REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 532 of 2006

INDUSTRIAL PLANT (E.A) LIMITED (IN RECEIVERSHIP)
……..…….…….PLAINTIFF

VERSUS

STANBIC BANK KENYA LIMITED…….....
….……..1ST DEFENDANT

GRAHAM SILCOCK and JOHN STANLEY WARD

(Joint Receivers and Managers of INDUSTRIAL PLANT E.A. LIMITED
……...……2ND DEFENDANT

RULING

This litigation is rather convoluted due to the conduct of the parties herein and the nature of their legal status as presently constituted. The plaintiff is a company under intensive care unit because it is under receivership while the 1st defendant is a company undergoing a legal metamorphosis due to its alleged merger with CFC Bank Limited.

The relationship between the plaintiff and the 1st defendant goes back to 1995 when the plaintiff sought and the 1st defendant advanced financial accommodation. That relationship continued to be cordial until 26th September 2000 when the 1st defendant appointed the 2nd defendants to be the receiver/managers of the plaintiff's assets in exercise of its rights/powers under the debenture instruments dated 16/3/95, 19/08/97 and 17/3/99. According to the instruments of debenture every receiver or receiver and managers so appointed shall be the agent of the plaintiff company and the company shall be liable for the acts, defaults and remuneration of the said receiver/manager. The powers, responsibilities, duties, obligations and authority of the receiver/manager is well set out in the debenture instruments.

No doubt that the 1st defendant created three debenture instruments over the assets and machinery of the plaintiff company vide the instrument dated 16th March, 1995, the one dated 19th August, 1997 both of which was varied by the debenture dated 17th March, 1999. In essence the assets of the plaintiff company was charged by the 1st defendant. The plaintiff went into arrears in the repayment schedule agreed between the parties. It is therefore clear that the plaintiff was placed under receivership by the 1st defendant on account of its alleged failure to repay some amount which was advanced as a result of the three debentures mentioned herein.

After the plaintiff was placed under receivership and before the receivers could proceed with their mandate, a third party name Airduct Engineering Limited brought proceedings against the plaintiff and the 2nd defendants (HCCC No.1855/2000) herein claiming ownership of the assets (machinery) of the plaintiff company. The application of Airduct Engineering Limited to remove the said assets from the premises of the plaintiff was allowed and the receiver/managers were unable to carry out their mandate because what remained of the plaintiff is a shell company with no tangible assets. It is important to note that the said assets were the ones covered in the debenture agreement in favour of the 1st defendant.

The 1st defendant on its part filed HCCC No.689/2002 against Airduct Engineering Ltd, Hermal Singh Sagoo, Indy Singh Sagoo and M. S. Sandhu seeking Kshs.185,875,205/89 plus interest at the rate of 19.75% until payment in full. The said claim is in relation to the advances made to the plaintiff herein. It is essential to note the 2nd defendant in that suit who is a director of the 1st defendant is the deponent of the supporting affidavit to application dated 30th April, 2008. He is also a director of the company that succeeded in taking away all the machinery and assets of the plaintiff company on the ground that it had let on hire the machinery to the plaintiff herein sometimes in 1980 and prior to the creation of the debenture instrument. On a layman's parlance Mr. Harmal Singh Sagoo can be termed as a man with a dual legal status by being on both sides of the fence. It is also therefore safe to conclude that Airduct Engineering Ltd is a sister or twin company of the plaintiff herein, hence the legal ingenuity of dubbing the bank into creating a legal document over nothing. The outcome of the two suits is not clear to me.

Having set out the background history of the dispute, it is important now to address what has fallen for my decision. There are two applications, the one dated 30th April, 2008 by the plaintiff and the one dated 15th May 2008 by the defendants. From what I have gathered from the documents filed by the parties and the submission by the Advocates for the parties, it is clear the application dated 15th May, 2008 is meant to derail and/or stall the plaintiff's application dated 30th April, 2008. I intend to deal with the application dated 15th May 2008 first, which I shall do shortly.

The gist of the defendants' application is that the plaintiff had no capacity to initiate any legal proceedings because the board resolution is defective and does not comply with section 145 of the Companies Act Cap 486 Laws of Kenya. It is contended by the defendants that there is no valid resolution exhibited by the board of directors to validate the filing of the chamber summons dated 30th April, 2008 or to file the amended plaint.

