintiff's business at a time when its customer base was close to 6,000 and 300 employees. As a result of the raid, the Plaintiff could not continue operating in the absence of the tools of trade, the loans advanced could not be recovered, and the Plaintiff could not honour any of its agreements its customers and itself. The Plaintiff denied having engaged in any banking business and its position had been vindicated in that the criminal court had acquitted its directors of the offences connected therewith.

The Plaintiff was further contended that since the issues in this matter were the same as in criminal case no. 2474/2005 the defences herein were a sham, they did not raise any bonafide triable issue to warrant a trial, the defences were but an abuse of the process of the court, that the criminal court had made a finding that the Plaintiff's affairs had not established an offence known in law and did not warrant closure, that indeed the criminal court had vindicated the Plaintiff's position that it had not breached the provisions of the Banking Act.

Mr. Simani, learned counsel for the Plaintiff acting with Mr. Njengo submitted that the issues of liability had conclusively been tried and determined in the criminal court, Counsel incisively dissected and tried to answer all the points of defence raised by the Defendants in their defences using the exhibits to the motion. The Plaintiff cited and relied on the following authorities on the proposition that there was no plausible defence the Defendant's defences should therefore be struck out, **Fremur Construction Co. Ltd –Vs- Manakshi Navin Shah (2005) e KLR, Plantation Fertilizers Ltd –Vs Rioki Coffee (1971) Co. Ltd 2006e KLR, John Patrick Machira –Vs- Grace Wahu Njoroge (e KLR)** and **Keshavji Jivraj Shaj –Vs- Juthalal Hadha Shah CA No. 42 of 1995(UR).**

Mr. Simani submitted that there was no serious answer to the matters pleaded in the Amended Plaint and in the circumstances, the application should be allowed as prayed.

The 14th Defendant filed a Replying Affidavit sworn by Neala Wanjala sworn on 27th January, 2012 and written submissions dated 20th February, 2012. It was contended for the 14th Defendant that the Plaintiff's application was based on the judgment of the criminal court, that his court is not bound by the findings of the criminal court and should make its own legal determinations. That the Plaintiff cannot exist as "Kenya Akiba Micro Finance" under the companies Act as the Banking Act Cap 488 prohibits the use of the word "finance" or any of its derivatives, that the licence under which the Plaintiff was licenced did not permit it to carry out financial business and that it was engaged in the business of taking deposits and lending money without licence, that the raid on the Plaintiff's premises was done by officers of the

BFIU under the direction of Mr. Okonga an Assistant Commissioner of Police.

It was further contended for the 14th Defendant that the investigations of BFIU led to the charging of the Plaintiff's directors in **Nairobi CMs Cr. Case No. 2474 of 2005**. The deponent produced the entire proceedings in the criminal trial court which this court has carefully considered. It was that the court did not have jurisdiction to grant prayer Nos. 4 and 5 of the Motion. That the provisions of Sections 1A, 1B and 3A do not give the Court the jurisdiction sought, that prayer No. 5 is outside the Court's jurisdiction as the law is clear on what happens upon death, that BFIU is not part of the 14th Defendant and the case of **Shadrack Mwiti Ithinji & 9 others –vs- Republic HCCC No. 331 of 2002 (UR)** was relied on, Mr. Amoko, learned Counsel for the 14th Defendant submitted that the court had in **Petition No. 513 of 2006** made findings that were binding on this court, that the judgment of the criminal court had a preclusive value and nothing more. Counsel for the 14th Defendant referred to the cases of **Standard Chartered Bank –vs- Intercom CA No. 37 of 2003 (UR) Iqbal Singh Marwal & Anor –vs- Mehakshi Marwa & Anor of the Supreme Court of India Appeal No. 402 of 2005 (UR),** and **Kibaki –vs- Moi (2008) 2 KLR 351** in support of the foregoing submissions. He urged the court to dismiss the application.

