



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc. Civil Application 960 of 2007**

***In the matter of:* AN APPLICATION BY CENTRAL BANK OF KENYA FOR AN EXTENSION OF THE PERIOD OF APPOINTMENT OF THE STATUTORY MANAGER OF CHARTERHOUSE BANK LIMITED**

***In the matter of:* AN APPLICATION UNDER SECTION 34(3) OF THE BANKING ACT, CHAPTER 488 OF THE LAWS OF KENYA**

**RULING**

This is an application by Central Bank of Kenya under *Section 34(3)* of the Banking Act Cap 488 Laws of Kenya. The prayers in the application are:-

- (a) That the period of appointment of the statutory manager of Charterhouse Bank Ltd be extended for a further 12 months with effect from the 22<sup>nd</sup> day of June 2007
- (b) That the costs of this application be provided for by this Honourable court.

The grounds in support of the application which appear on the face of the application are that the period of appointment of the Statutory Manager is due to expire on 22<sup>nd</sup> June, 2007. Secondly the statutory manager has been mired up in litigation which has prevented her from discharging her mandate and manacled by court orders from completing the same.

The application is supported by an affidavit sworn by one Rose Detho an assistant director of Central Bank of Kenya and who is also the Statutory Manager of Charterhouse Bank Ltd. The deponent avers that she is an assistant director in charge of financial institutions supervision department and also that she is conversant with all the facts having been the statutory manager of Charterhouse Bank Limited.

The deponent states that she was appointed a statutory manager of the bank through a letter dated 23<sup>rd</sup> June, 2006 because circumstances had arisen which suggested that some of the operations of the bank were in violation of the provisions of the Banking Act and Administrative guidelines issued by Central Bank of Kenya. She also states that the action to place the bank under statutory management was intended inter alia to safeguard the integrity of the financial sector in fulfillment of the applicant's regulatory mandate and is in the interest of ensuring the proper functioning of a sound financial sector.

The deponent further states that her primary role as a statutory manager is to establish the extent if any of any violations of any provisions of the Banking Act and the regulations made thereunder by the bank. And that she is required to thoroughly investigate, assess and audit all the operations of the institution and thereafter report her findings to the Central Bank of Kenya. And since her appointment she was unable to

perform her mandate due to various cases filed by the institutions and some depositors in various courts. She then mentions;

- (1) Milimani HCCC No.329/2006 filed against the applicant, where the institution was seeking a permanent injunction to restrain her from assuming her statutory mandate. The case which was filed on 23<sup>rd</sup> June, 2006, was heard and dismissed on 26<sup>th</sup> July, 2006. And on 27<sup>th</sup> July, 2006 the institution filed an appeal i.e. Civil Application No. 200/2006 in the Court of appeal seeking an injunction to restrain the statutory manager from assuming her statutory mandate. The institution again lost that application.
- (2) On 13<sup>th</sup> September, 2006 four customers of the institution filed Eldoret High Court Misc Civil Application No.638/2006 against the Central Bank of Kenya, Minister for Finance, Kenya Bankers Association, Kenya Revenue Authority and the statutory Manager seeking leave to apply for various judicial review orders. By an order issued on 15<sup>th</sup> September, 2006 the High court in Eldoret granted the said customers leave to apply for all the orders sought in the application and directed that leave so granted do operate as a stay of various actions.
- (3) On 18<sup>th</sup> September, 2006 another customer of the institution filed Kitale High Court Misc Civil application No.105/2006 against the same parties as in High court Misc. Civil application 638/2006 of Eldoret. The court issued the orders sought by the said customer.
- (4) 6<sup>th</sup> October, 2006 another customer of the institution filed Malindi High Court Misc. Civil application No.97/2006, where various orders were granted.
- (5) On 11<sup>th</sup> October, 2006 yet again another customer of the institution filed Malindi High Court Misc civil application No.98/2006 where also various adverse orders were granted by the court against Central Bank of Kenya and the Statutory Manager.

As a result the statutory manager alleges that the practical effect of the orders of stay was that she was restrained *ex parte* from executing her statutory mandate. And that she was prevented from discharging and completing her mandate as the said orders stayed all her decisions, actions, investigations, demands, audits, reports and recommendations. She contends that in order for her to effectively execute her statutory mandate, she ought to make decisions, take actions, conduct investigations and audits and eventually prepare a final report to Central Bank of Kenya and the said orders had the effect of preventing her from doing the said actions.

And being aggrieved by the *ex parte* orders issued against her mandate, she states that she made every effort to obtain remedial measures from the Court of Appeal by filing several appeals from the decisions made by the High Court in Eldoret, Kitale and Malindi. And due to the diary of the Court of Appeal the matters could not be heard and determined. She complains that there is no possibility that her appeals before the Court of Appeal, will be heard by the 22<sup>nd</sup> day of June, 2007 when her statutory mandate will expire.