Secondly the resolution is not certified as a true copy of the original minutes by the company secretary and thirdly the resolution does not give the full names of all the directors plus members present to show they had the authority to lawfully pass any resolution. And that the resolution dated 12th August 2005 does not indicate the names of the persons in attendance to validate the passing of the purported resolution, therefore the resolution is null and void as it contravenes section 143 of the Companies Act.

In my humble view the appropriate and legal organ of a company is the board of management and it is that board which authorizes a company to undertake any issue which is meant for the interest of the company. No doubt that the company cannot institute a suit in its own name unless such act has been ratified by the board of directors of the company in a general or special meeting. Such sanction is to be evidenced by way of resolution. In this case the plaintiff has exhibited a board resolution authorizing the filing of this suit. However, the defendants think the same does not meet the approval of section 143 and 145 of the Companies Act.

The question is whether the court will seek to establish the existence and/or availability of a board resolution or whether the court will be interested in the form of the resolution as drawn and exhibited by a particular board of management of a company. Courts in this country have held in various decisions that questions whether a party's advocate had been duly authorized to sue would depend upon the court's finding on who are the lawful directors and that can only be done after evidence has been adduced and tested by the court. As stated there is evidence of a board resolution giving authority to Mr. H. S. Sagoo and A. V. Chandaria to represent the company in the proposed suit or suits. It is therefore my decision

that the defendants cannot purport to claim the said resolution is not valid. The law says there ought to be a resolution before a suit can be instituted by a company and once that party brings before court evidence of such a resolution, the court cannot on a preliminary application determine the legality, validity and competence of the said resolution.

I therefore make a finding that there is nothing wrong with the document exhibited by the plaintiff in this proceedings and it does not lie in the mouth of the defendants to question the validity of that document at this preliminary stage. Having taken into consideration the totality of the defendants' application dated 15th May, 2008 and having seriously read the grounds and reasons advanced in support of the said application, I have come to the conclusion that the same has no merit and it is dismissed with costs.

I now turn to address my mind to the main application by the plaintiff dated 30th April, 2008 which is intended to protect the interest of the plaintiff in this litigation and which is in essence meant to determine whether the suit by the plaintiff will be rendered useless.

The basis of the plaintiff's claim is the decision by the 1st defendant to place the plaintiff company under receivership. It is the case of the plaintiff that its assets were lost when the 1st defendant appointed the 2nd defendants as receivers and managers of the plaintiff company. And that the receivers mismanaged the business of the plaintiff company thereby resulting in huge losses, which is the subject of the plaintiff's claim in this suit. As this suit was pending it came to the knowledge of the plaintiff that there was a proposed merger between the 1st defendant and CFC Bank Limited pursuant to a merger agreement or scheme of arrangement dated 22nd June, 2007. And in order to protect its claim which is pending before court for determination, the plaintiff made an application dated 30th April, 2008 seeking the following orders:

(2) THAT the 1st Defendant by itself, its servants, agents and/or its advocates or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them, that is to say, from proceeding with the proposed merger with CFC Bank Limited pursuant to the Merger Agreement or Scheme of Arrangement dated 22nd June, 2007 or with any merger plans with any institution or body at all or taking any steps to finalize or consummate the proposed merger or otherwise complete any amalgamation howsoever described or structured now or at any other time now or in the future of completing any conveyance or transfer of its banking business, its undertakings or assets, liabilities, shares or property of the 1st Defendant in whatever form or nature concluded pursuant to the said Merger Agreement or Scheme of Arrangement dated 22nd June, 2007 or at any other time now or in the future, pending the hearing and determination of this suit and this order be placed for public notice in both The Daily Nation and The Standard Newspapers immediately for advertisement.

(3) THAT in the alternative to prayer 2 above, the Court be pleased to order the 1st Defendant to furnish security by depositing into this Honourable Court the sum of Kshs.26,500,000,000/= or to produce and place at the disposal of this Honourable court all such property or Bank Guarantee acceptable to the Plaintiff in such prescribed form and manner from a reputable bank or banks licensed to conduct the business of banking in Kenya and/or in the country of incorporation if a foreign institution and to place the same under the control of this Honourable court within Kenya valued at Kshs.26,500,000,000/= or the value of the same or such portion as the court may deem sufficient to satisfy the Plaintiff's claim or any Judgement or Decree that may be passed by this Honourable Court, within a specified time to be fixed by this Honourable Court, and upon such terms and conditions that may be set or determined by this Honourable court.