The Attorney General for the 1st to 13th and 15th Defendants respectively filed Grounds of Opposition and written submissions dated 7th November, 2011 and 20th February, 2012, respectively. Mr. Ombwayo, the learned Senior Principal Litigation Counsel for the Attorney General submitted that the Attorney General's defence was no frivolous, it is not a sham in that it raises triable issues. That BFIU was a unit of the Criminal Investigations Department under the Investigations Branch of the 14th Defendant having been seconded thereto, that unit is answerable to the supervision branch of the 14th Defendant and any action by BFIU is an action that was sanctioned by the 14th Defendant in consultation with the directorate of criminal investigations, that there were triable issues which cannot be decided upon summarily.

I have considered the Affidavits on record, written submissions and oral hi-lights of Counsel. At the hearing of the application, what came out clearly and which is not in dispute is that on 2nd November, 2005, officers from the BFIU in the company of two officers from the 14th Defendant's supervision department, Mr. Ezekiel Chebii (1st Defendant) and Mr. Moses Gituma (2nd Defendant) now deceased, raided the Plaintiff's offices and took away all its tools of trade including security documents held on behalf of the Plaintiff's customers. The items included 3,000 log books, loan files, rubber stamps, company seals, cheque books, receipt books, computers and other machines. The Plaintiff's accounts in three banks were also frozen. What the parties fought over and do not seem to agree on is whether BFIU was under the direction and command of the 14th Defendant and whether the Plaintiff was carrying on banking business and thereby justifying the Defendants aforesaid action. The latter issue turns out on the meaning of Section 2 and 16 of the Act.

The principles applicable to the court's jurisdiction to strike out a pleading were settled in the case of **D.T. Dobie & Company –vs- Muchina (1982) KLR 1.** After analysing several authorities on the subject of summary determination of proceedings, the court set out the following as the principles. That the power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question is unsustainable. It is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised. The Court should not delve into minute examination of facts which is a matter to be left to the trial court. However, that power can and should be exercised in deserving and appropriate cases to save the precious judicial time.

As I have already found, this suit is entirely premised on the circumstances surrounding the raid carried out on 2nd November, 2005 upon the Plaintiff's offices and the subsequent closure of its operations. The answer given by the Defendants is that the Plaintiff had breached the law by conducting banking business for which it was not licensed. The Plaintiff on its part contends that it was carrying out hire purchase business as a micro finance institution. Is this a triable issue that should be allowed to go for trial?

Section 2 of the Banking Act Chapter 488 of the Laws of Kenya (hereinafter "the Act") defines banking business as:-

"a) the accepting from members of the public money on deposit repayable on demand or at the expiry of a fixed period or after notice;

b) the accepting from members of the public of money on current account and payment on and acceptance of cheques;

and

c) the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money." (Emphasis supplied)

A reading of this section will show that for one to be said to carry out banking business, that person should be in a business of accepting money from the public on deposit repayable on demand or notice, receiving money on current account, payment on and accepting cheques and finally investing monies received as such on one's own risk.

Section 16 of the Act provides for the restrictions on deposit taking. Section 16 (5) defines a business of deposit taking as lending to others the monies received as deposit and financing the activities of the business of the entity by use of such monies received as deposit.

All the Defendants in their respective Defences alluded to the fact that the Plaintiff carried on banking business and the business of deposit-taking contrary to Section 3(2) and (3) and Section 16 of the Act, respectively. The Plaintiff has denied that fact.

The Plaintiff has in paragraphs 12 to 15 of the Affidavit of Gideon Mwiti Irea sworn in support of the motion set out in detail the nature of the business it was carrying on prior to November, 2005. I have already set out these details at the beginning of this ruling. To begin with, the Defendants did not specifically or otherwise deny that the Plaintiff's business was carried out as set out in those

paragraphs. Further, none of the Defendants stated or submitted that the business of the Plaintiff as set out in those paragraphs of the Affidavit amount to banking business or financial business. In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.

It is not disputed that on 2/11/05 the Defendants took all the tools of trade of the Plaintiff. In paragraphs 7(c) and 7 (d) of her Replying Affidavit, Neala Wanjala swore that:-

"(c) the issue as to whether the Plaintiff was authorized in law to carry out financial business is before this Honourable Court, however, whether the Plaintiff carried on the business of "Micro Finance" in a professional and transparent manner, is not before this court as the Plaintiff was not in law authorized to carry out such business.