The institution through its Managing Director filed a replying affidavit. Mr. Sanjay Shah, who alleges to be the Managing Director, Director, Depositor and also having share interest of the institution termed the application for extension as malicious, ill-founded and illegal. He deposes that the mandate of the statutory manager was to assume the management, control and conduct of the institution with the rider that the conduct of banking business was to be conducted in the best interests of the institution, its depositors and creditors. But the manager upon her appointment in direct violation of the instrument of her appointment and the provisions of the Banking Act closed down all the bank's branches never conducted any banking business. He then accuses the statutory manager of the following;

- (1) The manager, immediately upon her appointment dismissed the Bank's senior managers/officers, ostensibly with a view to leaving a *la curiae* once the bank resumes ordinary operations.
- (2) The manager has since her appointment refused to allow any deposits nor withdrawals by the

bank's customers.

- (3) The manager has since her appointment beefed up armed police security in all bank's branches with a view to scaring away the bank's customers.
- (4) The manager has since her appointment refused to conduct any banking business at all, continued utilizing the bank's reserves by engaging all manner of 'experts' at exorbitant rates.
- (5) The manager has since her appointment refused to open any letters of credit or any other financial instruments.
- (6) The manager has, save for the first quarter of her appointments, refused, neglected to publish the bank's yearly or quarterly statements, in total disregard to the provisions of the law.
- (7) The manager has since her appointment delegated her duties to one Jimmy Mwiwa whom she claims is her deputy knowing well that the act of appointment does not entail such deputy.
- (8) The manager for a period of almost 3 months left the country and left the bank unattended allegedly on holidays.
- (9) The manager has since her appointment continued to utilize the depositors and bank's funds to pay employees who are sitting idle not generating any profits or conducting or offering to the depositors or general public any banking business services.
- (10) The manager has never acted to the best interest of the bank.

In short the institution complains that the manager has acted in total bad faith, derogated on all statutory provisions and acted in a manner contrary to the terms of her office. It is also alleged that she clearly misunderstood or is ignorant of her mandate under the Banking Act. In paragraph 22 of the deponent's affidavit he states:

"That indeed the appointment of the Manager to the bank which at all material times was solvent has been and remains baffling in fundamental material respects to wit;

- (1) The applicant is the regulator, inspector, advisor, supervisor, accuser and Rose Detho is also the applicant's Director.
- (2) The applicant and/or manager not only have they violated the law with impunity but has also acted in utter contempt of court orders.
- (3) The applicants have intentionally abused the authority and the court process where for unexplained reasons the Honourable court seems to be powerless.
- (4) Why the High court would permit a contemnor to vex it undeterred".

The position taken by Mr. Shah is supported by one of the depositors who filed a replying affidavit. Mr. Ravindra Tailor depones that he is a director of Ratalil Automobiles Limited, who was a depositor with the institution. The deponent avers that the impression created by the manager that court orders obtained by depositors prevent her mandate is factually incorrect. He says that the effect of the orders was to compel the manager to assume the banking business of the institution by continuing to provide banking services, which she refused to undertake or obey. And that the High Court in Eldoret, Kitale and Malindi ordered her to resume banking business of the institution. However, the manager ignored and refused to comply with the court orders with impunity.

Mr. Tailor further depones that the basic evidence required for the applicant's application to succeed is simply to show by way of evidence that she has been conducting banking business for the period the

manager has been in charge. In that there is no evidence that the manager has opened any new branches or current accounts or opened any letters of credit or any of the income normally generated from banking business. And that the depositors' money held on deposit is employed for beneficial gains.

The deponent also avers that there is no evidence from the applicant or manager showing any lending, investment, income, profits and/or any funds raised as from 23<sup>rd</sup> June, 2006. And all the suits filed ordinary depositors are crying for their deposits and the right to be provided with banking services. He also states that he has been advised by his Advocate that the duty, powers and approval of a manager under Section 34 of the Banking Act is intended to protect the interest of the institution, depositors and other creditors. Hence the acts of the manager right from 23<sup>rd</sup> June, 2006 to date have not been in the best interests of the institution, depositors and other creditors.

There was also another depositor Mr. Mohamed Hasham Ali Mohamed who filed a replying affidavit, which is in support of the replying affidavit of the institution and that of Mr. Tailor. He says that he is the depositor who filed and obtained orders through High Court Kitale Misc. Civil application No.105/2006. He contends that he filed the said suit because the statutory manager failed to provide banking services from the date of her appointment. And like all depositors, his desires are for the manager to be forced and compelled to obey the law to conduct banking business to the customers of the institution. He then accuses the manager of engaging in ultra vires activities contrary to her mandate under Section 34(2) of the Banking Act.

In conclusion Mr. Hasham states that the orders sought by the applicant should not be granted in the interest of fairness and justice as there are no sincere grounds being advanced by the applicant whose actions and acts so far, leave a lot to desire.

Mr. Ougo learned counsel for the applicant reiterated what is contained in the supporting affidavit and submitted that the extension is justified in the circumstances of the matter. He asserted that the court has unfettered jurisdiction to extend the tenure of the statutory manager. He urged me to consider that the circumstances, the statutory manager had to deal with a multiplicity of court cases in which various orders were given. And those orders had the legal effect of preventing the statutory manager from completing her statutory mandate.

According to Mr. Ougo Advocate, the practical effect of the cases and orders issued thereunder was to restrain the statutory manager from taking any decision, action, investigation, demands, audits or recommendations which she must do, to enable her discharge her mandate. The statutory manager went to the court of appeal seeking, a stay of the orders given ex parte by the High Court which restricted her mandate to discharge her statutory obligations. The appeal before the Court of Appeal have not yet been determined.

