



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
COMMERCIAL & TAX DIVISION  
CIVIL CASE NO. 780 OF 2010**

<b>GYDAN LIMITED.....</b>		<b>1<sup>ST</sup></b>
<b>PLAINTIFF</b>		
<b>KURAI LIMITED.....</b>		<b>2<sup>ND</sup></b>
<b>PLAINTIFF</b>		
<b>MOCASSIN LIMITED.....</b>		<b>3<sup>RD</sup></b>
<b>PLAINITFF VERSUS</b>		
<b>KASISI LIMITED.....</b>		<b>1<sup>ST</sup></b>
<b>DEFENDANT</b>		
<b>BINAMU LIMITED.....</b>		<b>2<sup>ND</sup></b>
<b>DEFENDANT</b>		
<b>OMWAMBO LIMITED.....</b>		<b>3<sup>RD</sup></b>
<b>DEFENDANT</b>		
<b>TARAKIMU INVESTMENTS LIMITED.....</b>		<b>4<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>KOLO LIMITED.....</b>		<b>5<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>STIFTELSEN KYRKORNAS U-FOND.....</b>		<b>6<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>SCANDINAVIA AB.....</b>	<b>JAMII BORA</b>	<b>7<sup>TH</sup></b>
<b>DEFENDANT THE REGISTERED TRUSTEES OF JAMII BORA CHARITABLE TRUST.....</b>		<b>8<sup>TH</sup></b>
<b>NORDIC MICROCAP INVESTMENT (PUBL) AB.....</b>		<b>9<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>JAMII BORA BANK LIMITED.....</b>		<b>10<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>MR. KIBUGA</b>		
<b>KARIITHI.....</b>		<b>11<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>MRS. KIBUGA</b>		
<b>KARIITHI.....</b>		<b>12<sup>TH</sup></b>
<b>DEFENDANT</b>		
<b>MR. LARS-OLAF</b>		
<b>HELLGREN.....</b>		<b>13<sup>TH</sup></b>
<b>DEFENDANT</b>		

**RULING**

By a Plaint dated 17<sup>th</sup> November, 2010, and filed on the same date, the three Plaintiffs pray for Judgment against the 13 named Defendants as follows;-

- (a) **A declaration that the plaintiffs are entitled to rescind the agreements made by them and the Defendants on 18<sup>th</sup> August, and 5<sup>th</sup> November, 2008.**
- (b) **As an alternative to (a) an order that the above stated agreements be set aside**
- (c) **A declaration that no merger of City Finance Bank Ltd with Jamii Bora Kenya Ltd has taken place and the true name of the 10<sup>th</sup> Defendant is City Finance Bank Ltd**
- (d) **A permanent injunction to restrain the 10<sup>th</sup> Defendant from issuing shares to the Defendants pursuant to the 10<sup>th</sup> Defendants' resolutions of 18<sup>th</sup> August and 19<sup>th</sup> October, 2010, respectively;**
- (e) **A declaration that the 11<sup>th</sup> to 13<sup>th</sup> Defendants breached their fiduciary duties during the purported merger of City Finance Bank Ltd and Jamii Bora Limited.**
- (f) **An order that the 11<sup>th</sup> to 13<sup>th</sup> Defendants do account to the Plaintiffs benefits derived from their breach of fiduciary duties**
- (g) **General damages**
- (h) **Cost of the suit**

Alongside the Plaint, the Plaintiffs filed a Chamber Summons dated 17<sup>th</sup> November, 2010, directed at the 10<sup>th</sup> Defendant, praying, firstly,

**THAT the 10<sup>th</sup> Defendant be restrained by itself, its servants and/or agents from issuing/allotting to the Defendants or any of them, shares, pending the hearing and determination of the application.**

and, secondly,

**THAT the 10<sup>th</sup> Defendant be restrained by itself, its servants and/or agents from issuing/allotting to the Defendants or any of them, shares, pending the hearing and determination of this suit.**

The application was certified urgent on 18<sup>th</sup> November, 2010, and set down for inter partes hearing on 24<sup>th</sup> November, 2010. When the same came up for hearing before me, the Respondent's advocate applied for an adjournment so as to take instructions and file papers on behalf of various Respondents which was not opposed, but counsel for the applicant applied that when granting the adjournment, the court should also issue orders as per prayer 1 of the application. Submissions were made in that respect on 24<sup>th</sup> November, 2010 and 25<sup>th</sup> November, 2010, the same having had to adjourn for shortage of time. It is in respect of the submissions for and against the granting of the temporary injunction in terms of prayer 1 that this Ruling is delivered.