(d) I am not aware of how the Plaintiff carried out its trading activities and whether all the parties observed the terms of the various contract. There are matters which in the event, can only be determined through a full audit and inspection of the Plaintiff's activities, a matter not in issue in this case."

"In my view, what the 14th Defendant was in effect saying is that although I, together with the other Defendants took all the tools of trade belonging to the Plaintiff in November, 2005 (which included computers, all data, as well as all transaction records and agreements between the Plaintiff and its customers) I am not aware of how the Plaintiff carried out its trading activities neither do I know the nature of those transactions as well as the terms of the various contracts."

How can it be that the 14th Defendant does not know how the Plaintiff carried out its trading activities yet it has been in the possession of the Plaintiff's trading records for over six(6) years and they still remain in its and other Defendants' possession?

I have on my part carefully examined the nature of the Plaintiff's business as detailed in the Affidavit of Gideon Irea paragraphs 12 to 15 thereof and I do not find the same to amount to either banking business, financial business or business of deposit-taking in terms of Section 2 and 16(5) of the Act. They do not amount to taking money on deposit from the public, repayment of the same on demand, payment on cheques or applying those monies to finance the Plaintiff's activities.

My understanding of the law has always been that a party who alleges the existence of a fact must prove it. Sections 107 and 108 of the Evidence Act Chapter 80 Laws of Kenya are very clear on this. The Defendants have had all the Plaintiff's documents and trading records since November, 2005. It cannot be said that six (6) years later the Defendants have not been able to analyse the records, contracts and data in the computers/in their possession and come out with a conclusion as to the nature of the activities of the Plaintiff's business as at November, 2005. Indeed, the least the court would have expected the Defendants to do was to exhibit anything whatsoever that could tie the Plaintiffs activities to banking or financial business or deposit taking. What of the contracts that the Plaintiff had entered into with its

customers? What of "banking" transactions showing deposits and withdrawals if ever they existed? I do not believe that it was not possible for the Defendants after all those six (6) years, not to have come across any such item out of all those documents and records collected from the Plaintiff's offices in Nairobi, Ongata Rongai, Kitengela and Voi that would have shown that contrary to what the Plaintiff is asserting that it was only carrying out Hire Purchase business for which it was licensed to do and as set out in paragraph 12 to 15 of Mr. Gideon Irea's Affidavit, it was actually carrying out banking or financial business or deposit taking business. The fact that no thread of any such evidence was forthcoming from the Defendants, it leaves the court with no alternative but to conclude` that there was none.

In any event, this is a suit that falls on documents to prove the matters alleged by the Defendants, i.e. that the plaintiff was carrying out banking business. Why withhold such documents if they exist? Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:-

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him."

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of **Kimotho –vs- KCB (2003) 1 EA 108** the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.

In the present case, the Defendant's have had custody of the Plaintiff's documents and business records for over six (6) years now. They still have possession of those documents. They have failed to produce anything to show that the business activities that the Plaintiff was engaged in amounted to banking or financial business or business of deposit taking. It does not require oral evidence to prove such fact. What the 1st, 3rd to 13th and 15th Defendants did was only to file grounds of opposition. They never filed any Affidavit to counter the positive assertions of the Plaintiff.

As I have already noted, the 14th Defendant filed a Replying Affidavit which never specifically denied the assertions of the Plaintiff said paragraphs 12 to 15 of the foresaid Affidavit. What the 14th Defendant did, was to produce the entire record of the Criminal trial in the criminal case. From the handwritten proceedings, it is clear from the evidence of PW1 Harris Thuku Mwangi, PW 2 Helen Osito Matika, PW5 Maria Wanjiku Kanyua PW7 Nathaniel Chomba and PW8 Jane Wambui Macharia who were alleged to be the customers of the Plaintiff, that they never operated accounts with the Plaintiff, no cheque books were issued to them and that the deposits they paid to the Plaintiff was not to be withdrawn but were made as deposits for financing their various projects, majority of them being purchase of Matatus. The proceedings in the Criminal case in my view, does not advance the Defendants' case that the Plaintiff was operating banking or financial business. To the contrary, the evidence by those prosecution witnesses go contra the definitions in Section 2 and 16(5) of the Act of banking or financial business or business of deposit-taking. I should point out here that, I delved into considering that evidence in the criminal case because that is what the 14th Defendant produced in answer to the Plaintiff's assertions that it was not carrying out banking or financial business.