Mr. Ougo Advocate further submitted that the Central Bank of Kenya and the statutory manager have done all within their powers to set aside the orders ex parte by the High court. But the applications and appeals are still pending before the Court of appeal for hearing and determination. In short Mr. Ougo Advocate contended that the statutory manager has been prevented from completing her statutory mandate because of the protracted litigation and the orders of stay issued therein. In his view that is a sufficient expression and/or justification for extension of the tenure of the statutory manager, hence he urged me to exercise my discretionary powers in favour of the applicant.

Mr. Odera-Obar Advocate opposed the application on behalf of the directors of the institution. The submissions of Mr. Odera Advocate is as follows: That the issue of appointment of the manager by the Central Bank of Kenya to run Charterhouse Bank Limited has been very unique in a number of ways. It is the first time a manager is appointed to take over a bank that is solvent and that has never happened in this jurisdiction. It is also the first time that a contemnor has been permitted to time and again come before court and has been entertained by the court notwithstanding the open defiance by the contemnor to the orders of the court.

It is also the first time where the Central Bank of Kenya a regulator with a specific mandate under the

Central Bank of Kenya Act has accused an institution of a number of ills or wrongs and appointed its own director to investigate the alleged ills. That will remain a matter contrary to the ideals of natural justice, where the accuser is the investigator.

Mr. Odera Advocate also contended that there is no such a position under the Banking Act as a statutory manager. The only thing the law provides is the position of a manager, hence the concept of a statutory manager is ill-founded.

It was also the position of Mr. Odera Advocate, that the person to make an application for extension of the management is the Central Bank of Kenya. It cannot be made with the assistance of the manager in question and/or jointly and severally with the manager in question. And if the court were to find that the manager was directly or indirectly involved in the application for extension then that application must fail.

Mr. Odera Advocate also took issue with the conduct of the statutory manager. According to him, the manager has conducted herself in a manner not befitting her statutory mandate. She violated section 34(2) of the Banking Act and since she did not assume the management, control and conduct of the affairs and business of the bank, then there is no need for extension. The manager from the time she took over the management of the bank has not conducted any banking business.

It is the position of the respondent that the application is an abuse of the court process since the statutory manager failed to act within her statutory mandate. And she also failed to observe the various orders issued by the High Court. According to Mr. Odera, there is no way this court could extend the tenure for the statutory manager to remain in an institution which is not bank since the applicant did not apply for the renewal of the bank's licence for the year 2007. The same were to be made by the manager and it is the direct obligation of the manager to take into consideration the interests of the bank, depositors and creditors as per section 34(1) (D).

Mr. Kiarie and Mr. Nyairo Advocates ably submitted that the applicant has not made a case to warrant the extension now being sought. That the extension is not automatic and the court has to be satisfied that there is sufficient justification to enable the court to exercise its discretion in favour of the applicant.

The position of Mr. Kiarie and Nyairo was that the orders issued by Eldoret, Kitale and Malindi High court staying further actions of the manager is still subsisting to date. And if the court were to allow the present application that shall be in direct contradiction of the orders issued by the High Court in Eldoret, Kitale and Malindi. The orders were issued by Judges of concurrent jurisdiction and to issue orders in contradiction of those orders would create more confusion and contradiction. Mr. Nyairo Advocate also asserted that this application is a backdoor attempt to attain what the Court of Appeal has not yet given, besides contradicting the existing orders of the three judges of the High court.

The two counsels also submitted that their clients being depositors were dissatisfied with the conduct of the manager in failing to offer any banking services since her appointment. And when no services were forthcoming, they were forced to approach the court for remedial action. The High court sitting in Eldoret, Kitale and Malindi separately appreciated the predicament of the depositors and gave orders which are still in place. And if the appointment is extended for a period of another year it would seriously embarrass the depositors and may prejudice their position.

The above is a representative of the issues of the parties contested before me when the application was admirably and well argued by Mr. Ougo, Mr. Odera-Obar, Mr. Nyairo and Mr. Kiarie Advocates. The parties took divergent positions and on the strength of their positions, laboriously worked out the finer details to make it a success. Each party took the view that its position is well merited. On my part I have taken into consideration the rival positions taken by the parties in particular the lengthy affidavits filed by the parties in support of their respective case. Above all I have taken into consideration the able and persuasive submissions of Mr. Ougo, Mr. Odera, Mr. Kiarie and Mr. Nyairo Advocate. My task though fairly exaggerated by the Advocates is fairly simple and straight forward.

As a start, the application is under Section 34(3) of the Banking Act, which gives this court unfettered discretion. The section states;

“The appointment of a manager shall be for such period, not exceeding twelve months, as the Central Bank shall specify in his instrument of appointment and may be extended by the High Court upon the application of the Central Bank if such extension appears to the court to be justified”.

Before I address the merit of the application, I think it is pertinent and essential for me to answer three issues namely;

- (1) whether there is a proper application before court,
- (2) what Mr. Odera Advocate called the wrong concept of a statutory manager;
- (3) The issue of a contemnor who has violated the orders of the court persistently and consistently being entertained by this court.