The Plaintiff/Applicants' main contention, as I understand it, is that the allotment of shares in the 10<sup>th</sup> Defendant/Respondent (hereby referred to as "**the rights issue**") should not be carried out for reasons that the merger between City Finance Bank Limited, in which the applicants claim to have invested Kshs 75 Million, with Jamii Bora Kenya Limited, has resulted in the creation of an unviable business entity, the 10<sup>th</sup> Defendant whose existence cannot be sustained even with the injection of new capital as would be raised through the rights issue being undertaken pursuant to the Board resolution of 18<sup>th</sup> August, 2010. The applicant fears that if the ongoing merger programme and the rights issue are not stopped, then City Finance Bank's operations will have been swallowed up in the unviable business and the applicants' investment lost.

Submitting for the applicant, learned counsel Dr. Kamau Kuria stated that, although the applicants were all along involved in the agreements leading to the merger and the agreement to carry out a rights issue, their acquiescence to the same was founded on information obtained from the 11<sup>th</sup> to 13<sup>th</sup> Defendants in the suit and the true financial status of Jamii Bora Kenya Limited only became known to them on 21<sup>st</sup> October, 2010, when the Board of the 10<sup>th</sup> Defendant/Respondent met and deliberated on the audited accounts of Jamii Bora Kenya Limited of the year ending 31<sup>st</sup> December, 2009, which, according to the applicant reflected a capital base of Kshs -180.213 Million, which proceeded to erode further, Kshs -180.213 reaching a figure of Kshs -303 million at the time of the commencement of the rights issue. The applicant states that, despite a promise by the 1<sup>st</sup> to 9<sup>th</sup> Defendants to make a suitable proposal to address the situation, none has been forthcoming, hence the filing of the Suit and the Chamber Summons.

Replying to the submissions, learned counsel for the Respondents, Mr. Mwangi, stated that, although it is not disputed that the 1<sup>st</sup> to 9<sup>th</sup> and 11<sup>th</sup> to 13<sup>th</sup> Defendants have between 60% to 70% shareholding in the 10<sup>th</sup> Defendant/Respondent, they are only 12 of the over 600 shareholders whose rights would be directly affected by the injunctive orders sought herein. He submitted also that the rights issue programme is almost complete and to stop the same at this late hour would be highly prejudicial, particularly since the applicants stand to suffer no prejudice at all, since they too are eligible to acquire shares amongst other shareholders. Counsel expressed the view that, the suit being one that seeks a de-merger of two already merged entities, which cannot now happen, the court should find that the applicant has not established a prima facie case with a probability of success.

Counsel referred the court to the positive financial projection in which the rights issue is included as an indicative strategy to inject new share capital towards raising the company's capital base, a process which the Plaintiff/Applicants have been keen to be part of since May, 2010 when they notified the 10<sup>th</sup> Defendant of their intention to dispose of their shares in writing as follows:-

- 1. By a letter dated 24<sup>th</sup> May, 2010, Gydan Limited (1<sup>st</sup> Plaintiff/Applicant) notified the 10<sup>th</sup> Defendant's Board (with copies to 13shareholders) of its intention to dispose of 74,582 shares within 90 days.**
- 2. By a letter dated 24<sup>th</sup> May, 2010 Kurai Limited (2<sup>nd</sup> Plaintiff/Applicant) the 10<sup>th</sup> Defendants' Board of a similar intention in respect of 66,226 shares**
- 3. By a letter dated 24<sup>th</sup> May, 2010, Mocassin Limited (3<sup>rd</sup> Plaintiff/Applicant) advised the 10<sup>th</sup> Defendants' Board of similar intention in respect of its 64,485 shares.**