After considering all the material before me, I am satisfied that the contention that the Plaintiff was carrying banking business contrary to Sections 3 and 16 of the Act is a red herring being raised by the Defendants to try and cushion themselves from liability for the blatant, illegal ad uncalled for raid upon the Plaintiff's premises on 2nd November, 2005. That raid not only broke the Plaintiff's backbone as a commercial entity but it also ruined many a business of the Plaintiff's customers. The Defendants having analyzed the Plaintiff's business activities through its records, have not produced any acceptable material to show that what the Plaintiff was doing was anything other than hire purchase business.

Before concluding this issue, I need to refer to a matter which the Defendants referred me to. When the directors of the Plaintiff were arrested and charged in a criminal court for operating an entity (the Plaintiff) which was allegedly carrying banking business and deposit taking contrary to Sections 3 and 16 of the Act, they rushed to the Constitutional and Judicial Review Division of this court, as it was then, and filed **Misc Civil Application No. 446 of 2006 and Constitutional petition No. 513 of 2006.** In his consolidated and considered ruling delivered on 10th May, 2011 Hon Musinga J dismissed the Plaintiff's directors' said application and petition and held that:-

"I think most of the issues raised by the Applicants are matters which are suitable grounds of defence in the criminal proceedings and therefore ought to be raised before the trial court. The central issue for determination before the trial court is whether any of the petitioners flouted the provisions of Section 3(1) (a) and (b) of the Banking Act by carrying out business that amounted to banking business as defined by Section 2 of the Banking Act. If the 2nd Respondent, being the regulator of the banking industry in Kenya, was of the view that the petitioners or any of them was violating the law it was within its mandate to carry out appropriate investigations and act accordingly. Whether the actions by the 2nd and 3rd Respondents were warranted or not is an issue that can only be determined by the trial court upon consideration of all the relevant evidence." (Emphasis mine)

The Defendants had submitted the Hon. Musinga J. had made findings that the Plaintiff was carrying on banking business. But from the foregoing ratio decidendi of his decision, it is clear that he left the issues raised before him to be decided by the criminal court. After the trial court had considered all the relevant evidence before it, the criminal court (which is a competent court under Section 3 of the Act) made firm findings to the effect that the Plaintiff was carrying hire purchase business which it was licensed to, that it was financing purchase of specific assets and was not at all carrying any banking business.

Whilst the findings of the criminal court in Cr. Case No. 2474 of 2005, are not binding on me, it is instructive to note that that court was considering the very same issue of whether the Plaintiff was carrying banking business and that the findings of that court have not been appealed against by any of the Defendants. Some of the witnesses who testified in that criminal case were the Plaintiff's customers, the 1st, 2nd, 3rd and 4th Defendants in this case. I do not think that there would be any other and further evidence that a trial in this case will elucidate as far as this issue is concerned. The parties have put their best foot forward and I have made a finding based on what they have availed to the court, to the effect that there is no evidence that the Plaintiff was carrying on banking business or business of deposit-taking. They tried before the criminal court and they failed.

For the foregoing reasons, I am satisfied that the issue of whether or not the Plaintiff was carrying on banking business is a non issue and to let the same to go to trial, will be but a waste of judicial

time. Accordingly, I hold that the issue of whether the Plaintiff was carrying on banking business is not a triable issue.