(4) THAT the 1st Defendant do disclose to this Honourable court its business and assets in Kenya and the same to be conditionally attached until the determination of this suit.

(5) THAT in default of furnishing such sufficient security deposit or Bank Guarantee as shall be ordered by this Honourable court, the 1st Defendant do show cause why all sums of money due to it from business and any assets should not be attached by the Court pending Judgement by this Honourable

court.

(6) THAT the 2nd Defendants be restrained by themselves, their agents or servants or otherwise howsoever from continuing to act or purporting to act as Receivers/Managers of the Plaintiff Company and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of all of its premises, bank accounts, properties, machinery, equipment, assets and the general day to day running/management of the Plaintiff's bank accounts do revert to the Plaintiff Company pending the hearing and determination of this suit.

(7) THAT the costs of this application be provided for.

The plaintiff is seeking damages which is over Ksh. 26 billion from defendants and now wants the 1st defendant to provide security for the purported acts and omissions of the receiver managers. The plaintiff company is apprehensive the 1st defendant is about to dispose of the whole of its property, undertakings, assets and liabilities pursuant to a planned merger with CFC Bank limited whose consequence would diametrically alter its obligations to meet any liability, debt and/or judgement that may be passed against it by this Honourable court in the event the plaintiff's suit is successful. It is contended that the 1st defendant is being sold to CFC bank Limited in its entirety and its current shareholders are receiving as consideration for the sale of shares in CFC Bank Limited which will then convert itself into a new entity called CFC Stanbic Holdings Limited.

It is also contended that the 1st defendant is becoming a wholly or subsidiary of CFC Bank Limited with both banks then becoming one merged entity that would be wholly owned by yet to be created entity to be called CFC Stanbic Holdings Limited. Further it is contended that the banking business of CFC Bank Limited being merged with or otherwise transferred back to the 1st defendant so that CFC Stanbic Holdings Limited will thereafter be the holding company of the 1st defendant as well as the other subsidiaries currently owned by CFC Bank Limited and being renamed CFC Stanbic Holdings Limited while the banking business currently owned and operated by the 1st defendant will be subsumed and merged with CFC Bank Limited thereby creating a new entity not a party to this suit and not amenable to the orders of this court.

The plaintiff further contends that the 1st defendant and CFC Bank Limited have already received the necessary approvals from the Central Bank of Kenya, the Capital Markets Authority and the Monopolies Commissioner and the South African Reserve Bank as prerequisite to the planned merger. The respective shareholders of both the 1st defendant and CFC Bank Limited have also approved the planned merger which will pave way for the transfer of assets, undertakings and banking business of the two respective banks to the new entity to be called CFC Stanbic Holdings Limited.

It is therefore alleged by the plaintiff that upon completion of the proposed merger, it may not thereafter be in a position to enforce any judgement, court order and/or decree that this Honourable court may pass against the 1st defendant in the likely event that the plaintiff company is successful in this suit. Secondly that the co-existing liabilities and obligations under the suit predate merger negotiations and the 1st defendant's assets and liabilities should not flee to a special purpose vehicle or third party where assets are shielded, sheltered and/or placed beyond the reach of the valid creditors and claims arising prior to the merger agreement dated 22nd June, 2007.

The issues for determination in this application by the plaintiff is fairly simple and it is whether the merger or acquisition of the 1st defendant by CFC Bank Limited is intended to allow the combined banks in the new entities to repudiate pre-existing claims of the predecessor banks including the 1st defendant thereby defeating the case of the plaintiff and by extension the ends of justice. The plaintiff contends that the 1st defendant has refused and/or failed to confirm to the plaintiff whether the new entity known as CFC Stanbic Holdings Limited will assume any liabilities, debts or judgement that may be passed against the said 1st defendant by this Honourable court.

The defence of the 1st defendant is that it is a limited liability company incorporated under Kenya Laws and conducting business in this country. That one of the shareholders of the bank, Stanbic Africa Holdings Limited decided in the course of the year 2007 to dispose of its shares in applicant bank to CFC Bank Limited a locally registered bank in exchange for shares to be issued to Stanbic Africa Holdings Limited. And save for the shares transfer transaction, the 1st defendant remains the corporate entity registered under company registration certificate No. 9520. The consideration being exchanged for the shares of the shareholders, Stanbic Africa Holdings Limited is for the value of the shares and the transaction in no way compromises the banks financial viabilities and status. It is also the position of the 1st defendant that the transfer of shares to a new shareholder does not amount to transfer of business, undertakings, assets or property. And the shares remain subscribed with the bank and the business remains the business of the institution still registered under the original company registration certificate hence the sale of shares is not synonymous with the sale of assets to third parties.