As stated in the replying Affidavit filed on behalf of the 10<sup>th</sup> Defendant, the 10<sup>th</sup> Defendant reads mala fides in the injunction application in that it is within the applicants' knowledge that the rights issue is already underway, and is seeking to raise Kshs 396 Million additional capital for the 10<sup>th</sup> Defendant so as to comply with the Central Bank's prudential guidelines by 31<sup>st</sup> December, 2010, as required under Section 7 of the Banking Act. It is deponed that the applicants' common director (and deponent of the Supporting Affidavit) Mr. Elvin Mutuma Marangu sits on the 10<sup>th</sup> Defendants' Board and he personally participated in the deliberations of the 10<sup>th</sup> Defendant Bank's Board of directors and, attended and participated as the representative of the applicants as shareholders, at the Banks Annual General Meeting of 1<sup>st</sup> October, 2010, when the resolutions to increase the share capital were discussed and unanimously passed. Averring that the said director/deponent, Mr. Mutuma ought to have either dissented or objected to the resolutions in order to give validity to his present complaints, the Respondent has submitted that the said director's failure to disclose anywhere in the supporting affidavit that he sits on the board of the 10<sup>th</sup> Defendant/Respondent compounds the mala fides in his application.

Further, it is deponed in the Replying Affidavit that the entire process leading to the merger of City Finance Bank Ltd and Jamii Bora Kenya Limited, which brought about Jamii Bora Bank Limited was

preceded by an elaborate process of financial due diligence in the course of which, a firm in the name of Promontory Financial Group LLC, was appointed to undertake due diligence of Jamii Bora Kenya Ltd and a report dated 11<sup>th</sup> December, 2009 duly produced and a copy given to Mr. Mutuma. The Report is annexed to the Replying Affidavit as annexure “MWM 10”.

The Respondent holds the view that the application for injunction has been overtaken by events since, after the merger of City Finance Bank Limited and Jamii Bora Kenya Limited, its gazettment and issuance of a Certificate of Change of Name mean that the merged entities ceased to exist with their share registers, as well as all contracts, suits and employee contracts being merged. This, together with the fact that the rights issue is nearing completion, means that the suit and the application have been overtaken by events.

A lot was said at the hearing which, clearly went outside the prayer for temporary relief, pending the hearing of the application inter partes. Infact, a lot of what was said before me touched on the substantive motion and the validity of the suit itself. I will avoid going into all that and confine myself to the question whether a case has been made out for the granting of a temporary injunction, to restrain the 10<sup>th</sup> Defendant from issuing or allotting shares to the Defendants or any of them, pending the hearing and determination of the Chamber Summons.

After carefully considering the lengthy submissions made herein and perusing the numerous documents referred to, I am unable to find that the applicant has met the legal requirements for the granting of an injunction as restated in the case of GIELLA –VS- CASSMAN BROWN & CO. LTD [1973] E. A. 358 which are;

- 1. That the applicant establishes a prima facie case against the Respondent with a probability of success.**
- 2. That the applicant demonstrates that he is likely to suffer irreparable loss which cannot be adequately compensated in damages.**
- 3. That (if the court is in doubt) the balance of convenience favours in the applicants.**

I must state, firstly, that the applicants have not filed any reply to the Respondent’s Replying Affidavit which leaves the several depositions made therein unrebutted. There is no dispute therefore, that the applicants are part and parcel and active participants in the events leading to the takeover of Jamii Bora Kenya Ltd by City Finance Bank Ltd and the subsequent merger. The Plaintiffs director and deponent of the supporting affidavit (Mr. Mutuma) attended the Board Meeting of City Finance Bank Limited of 26<sup>th</sup> February, 2010, when it was reported that the acquisition of the entire business, assets and liabilities of Jamii Bora Kenya Limited had been approved by the Central Bank of Kenya and also by the Minister for Finance, with the result that City Finance Bank Ltd had effectively taken over Jamii Bora Kenya Limited, its business, assets and liabilities. Indeed, Mr. Mutuma was, at the said meeting, appointed a signatory to all documents concerning the acquisition, alongside two other persons. He also attended the 10<sup>th</sup> Defendant/respondents 120<sup>th</sup> Board of Director’s Meeting of 19<sup>th</sup> August, 2010, at which the Rights Issue was discussed and a board resolution passed in that regard, and a time table drawn up for the same, for approval by either an Annual General Meeting (AGM) or Special General Meeting (SGM) scheduled for the 1<sup>st</sup> October, 2010. The timetable appears under Minute 6/08/2010. According to the said timetable the Rights Issue application was to open on 29<sup>th</sup> October, 2010, with the deadline for Rights Issue allocation payment being set for 17<sup>th</sup> November, 2010, and the closure of the Rights Issue Allocation register on 30<sup>th</sup> November, 2010. The 6<sup>th</sup> of December, 2010, would be the deadline for filing Allotment Returns with the Registrar of Companies while the deadline for reporting to the Central Bank of Kenya was set at 15<sup>th</sup> December, 2010.