According to Mr. Odera Advocate, the person to make an application for extension of the management is the Central Bank of Kenya. It cannot be made with the assistance of the manager in question. He also submitted that the application cannot be made jointly and/or severally with the manager in question. He contended that there is no proper application in a situation where the manager is swearing an affidavit on behalf of Central Bank of Kenya. The question Mr. Odera Advocate posed is;

“The question would be that in the situation that subsists where you have the Central Bank of Kenya and the manager swearing the affidavit, is this application by the Central Bank of Kenya”.

In reply Mr. Ougo Advocate submitted the present application has been made by the Central Bank of Kenya, a corporate body and it cannot swear an affidavit. And the fact that Rose Detho swore an affidavit cannot make her an applicant.

The wording of Section 34(3) by the Banking Act gives the Central Bank of Kenya the exclusive right to make the application for extension of the appointment of the manager. It is clear that the appointment after the expiry of 12 months may be extended by the High Court upon the application of the Central Bank of Kenya. There is no dispute that Central Bank of Kenya is a body corporate, therefore cannot swear an affidavit. It must do so through its agents, servants and/or employees who are directly concerned with the relevant issue in contest. To the extent that the application for extension ought to be made by the Central Bank of Kenya, both Advocates are right. The point of departure is that Mr. Odera Advocate thinks that the fact Rose Detho swore the supporting affidavit makes her a party directly or indirectly making the application jointly and/or severally with the bank. With respect Mr. Odera is outrightly wrong in that proposition. I agree with Mr. Ougo Advocate there is nothing wrong with the application by the applicant. Rose Detho confirms that she is an Assistant Director in the applicant’s supervision department. She also states that she is fully conversant with the facts deponed in support of the application. In my view she is the best and most competent person to swear the affidavit in support of the application.

The heading of the application is very clear and it reads;

*“An application by the Central Bank of Kenya for an extension of the period of appointment of the statutory manager of Charterhouse Bank Ltd”.*

*An application under Section 34(3) of the Banking Act Cap 488 of the Laws of Kenya”.*

It is clear in my mind that the present application has been properly made by the Central Bank of Kenya in exercise of its powers under Section 34(3) of the Banking Act. I therefore refuse to entertain the submissions made by Mr. Odera and hold the application is proper, competent and/or validly before court.

The other issue is what Mr. Odera Advocate called a wrong concept of a Statutory Manager. According to Mr. Odera Advocate, there is no such position under the Banking Act as a statutory manager. The only thing the law provides is the position of a manager under Section 34(2) of the Banking Act.

Mr. Ougo Advocate in reply submitted that the term statutory manager is used as a matter of practice, because the manager is appointed pursuant to a statutory provision which is Section 34 of the Banking Act.

I agree that under section 34(2) the word statutory manager is not used. The word used is 'a manager' and even the letter of appointment dated 23<sup>rd</sup> June, 2006 was conscious of that requirement. The letter of appointment, under paragraph I states;

*“Under the powers conferred by section 34(2) (a) of the Banking Act, you are hereby appointed as manager for Charterhouse Bank Ltd effective 23<sup>rd</sup> June, 2006”.*

One may be tempted to say that there is no such position under the Banking Act as a Statutory Manager. In my view if one were to accept such a position, it would be gross violation of the practice which has evolved and developed by the ingenious, progressive, innovative and modern Advocates. The jurisprudence of law is not static but has been over the years developed and modernized by the creative and imaginative skills of the learned friends.

I have tried to look whether there is a statutory power of sale or statutory notice under the relevant Acts of Parliament, but I am afraid to report that what is provided is power of sale and notice. However it is widely accepted term to use a statutory power of sale and a statutory notice. The reason why the word “statutory” is put before the words “sale” and or “notice” is because the power arises from a statute.

It means the power to sell one's property upon default is given and/or provided by a particular section in a statute. It is therefore my view that the use of the word statutory manager, statutory power of sale and/or statutory notice is an expression, an application of creative skills and/or imaginations of the legal minds of an Advocate who is appreciative of the meaning, import and context of the word. It is an attempt of an Advocate who is equipped properly with his tools of trade to point and/or show that the power is donated by a statute. It means the origin and basis of the power is given by an Act of Parliament, therefore Advocates being primarily concerned with the provision of the law would invent particular words in expression of their knowledge and sophistication. But to layman, the word statutory manager may look or sound strange. Being a brilliant lawyer Mr. Odera Advocate should know that Advocates have special skills at doing things in a specified manner. And in a style of decoration to show that they are in deed learned friends. I am afraid the learned friend misconceived the word statutory in a manner not intended by his peers. Mr. Odera Advocate is alone in the position taken and I too refuse to go with him.

The third issue is the contempt committed by Rose Detho. First it is a basic principle of law that courts can only deal with matters that are properly before it for determination. The issue of whether there is a contempt is not an issue before me for determination. This court is not the relevant authority to deal with the issue of contempt committed by Rose Detho, since the matter of contempt is not before me. The present application is by Central Bank of Kenya and I have no evidence to demonstrate that Central Bank of Kenya is in contempt of any court orders. In any case I can only deal with matters that are brought to my attention in a proper manner.