I have considered the application and the rival submissions by the Advocates for the parties. As stated earlier the point for determination is whether the claim of the plaintiff is secured in the event of being successful against the 1st defendant. It is contended that the 1st defendant has refused to confirm to the plaintiff whether the new entity known as CFC Stanbic Holdings Limited will assume any liabilities, debts or judgement that may be passed against the 1st defendant by this Honourable court.

I agree that any company or Bank is entitled to merge or sell all or part of its assets and interest to another Company provided some kind of protection is put in place for any existing or contingent liability. In my understanding the right of a litigant to have an opportunity to proof his case is so fundamental in the administration of justice. In essence no party ought never to be refused an opportunity to present his case and it is usually desirable to safeguard the rights of litigants by putting in place appropriate measures. The point I am making is that no party can legitimately have an opportunity to present his case when the other side has conveniently and deliberately displaced the chances of enforcing any judgement that may be obtained against him. There is no reason of having a suit whose foundation has been legally destroyed by the opposite party. In my judgement the attitude of the court is always to cement the principle of fair trial and verdict upon merits rather than shutting out a litigant before a proper adjudication is done on his case. The primary consideration of the court is to ensure that no party is accorded or allowed to displace the intended outcome of the dispute by failing to put in place proper mechanism for the enforcement of judgement or decree that may be possibly issued by the court against him/her.

The 1st defendant is legal position after the merger will be different as it will be a new entity and will not be in a position to assume any liabilities, debts or judgement that may be passed against it unless there is evidence to show that there is a provision in its legal documents and/or in its financial books. The fear expressed by the plaintiff is that any judgement or decree that may be passed against the 1st defendant will be rendered infructuous as a result of the planned merger between the 1st defendant and CFC Bank Limited and the plaintiff company will suffer substantial financial loss and prejudice in the circumstance.

I have meticulously considered the two public announcements by Stanbic Africa Holdings Limited and the one of CFC Bank Limited. I have also gone through the notice of intention dated 22nd June, 2007 by Stanbic Africa Holdings Limited and one thing is clear that a new entity would be created by the resultant merger between the 1st defendant and CFC Bank Limited. However, there is no provision in the said documents as to the past and present liabilities that may have accrued against the 1st defendant. In my humble opinion any judgement in favour of the plaintiff and the enforcement of the same will depend on certain conditions being fulfilled by the 1st defendant. The conditions are;

(1) To acknowledge the existence of the alleged claim by the plaintiff without necessarily admitting.

(2) To make provisions for the same in its books of accounts.

(3) To provide the same in the documents of merger/sale with CFC Bank Limited, so that in future the element of surprise and lack of knowledge is eliminated.

(4) To inform the directors/shareholders of both 1st defendant and CFC Bank Limited that there is a claim against the 1st defendant; the remoteness, strength, chances of success can thereafter be addressed. Etc.

The issue for determination is whether or not the above conditions had been fulfilled by the 1st defendant. And unless there is evidence to show the bank had taken into consideration the alleged claim of the plaintiff in its books of accounts, then one may be tempted to say that the apprehensions expressed by the plaintiff is valid.

I have also seen the financial report and statement of the 1st defendant dated 31st December, 2007. At the time the financial report was prepared, the present suit was in existence. The 1st defendant acknowledges the existence of the plaintiff's claim in that report. It shows some significant accounting policies followed or used in analyzing the financial health of the 1st defendant. On item (o) of the said accounting policies states as follows:

"Provisions are recognized when the group has a present legal or constructive obligation as a result of past events and it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation and a reliable estimate of the obligation can be made".

Item (t) states as follows:

"*Critical accounts estimates and judgement in applying accounting policies*

The group makes estimates and assumptions that affect the reported amounts of assets and liabilities within the next financial year. Estimates and judgements are continually evaluated and are based on historical experience and other factors, including expectations of future events that are believed to be reasonable under the circumstances.