I should here note that, it was common ground between the parties that prior to 2005, there was no legal framework concerning operations of Micro-Finance Institutions in Kenya. Indeed exhibits "GM2" and "GM10" is but an acknowledgment by both the Government of Kenya and the 14th Defendant of this fact. Indeed the Micro Finance Act came into force in 2006! The Plaintiff was incorporated as a microfinance institution and carried on business as such and there is no evidence whatsoever to the contrary. Although in its objects it had an object for banking business, such an object per se, without any evidence of actual carrying on of banking business, does not and cannot lead to an inference of carrying banking business. Further, if the use of the word "finance" by the Plaintiff was illegal or is offensive as the 14th Defendant contend, that did not confer any right to any of the Defendants to engage in the brutal and high handed action of violent closure of the Plaintiff's business. Indeed, the detention of the Plaintiff's properties in itself, in the manner in which it was undertaken, is not only unconstitutional but unacceptable in a society that is Kenya that prides itself to be under the rule of law. I believe there were and still are legal ways of stopping the use of an "illegal" or "offensive" name or word by a company. In any event, it is the Government itself that registered the Plaintiff with such name, why should agents of the same Government now seek to punish the Plaintiff for the Government's mistake? That won't do and this court cannot allow it.

Let me now deal with the issue of who is liable for the actions that took place on 2nd November, 2005. The Defendants submitted that the issue as to who is liable for the actions of BFIU is a triable issue. In their view, a trial should be held to establish who BFIU was answerable to. The Plaintiff submitted otherwise.

It is not denied that BFIU and some other persons carried out the raid of 2nd November, 2005. It is also not denied that those officers who carried out the raid were housed or were operating from the Central Bank of Kenya and indeed they were accompanied by officers from the 14th Defendant. The issue, according to the Defendants therefore as I understood it, is who amongst themselves is to blame?

The answer to that question in my view is simple. Having held that the question of the Plaintiff acting illegally or contrary to the Banking Act does not arise and therefore that the Defendants' actions of the 2nd November, 2005 was illegal and unacceptable, the Defendants are liable, jointly and severally, as prayed in the Plaint. The issue of apportioning liability amongst the Defendants would not and does not arise when a notice under Order 1 Rule 24 of the Civil Procedure Rules has not been issued. To my recollection, none has been issued and the issue as to who among the Defendants is liable for the actions of 2nd November, 2005 does not therefore arise. My view therefore is that the Defendants are liable to the Plaintiff, jointly and severally.

If I am wrong in so holding, which I don't think I am then I still hold the view that all the Defendants are still liable jointly and severally for the following reasons:

a) The 1st and 2nd Defendants are employees of the 14th Defendant. In the Criminal court they both

testified on oath as PW10 and PW6 respectively. The 1st Defendant stated that he was working for the 14th Defendant as an officer in charge of banks supervision department since 1996 whilst the 2nd Defendant stated that he was working in the 14th Defendant as a Bank Inspector. That they were instructed by Mr. Nyaoma, a very senior bank official who was in charge of the Bank's supervision department, to accompany the officers of BFIU and they both went to the Plaintiff's premises.

My view is, the orders for these two officers for them to join the raid was received from an official of the 14th Defendant, Mr. Nyaoma. He was at that time a director or manager heading one of the 14th Defendant's department. That has not been denied, it cannot be denied as it was stated on oath in the criminal court. Their participation in the illegal raid cannot exonerate the 14th Defendant. The 14th Defendant is liable for their actions as anyone else in the group. Indeed they were executing the bank's supervisory duties!

The officers of BFIU who conducted the raid were from the Central Bank of Kenya. Although they are police officers seconded to the 14th Defendant, the organizational chart produced as exhibit "GM15" would show that as at 2004, the 14th Defendant recognized that department then known as Banking Fraud Investigations to be directly under its Governor. That piece of evidence was not denied in the Replying Affidavit of Neala Wanjala. Mr. Amoko for the 14th Defendant urged the court to ignore that chart and cited the case of **HCCC NO. 331 of 2002 Shadrack Mwiti Ithinji and 9 others –vs- Republic** where a three bench court found that BFIU was a department of the police and not Central Bank of Kenya. In my view, that case is distinguishable for reasons that the court in that case was dealing with issues whether BFIU could investigate and prosecute under the directions of Central Bank of Kenya, and whether the Constitution of Kenya and prosecutorial powers of the Attorney General had been infringed. Further, that decision was made before the Governor of the 14th Defendant gave the institutional chart produced as "GMI – 15." Why didn't the 14th Defendant deny or disown that chart? Can the court ignore it? No. That chart cannot be ignored.

b) In his defence dated 9th May, 2006, the Attorney General stated in paragraph 3:-

"3. That in response to the contents of paragraph 4B, the Defendant avers that the officers who carried out the operation are attached to the Banking Fraud Unit which is a unit of Criminal Investigations Department, under investigations and are not employees of the Department."