The orders allegedly violated were given by a court of competent jurisdiction. It is my position it is only the court properly seized of the matters of contempt, which can/should adequately respond to the unique submissions made by Mr. Odera, Mr. Nyairo and Mr. Kiarie Advocates. It is not true as Mr. Odera Advocate contends, that it is the first time a contemnor has been permitted to time and again come before court and has been entertained by the court. I am not in a position to comment, whether the respondents have proper orders or not, because I have no jurisdiction to inquire, investigate and examine the past conduct of the applicant or Rose Detho. The person to answer whether respondents have proper orders is not this court. The person to examine whether any orders were violated, disobeyed and/or enforced is equally not this court.

Let me say that I have not and I cannot entertain and/or permit a contemnor to appear before me and address a cause of action. It is unfortunate the respondents have directed their unfounded anger and/or arsenal at the wrong direction. They should target their grievances if any, to the right court, who I am sure, is equipped and competent to handle. If the manager or any other person refused to comply with the orders of the court, then the competent court to be moved is the court which gave the orders being disobeyed. I am sure the relevant court would be in a position to give a proper and competent determination. That side-show is also dismissed.

The main reason for the extension is that the statutory manager has been prevented by court through various orders granted in different courts. No doubt the applicant is a statutory body established under Section 3 of the Central Bank of Kenya Act and one of its principal objects is to regulate the operations of all commercial banks in the Republic of Kenya. It is alleged that the execution of the applicant's statutory mandate involves the regular inspection of the operations of commercial banks to ensure they comply with the provisions of all the laws applicable together with administrative guidelines issued.

It is important to know the background information that caused the Central Bank of Kenya to move against the institution. The deponent of the supporting affidavit, Rose Detho in paragraph 6 relates the circumstances which led the applicant to form the opinion that it was necessary to place the bank under statutory management, namely;

- (1) Some credit facilities were advanced before their beneficiaries executed letters of offer and in some cases, there were no letters of offer at all.
- (2) Some credit facilities were disbursed to their beneficiaries on verbal instructions of the bank's directors.
- (3) Some customers hold multiple accounts which are suspect and it is important to investigate the nature of the transactions in such accounts.
- (4) There were evidence of electronic transfer of funds without corresponding instructions and entries without appropriate authority.
- (5) There was evidence that some members of the bank's staff are paid cash bonuses outside the pay roll and not subjected to tax.
- (6) Account opening forms of 45 suspect customer transactions accounts were not available contrary to "know your customer regulations".
- (7) The engagement in offshore money transfers involving the splitting of transactions was detected.
- (8) Cheques drawn at customer's account were routinely being cleared through a lawyer's client account.

It is the position of the applicant that the action to place the institution under management was intended to safeguard the integrity of the financial sector in fulfillment of its regulatory mandate and is in the interest of ensuring the proper functioning of a sound financial sector. If I got Mr. Ougo Advocate right, the statutory manager was required to thoroughly and properly investigate, assess and audit all the operations of the institution and make a report to the Central Bank of Kenya.

The Central Bank of Kenya under Section 32(1) of the Banking Act is empowered at any time to cause an inspection to be made by any person authorized by it of any institution, its books, accounts and records to establish compliance with the law.

Section 32(3) states;

*“the person making the inspection shall submit his report to the Central Bank of Kenya and the report shall draw attention to any breach or non observance of the requirements of this Act and any regulations made thereunder, any irregularity in the manner of conduct of the business of the institution inspected, any apparent mismanagement of the lousiness or lack of management skills in that institution and any other matter revealed or discovered in the course of the inspection warranting in the opinion of the person making the inspection, remedial action or further investigation”.*

In my understanding the bottom-line task and purpose of appointing a statutory manager was to investigate the allegation of non compliance with the law by the institution. It is due to the routine inspections carried out by the Central Bank of Kenya, that the circumstances indicated in the affidavit of Rose Detho were noted. And the applicant was therefore obliged to move under Section 34(1), hence the move to appoint a manager to run the institution and to go to the bottom of the matter in order to establish whether there were violations of the law. I therefore think that Section 34(2) must be read together with Section 34(1) (D) and Section 32 in order to understand and appreciate the purpose and intention of the appointment of the manager to run and manage the affairs of the bank for the period indicated in the letter of appointment. The Manager was appointed to establish the extent of any malpractices in the Banking Act.

Section 34(2) vests the Central Bank of Kenya the powers to appoint any person to manage an institution placed under the management of the Central Bank of Kenya. The law says any person and that power in my humble view enables the manager to do all that is necessary for the interest of the institution, its depositors and creditors.

An issue which has been spiritedly and force fully canvassed by the Advocates for the respondent is that the manager has failed to provide Banking services. And as a result the assets of the bank is being depleted because the bank is still incurring expenses. And that is why the depositors went to court. It is alleged that the depositors expected the manager to accord and/or afford customers banking services. And when no services were forthcoming between June, 2006 and September, they opted to go to court, so that the manager could be forced to open banking services to all depositors and in particular the applicants who instigated the suits in Eldoret, Kitale and Malindi High court. In my view it is wrong to say that at the inception, the manager was to offer banking services to all customers of the bank. It is preposterous to say that she failed to offer banking services to depositors of the bank. That was not the primary responsibility of the manager. In my view that was secondary and incidental to the investigation, inspection, audit and report required by the applicant.