And in Article 43 in legal matters the 1st defendant acknowledges the existence of the plaintiff's suit but it states in the financial report or statement as hereunder:

"During 2007 a former customer of the bank, Industrial Plant (E.A.) Limited (In Receivership) (IPL") instituted a suit against the Bank, claiming approximately Kshs.25.8 billion, on the basis that the appointment of a Receiver in the year 2000 was wrongful. In view of the company's solvency status, the Bank has filed an application for an order for IPL to furnish security for costs. Based on consultation with external legal counsel, it is considered that the suit is frivolous, vexatious, out of time and lacks merit. The directors did not have legal capacity to institute the suit without the consent of the Receiver. No provision for any possible loss has been made as the likelihood of a successful judgement against the Bank has been determined, in consultation with external counsel, to be remote.

From the above proposition it is clear that the 1st defendant has made a clear determination on the issues pending before court in relation to the dispute between the parties herein. By the 1st defendant's estimation and conclusion, the plaintiff's suit is frivolous, vexatious, out of time and lacks merit. It is also contended that the directors of the plaintiff did not have legal capacity to institute the present suit without the consent of the receiver and as a result the 1st defendant has made no provision for any possible loss in the event the plaintiff's suit succeeds against the bank. It is alleged also that the decision was reached after consultations with external lawyers and that the plaintiff's case has very remote chance of success. In my understanding financial assets and liabilities are offset and the net amount reported in the balance sheet. And when there is a legally enforceable right to set off the recognized amount the Company has to express an intention to settle the alleged claim and reflect the same in its books of accounts. I think it is wrong for a Company like the 1st defendant to upset the pending claim of the plaintiff without any basis or proper judgement. In short there is no recognition of the plaintiff's contingent debt/claim in the 1st defendant's books of account. On my part I am tempted to say that there is not a significant and/or prudent accounting policy.

I agree that the plaintiff's claim until and unless proved is no more than a hope for money and as was rightly held by Ringera J in the case of Elijah arap Bii vs KCB HCCC No. 300 of 2000 Milimani such a claim is a contingent asset or a choice in action which cannot be used to offset against an existing liability. However, the converse is that the plaintiff's claim has a chance of success in future and a party faced with a claim like that of the plaintiff cannot be heard to outrightly dismiss it as if it is sitting on the chair of the court. That is tantamount to having own's cake and eat it. By acknowledging the existence of the plaintiff's claim and by refusing to make a provision in its books of account, the plaintiff has in my opinion baked its own cake for its own consumption. It has assumed the role of a judicial officer in a matter where it is the defendant. As stated earlier the 1st defendant is in the process of being merged with or otherwise transferring its assets to a new entity with the resultant possibility that the plaintiff may be left licking its own wounds. It is incumbent upon this court to ensure that the plaintiff is not left in a vulnerable position with no possibility of salvaging anything in case its claim succeeds against the defendants. The possibility is that real risk has not been eliminated by the 1st defendant bank in its failure to make a provision for the plaintiff's claim pending for determination

The undisputed facts in this case are that the plaintiff has a pending claim in this court which has not been determined and/or satisfied. It is also undisputed that the 1st defendant has dismissed the astronomical claim of the plaintiff as frivolous, vexatious and one lacking merit.

Admittedly the 1st defendant is currently in the process of merging with CFC bank which will result in 1st defendant becoming a wholly owned subsidiary of CFC bank with both banks then become one merged entity that will be owned by CFC Stanbic Holdings Limited. In my humble view this may result in 1st defendant transferring its undertakings, property, liabilities either fixed, moveable and tangible assets to CFC bank in first instance and to CFC Stanbic Holdings Limited in the 2nd phase. Such a scenario will lead to a situation whereby the plaintiff will not be in a position to enforce any judgement against the new entity should its claim succeed against the 1st defendant.

It is also undisputed that the 1st defendant's balance sheet and financial report of 31st December, 2007 does not recognize, capture and make provisions that reflects the claim lodged by the plaintiff against the defendants. There is no indication that the failure to capture, recognize and reflect the plaintiff's claim is as a result of mistake and/or oversight on the part of the 1st defendant. One thing that comes out is that the decision was a deliberate conclusion based on the circumstances and information supplied to the bank. It is even acknowledged that the bank consulted external lawyers and reached a conclusion that the plaintiff's claim has a very remote chance of success against the defendants. I agree with the position taken by Nambuye J in HCCC 983 of 2004 Jimmy R. Kavilu & 14 others vs Stanbic Kenya Limited & 6 others where she held;

"This court should not permit the existence and/or creation of situation where the 1st defendant's assets will be moved to a location whereby they will be shielded, sheltered, and/or protected or placed beyond the plaintiffs herein. The applicants are also apprehensive that the proposed merger might create an avenue whereby the new entity may be allowed to repudiate the existing claims of the plaintiffs to its predecessor or the 1st defendant. This fear and/or apprehension has been made more real by the fact that the 1st defendant has neglected and/or refused to confirm and assure the plaintiffs that the incoming entity is ready and willing to take over and make good their claim should they succeed".