The resolution on the Rights Issue was reached upon a finding that the core capital of the 10<sup>th</sup> Defendant/Respondent on the consolidated position of City Finance Bank and Jamii Bora Kenya Limited was approximately Kshs. 301 Million, Kshs. 199 Million short of the Kshs. 500 Million core capital

required for the 10<sup>th</sup> Defendant/Respondent to be issued with a banking licence for the year 2011. As required under the Gazette Notice No. 8 of 2008 the deadline for compliance is 31<sup>st</sup> December, 2010. Under Minute 7/08/2010 of annexure MWM2b, it was reported that the accounts of Jamii Bora Kenya Ltd for the year 2009 had not been finalized and that Mr. Mutuma did in fact express his dissatisfaction in this regard, asking the audit committee to

***“ensure that the pending issues were finalized in order to have the accounts signed off”.***

From the above it is quite clear that the Plaintiff/Applicants' contention that the financial status of Jamii Bora Kenya Limited only became known to them at the time of filing the suit and the application herein is not quite correct. The applicants were put on notice about the status of Jamii Bora Kenya Limited initially under the due diligence report of 11<sup>th</sup> December, 2009, and were kept abreast of the same throughout the merger processes and in particular, at the time the resolution for a Rights Issue was passed. Even so, it is clear from the above that their concern about the accounts of the said entity as expressed by their representative Mr. Mutuma was with a view to having them **“signed off”**, and not so that the Plaintiffs can challenge the merger or reconsider their position in that regard.

Having been part and parcel of the process, what complaint, can the applicants validly push against the 10<sup>th</sup> Defendant/Respondent to warrant the injunctive orders? The process having been put in motion way back as from August, 19<sup>th</sup> 2010, and the deadline for Rights Issue Share Allocation Payment having set for the same date that the application and suit herein were filed, would the orders sought serve any purpose, unless, which has not been submitted, the time table changed? The projection for the Rights Issue is that a total of Kshs 396 Million would be realized, raising the 10<sup>th</sup> Defendant/Respondents Core Capital to Kshs 697 Million. The applicants have not furnished the court with any evidence that the said target cannot be achieved. On the contrary, it was proposed and agreed/resolved at the meeting of 18<sup>th</sup> August, 2010, as follows:-

**“In case all the rights are not taken up, the first priority would be given to the existing shareholders to take additional shares and if there is still a balance, a guarantor or an underwriter is required to take up the remaining shares so as to ensure that the required minimum share capital of Kshs 500 Million is achieved by 31<sup>st</sup> December, 2010 as required by Central Bank of Kenya”.**

In my considered view, the proposals, which have been carried out as per the Rights Issue Time Table, provide adequate cushioning of the shareholders rights, including those of the applicants, who, as evidenced from the documents exhibited by the Respondents, do not appear to have a genuine cause of complaint. Furthermore, the injunction sought, as worded, does not seek to pre-empt the issuance of shares to any other persons than the Defendants. This suggests therefore, that the same is not intended to stop the rights issue procedure as a whole.

Given the facts, the applicants have not, in my view, established a prima facie case with a probability of success against the Respondents. They have also not demonstrated that they are likely to suffer irreparable loss from a refusal to grant the temporary injunction sought, which loss cannot be compensated in damages. I am in no doubt as regards the legal prerequisites, and even if I was, I would still find that the balance of convenience favours the Respondent, given that the process sought to be stopped is at a close, and that the consequences of the 10<sup>th</sup> Defendant/Respondent's non-compliance far outweigh the apprehended loss by the applicant, which in my view can be sufficiently compensated by way of damages.

Consequently, I find that the prayer for a temporary injunction under prayer 1 of the application cannot issue and I decline to grant the same. That being the case, the applicants may have to rethink their next course of action, particularly as regards prayer 2, which seeks similar orders as those refused herein, and which, in the circumstances, appear to have been overtaken by events, in view of the completion of the process of the Right Issue as per the agreed time table.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of NOVEMBER, 2010**

**M. G. MUGO**  
**JUDGE**

In the presence of:  
Dr. Kamau Kuria

For the Applicant

Mr. Mwangi

For the Respondent