It is also alleged that the statutory manager upon her appointment closed all the branches and chased away all senior managers of the institution. In my view the manager could not adequately carry out her responsibility when the branches of the institution were open for business. The investigation was to be carried out in a smooth manner. And in my view proper investigation could not be carried when the bank was offering banking facilities to customers. Definitely the shoddy and shadowy customers would carry away all evidence or money. And equally there would be a rush by depositors to take away their money and other documents.

Let me say that this is not a case of the fox being in charge of the hen house. There is allegations that the institution was involved in an intricate and complicated web which were in violation of the Banking Act. Such a suggestion is not quite without merit but again it belongs to the province of speculations and assumption unless there is a proper report, investigation, examination and audit into all the areas where the suspect transaction were noted by the Central Bank of Kenya in its initial inspection carried out. It is therefore incumbent upon the Central Bank of Kenya through the manager to go to the root cause of the malpractices allegedly undertaken by the institution. The manager claims that she was unable to undertake her mandate due to multiplicity of suits filed against her while the institution alleges that the manager from the word go has not acted in a manner to protect and preserve the interest of the institution, its depositors and creditors. It is contended that she has failed to assume the management, control and conduct of the affairs and business of the institution to the exclusion of the Board of directors. It is also alleged that the manager failed to offer any banking services to the customers of the institution, no letters of credit opened, no new accounts opened and no recovery from the debtors of the institution. The total

effect of such action is that the assets, property and reserve of the institution is being depleted in a manner that can lead to liquidation. On my part I have not seen any documentary evidence or otherwise to show the manager was/is involved in circumstances or actions that the assets and property of the institution is being used in a manner detrimental to the interest of the institution or is depleted in a manner that can result in liquidation.

The case of the institution is that there is manifest disadvantage in the manner the institution is being managed by the statutory manager. I agree that there is a manifest disadvantage where the transaction does not provide equal benefits for both parties giving up something of substance without receiving any tangible benefit in return is a manifest disadvantage to one party. In my view the nature of the disadvantage is to be judged by the circumstances subsisting at the time when the whole dispute has crystallized. Evidence must be adduced to satisfy this court that the manager had obtained benefits or is likely to obtain benefits because of her stay at the helm of the institution. The court has to objectively examine the facts with particular reference to the terms of the appointment of the statutory manager and the court will have to conduct, a balancing exercise weighing on one hand any benefits/purpose derived by the statutory manager and on the other hand whether the presence of the manager is worsening the financial position of the institution and its depositors.

In my humble opinion if the latter significantly outweighs the former, the court would have to intervene to correct any manifest disadvantage suffered or likely to be suffered by the institution. In the scales on one side must be placed the plea of the applicant in reaching to the bottom of the matters that necessitated the institution be put under a statutory manager, on the other hand there is the opposing plea of the directors of the institution and the depositors. Each side is clearly entitled to recognition and respect. However, which way the balance tilts depends upon the weight and circumstances of each case.

The respondent (institution) contends that they had been grievously impaired by the conduct of the applicant in putting the institution under statutory manager for grossly inadequate reasons. While the applicant is saying that as regulator of the Banking sector we had discovered evidence of violation and dealings contrary to known practice and administrative guidelines issued by the banks, we therefore need an opportunity to thoroughly, conclusively and exhaustively examine, and investigate and determine the practice of the institution. The Manager is saying that the Bank is half-way the journey and it must be allowed to complete and discharge its statutory mandate.

It appears to me a crucial consideration in a case such as the present one is thus what is the interest of the applicant in seeking an extension. The Central Bank of Kenya is the statutory regulator of all banking and other financial institutions. The primary and core function is exercised in order to achieve financial stability and sound banking practice. I can therefore hold that it is predominantly the business of the Central Bank of Kenya to regulate the activities of all banks. However the Central Bank of Kenya in asserting the rights of the public cannot oppressively and capriciously exercise its regulatory powers.

It is the duty of the bank or the statutory manager to keep strictly within the powers donated by the statute. If such persons acts in excess of their powers, they are to the extent to which they exceed their powers deprived of any protection conferred upon them by the statute in question. In my view an act which does injuries to others cannot be justified as necessary if it merely enables undertakers to carry out authorized works in a manner more convenient or economical to themselves without consideration for the effect it will have on the accommodation and convenience of those whose rights are sought to be altered. My take is that a statutory power given by an Act of Parliament must be exercised bonafide, reasonably and without negligence and for the purpose it was conferred or intended. It is therefore necessary and expedient for the manager to exercise the powers conferred in a manner not contrary/detrimental for the intended purpose.

In the position of the Central Bank of Kenya circumstances has arisen for the institution to be put under management and it has exercised its powers legitimately for the protection of public interest. It is in essence saying that it must be allowed to go to the logical conclusion to unearth the alleged malpractices committed by the institution. The violations include lending to both Nakumatt Holdings Ltd and Triton Petroleum Ltd in excess of the single borrower limit of 25% of the institution's core capital, credit

facilities advanced before beneficiaries executed letters of offers and in some cases no such letters of offer were executed at all. It is also alleged that credit facilities were disbursed to beneficiaries on verbal instructions of the institution's directors. More interesting is the use of Advocates accounts as a trading account for some of the institution's big customers.