The position expressed by my sister Nambuye J and the facts in the case before her are similar to the one under my determination. The Judge in that case gave the orders sought by the plaintiffs because the 1st defendant which is also the 1st defendant in this case did not recognize the claim of the plaintiffs as one of the liabilities to be taken over by the new entities to be created after the sale and/or merger of the 1st defendant herein and CFC Bank Limited. In my humble view that is a fundamental and significant consideration in deciding whether the claim of the plaintiff would be rendered superfluous or useless at this stage by failing to put in place protective measures to ensure the pending claim which is subject to proof is not rendered nugatory. As was rightly pointed out by Nambuye J there is real possibility and/or danger that the 1st defendant upon completion of the merger will shed off its own coat and wear a new

garment with a view to displace and/or dislodge any claim predating the birth of the new baby. It is for that reason that this court has a duty to ensure that the 1st defendant does not through the legal mechanism render the pending case irrelevant. At page 30 of her ruling Nambuye J had this to say, which I am in total agreement;

"The court makes a finding that although the 1st defendant has a right to merger with any other entity of its own choice, moving to do so in a manner it has done without taking cognizance of the plaintiffs' claim against it is tantamount to acting in an oppressive manner in the opinion of this court".

The principles to be derived from the decision of Nambuye J is that where a bank does not acquire a contingent liability in its books of accounts and continue to deny the same, the said bank should be ordered to provide security. It means that when the party against whom there is a possibility for judgement against him/her outrightly refuses putting a provision for such eventuality in its books of accounts, then the court has a duty to conclude that the new entity has no intention of honouring any judgement that may be given against it.

As stated the proposed sale/merger agreements between the 1st defendant and CFC Bank Limited gives no details or evidence as to the status of the plaintiff's claim after the completion of the said transaction. And in the absence of clear and convincing evidence that the new entity is going to take over any liability that may result from the plaintiff's case being successful, then it is clear that the intended transaction will displace the rights of the plaintiff, thereby amply justifying the fears/danger expressed by the plaintiff.

The only question that remains is what is the appropriate order in the circumstances of this case. In doing so I have taken into account the pertinent factors in this dispute, which are;

(1) That the plaintiff was allegedly put under receivership due to some outstanding debt owed to the 1st defendant.

(2) That most and/or all the assets and machinery covered in the debenture agreements were taken away by a sister company of the plaintiff through a court order.

(3) The level of success of the receiver/managers can be termed as minimal.

(4) That at the time the plaintiff was placed under receivership (allegation) it was a going concern financial sound and with lucrative projects at hand and business proposals from other companies for expansion capable of generating large sums of money to service facilities extended by the 1st defendant.

(5) That the plaintiff's claim is based on an actuarial expert report to determine the value of the plaintiff company as a going concern before being put into receivership.

(6) That the plaintiff has waited for over 7 years to bring this claim which is over Kshs.25 billion against the defendants.

(7) That the present application was filed less than 25 days before the planned merger/sale between the 1st defendant and CFC Bank Limited.

It is clear that the planned merger between the 1st defendant and CFC Bank Limited was scheduled to be implemented on or before 30th May, 2008 now past. I have already given an interim order directing the 1st defendant to deposit or give a bank guarantee in the sum of Kshs.200 million failure of which no merger shall take place. From the record I have confirmed that the 1st defendant has put in place a bank guarantee from Kenya Commercial Bank Limited pending the delivery of this ruling. It therefore means there is real possibility that prayer No. 2 in the application dated 30th April 2008 may have taken place. The other prayer that was canvassed before me is prayer No.3 which was in the alternative. Taking into

consideration that the plaintiff's claim is a hope for money and that it was made 7 years after the plaintiff was put under receivership by the 1st defendant, I think the appropriate order is to confirm the orders given on 29th May 2008 till the hearing and determination of this suit. I direct parties to resolve all pre-trials within the next 14 days and list the suit for hearing within 30 days from the date of this ruling. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 4th day of June, 2008.

M. A. WARSAME

JUDGE