In his submission, Mr. Ombwayo, the learned Senior Litigation Counsel indicated that although BFIU was a unit of the CID, it was under the investigations Branch of the 14th Defendant, that the members of BFIU are officers in the supervision department of Central Bank of Kenya whose duties include inspection of Banks and Financial institutions under the Banking Act. Such a statement from no less than the Attorney General of the Republic of Kenya leaves no doubt in my mind that the issue of at whose direction BFIU acted on 2nd November, 2005 is not a triable issue. Although the officers were from the Kenya Police, they were under the direction of and were acting in furtherance of the 14th Defendant's duty of bank supervision under the Central Bank of Kenya Act Cap 491 Laws of Kenya. Surely, this cannot be a triable issue.

Having come to the foregoing conclusion, I am satisfied that the Defendants' defences are but frivolous and vexatious. Indeed they are scandalous to the extent that they seek to justify the actions of 2nd November, 2005 which in my view were outrightly illegal in the circumstances whereby, they put the Plaintiff as well as many of its customers out of business. To sustain those defences and let go to trial, will not only be an abuse of the court process but a waste of judicial time. Accordingly, they are for striking out which I hereby do.

Consequently, I enter judgment for the Plaintiff against the Defendants, jointly and severally, under Order 2 Rule 15 (1) of the Civil Procedure Rules.

As regards prayer 4 of the motion, Mr. Amoko submitted that since the criminal court had already made an order for the release of those items in the criminal judgment, this court has no jurisdiction to make that order. Mr. Amoko did not cite any authority or law to back his submissions. On my part, I note that prayer (e) of the Amended Plaint seeks an order to compel the return of the items set out in prayer 4 of the motion. I believe that when the criminal court delivered its judgment, it did not intrude into or in any way hamstring this court's civil jurisdiction. That it cannot do and did not do so. I am satisfied therefore that there are no good reasons or any grounds at all why the Defendants should continue to cling to the Plaintiffs property. This court has jurisdiction to grant prayer (4) unless the giving of such an order will contravene the Judgment of the Criminal Court which it does not. Accordingly, I grant prayer No. 4 of the Motion dated 28th October, 2011 only to the extent of releasing and returning to the Plaintiff the items set out therein. As regards that part of the prayer requiring the Defendant to give a suitable undertaking for Ksh.2 billion in lieu of the release of the items, I decline to grant that part of the prayer.

Having found for the Plaintiff on liability, this matter which has been pending in our courts for nearly seven (7) years should proceed to assessment of damages. However, in the case of **Salama Mahmoud Saad –vs- Kikas Investments Ltd & Anor Milimani 462 of 2011 (UR),** after finding for the Plaintiff in that company dispute, I held:-

"Since no name (s) of such inspector was suggested by the applicant and in order to promote the spirit of alternative dispute resolution envisaged in Article 159 (2) (c) of our Constitution, I direct as follows:-

1) The Applicant and the 2nd Respondent do within 14 days of the date of this ruling agree on a suitable person or firm to act as an inspector for the purposes of this order, in default the court shall appoint one……..."

I am minded to do likewise in this case. Taking into consideration the fact that the Defendants have in their possession the Plaintiff's documents including its tools of trade, the details of the frozen bank accounts, that the parties also have or can secure financial and accounting expertise and they will be better placed to make calculations as to the loss so far suffered by the Plaintiff, I direct that in the exercise of the jurisdiction of this Court under Article 159 (2) (C) of the Constitution, the Plaintiff and the Defendants do attempt negotiations or any form of dispute resolution under that part of the Article to

resolve the issue of the quantum of compensation payable to the Plaintiff as claimed in the Amended Plaint. Such negotiations be carried out and concluded within 30 days of the date hereof and the parties thereafter to report to or record the same in court. In default, this matter may be listed for assessment of damages within 45 days of the date hereof.

I award the Plaintiff the costs of the application in any event.

DATED and delivered at Nairobi this 4th day of May, 2012

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A. MABEYA

JUDGE