The applicant is now saying that it needs to go to the root cause and address, the information and evidence discovered at its initial inspection. It could not do so due to multiplicity of suits filed by the institution and some of its depositors. The Central Bank of Kenya is saying that it has cause to believe that certain matters were not properly and legally done by the institution, its directors and depositors, which requires extensive and thorough investigations and audit. The investigation and audit is meant to unearth, understand and/or appreciate the operation and financial integrity of the institution. I reckon that the Central Bank of Kenya if it thinks it is necessary in the public interest may request information from and make recommendations as to the activities of any banking institution.

The powers of regulating banking institution by the Central Bank of Kenya is exercised on behalf of the citizens of this country. In my view a court of equity has never hesitated and would never hesitate to use the strongest powers to protect and preserve the interest of the public, when it is endangered by the activities of an individual or group of individuals. It is at the heart and concern of any court of equity to see a stable banking system properly and efficiently supervised by the Central Bank of Kenya. This is to ensure that the stable door is locked before the horse has gone. Of course the horse would go and disappear the moment it gets the slightest opportunity to escape. If the owner of the horse is unwilling to play within the rules, then it would be unfair and inequitable to subject other players to rules which have been violated by one participant.

In my view the interest and regulatory powers of the Central Bank of Kenya is to have a fair play within the banking system. It is therefore incumbent upon owners of horses to play within the rules, regulations and conduct its competition in a manner to say that it was done over the board. The under hand dealings and dealings below the board are unacceptable and prejudicial to the interest of the public and players in the banking industry.

The institution has only itself to thank for not following ordinary banking and commercial practice and to be allegedly engaging in transactions contrary to the Banking Act. It is the discovery of the information that the institution was in violation of the law that culminated in the prudence of the Central Bank of Kenya to undertake an investigation hence the appointment of a statutory manager. That fault is not attributable to Miss Rose Detho, that liability is contingent to the default of the institution not to allow its horse to participate in the competition as per the rules set by referee. The law is that no party can and/or should be allowed to play outside the rules or without rules. Playing without rules or playing in violation of the law makes the competition unlawful. The mandate to ensure that all financial institutions play within the rules falls on the shoulders of the Central Bank of Kenya. That is a statutory mandate which must be discharged properly, effectively and efficiently to avoid the commission/omission of financial impropriety.

The statutory manager has been seriously accused of various ills and allegations. Let me say that the statutory manager is only discharging powers and mandate conferred by the Central Bank of Kenya through the Central Bank governor. The manager exercises her powers on behalf and for the interest of the Central Bank of Kenya who is the custodian of public interest in all matters concerning financial institutions. In my understanding the powers exercised by the Central Bank of Kenya is done on behalf of the citizen of this country. The Central Bank of Kenya is the executor, administrator, trustee, agent and/or servant of the public interest in so far as the activities of the banks are concerned.

Apart from the complaint that she failed to offer banking business to customers, there is no documentary evidence to show the statutory manager has breached any of her statutory duties in relation to the institution, its depositors or creditors. She is a foot soldier of the public who are interested in sound banking and formulation of monetary policies in order to safeguard the image of this country's financial institutions.

I have no evidence to show that she put herself in a manner to derive or obtain financial or fiduciary interest from her position of statutory manager. The Central Bank of Kenya was concerned and alarmed at the instances mentioned in paragraph 6 of the supporting affidavit of Rose Detho, when it placed the institution under management. The said circumstances have not changed and the investigation is not complete. It is not complete because the statutory manager was trapped in multiplicity of suits. It is contended by applicant that the enormity and magnitude of the allegations leveled against the institution requires proper and conclusive investigation and determinations.

In my view a village elder from far and remote place like Mandera, given the history, circumstances, extent and nature of the allegations leveled against the institution or its depositors would wonder at the sense and purpose of placing the institution under management if investigation would not be completed. I think he would sincerely say that it is in the interest of the institution and its depositors for the manager to complete her investigations, inspection and audit in order to determine the cause and suggest remedial measures. The village elder would definitely say that it is prudent, it is logical, it is reasonable and it is fair to examine and determine the nature and extent of the allegations made against the institution, its directors and some depositors.

As a court what we can do, of course and what we must do is to work to eradicate the conditions that spawn the criminal mentality of engaging in illegal activities and unsound banking practices. I am not in any way saying the bank was involved in criminal or unsound banking activities but based on the interim inspection, the institution was found to be culpable. In this case the institution owed a duty, the standard and scope of the duty is expressly outlined in the banking Act and administrative guidelines issued by the Central Bank of Kenya.

There is prima facie evidence of violations committed by the institution and its depositors. The management of the institution allowed its depositors and creditors to act in contravention or violation of the law. By allowing customers to hold multiple and suspect accounts, by disbursing monies on verbal instructions, by advancing credit facilities before proper documentation, by transferring huge and substantial monies through electronic transfer without corresponding instructions, by lending to Nakumatt Holdings Limited in excess of the single borrower limit of 25% of the bank's core capital, the directors and management of the bank were prima facie involved in criminal activities. The truth has to be discovered. And it can only be discovered through the mode and method employed by the applicant. I think it is fair to have a result, which may or may not exonerate the parties.

The sincere motivation of the Central Bank of Kenya is to go to the root of those serious allegations. It could not do so due to the nature and extent of the litigations commenced by the institution and some of its depositors. In my view when the primary and core obligation of the statutory manager has not been achieved due to multiple suits, which had the effect of staying, restraining and/or executing her statutory mandate it can be rightly said she was prevented from discharging the purpose and intention of the appointment.

It is my position that in order for the statutory manager to effectively execute her statutory mandate, which was to make decisions, take actions, conduct investigation, audits and eventually prepare a final report to the Central Bank of Kenya, she required uninterrupted period and peaceful time at the offices and branches of the institution. I am therefore satisfied that the conduct of the directors of the institutions and some of the depositors who appear to be agents or proxies of the institution did impede the smooth operation of the mandate and powers, the manager was to exercise in fulfilling her obligations to the appointing authority. It is my sincere finding that the appointing authority was deprived and prevented by the conduct of the respondents and others who did not participate in this application.

The reasons advanced by the applicant is a sufficient justification for this court to exercise its discretionary powers. To fail to extend time would mean the purpose and object of placing the institution under management would not have been achieved. The reasons behind the appointment would have been lost and the desired goal of establishing the extent of any violations by the institution would have been defeated.

In my view where a limited time has been fixed for doing any act, the court retains the residual powers to enlarge time upon sufficient reasons and as justice of the case may require. I think justice requires the statutory manager and by extension the Central Bank of Kenya to bring to public domain, the violations allegedly committed by the institution, its directors and some of its depositors. Such a report is healthy for the financial stability of this country. It is also healthy for the integrity of our Central Bank of Kenya in performing its regulatory mandate.

The Central Bank of Kenya has been accused over the years of being behind the financial instability in this country. It is a matter of public notice or notoriety, that the Central Bank of Kenya supervised an era where Banks were incorporated and licensed to defraud public money. The citizens of this country were aggrieved and concerned about the lack of exercise of regulatory power on the part of the Central Bank of Kenya. Such blunders were committed when the eyes and ears of the protectors of public right were widely open. They failed to do the right thing, they failed to exercise their statutory mandate, simply because the Central Bank of Kenya was cohabiting with the perpetrators of the fraud.

As was rightly pointed by Mr. Odera Advocate this case is unique. It is unique because it is the first time a solvent bank was put under management. In my view the mandate of the Central Bank of Kenya to exercise its powers under section 32 and 34 of the Banking Act is not underpinned by the status of the institution placed under management. The liquidity, solvency, financial muscle and/or the amount of billions held by a financial institution is not a factor to prevent the Central Bank of Kenya to exercise its supervisory and regulatory powers and/or mandate. If the institution in question is holding billions acquired through money laundering or drug trafficking or tax evasion business and/or is involved in dealings in violation of the law, the Central Bank of Kenya is well within its powers to place such institution under management. The guiding factor is playing within the rules.

The source of the funds offered without sufficient security and documentation are matters which the public are interested. The interest of the public can only be addressed by the statutory mandate exercised and given to Central Bank of Kenya. The Central Bank of Kenya may have had one year period but in my view the magnitude and weight of the allegations, has to be resolved even if it takes two years. Any injuries or damages that may be suffered by the institution and its depositors can be and would be compensated by the Central Bank of Kenya. I therefore expect the statutory manager to perform her duties scrupulously and without negligence. Her action must not be willful and deliberate to deplete the assets of the institution and its depositors.

In my humble opinion where a person is authorized by statute to effect a particular object/purpose and are granted powers he/she is expected to exercise those powers with due regard to the rights of all persons that may be affected by the exercise of the power. In short the powers must not be exercised in an oppressive manner or in a manner to cause injury to the beneficial and legal owners of the property, and, assets investigated or statutorily managed.

It is now well settled, that the decision whether or not to extend time is essentially discretionary. I have anxiously considered the application and in my mind the reasons and explanation offered by the applicant is credible to warrant the exercise of my discretion. I am satisfied that the directors of the institution and some proxy depositors engaged the Statutory Manager in endless and multiple law suits, which are still hanging over the head and neck of the statutory manager. The respondents lit fire all over the country and the Statutory Manager was forced to put off the fire, most times without success, meaning that she is under constant fear or apprehension about her status as a manager. In my view the manager had no peace to discharge her mandate albeit partial because of the orders sought and obtained by the alleged depositors.

I am persuaded that the Central Bank of Kenya and the Statutory Manager were pre-occupied with putting out the side-fires lit up by the respondents. The fires were lit to confuse and disorientate the Statutory Manager, so that the direction of the horse is lost. In my humble opinion the direction of the horse would be difficult to know and it is impossible to go after a horse whose owner is running away from detection and/or investigation.

In my understanding the period to be extended would assist the manager to capture through inspection, audit and investigation the real owner of the horse that does not want to play within the rules. It means the half-way house must be allowed to be completed in order to achieve the desired goal of starting and putting up the foundation. The good explanation given by the applicant allows it to complete the task it undertook in exercise of its statutory mandate.

Before I conclude this ruling let me make some observations. First, let me state that one of the greatest changes which has occurred in this country in the least 10 or so years is the dramatically increased expectation people have of the institutions of Executive, Judiciary and Parliament. The people of this country expect the three arms not just to maintain status quo but to achieve progress and development in the protection and enhancement of public rights and public property. My concern is that the legal system in this country has been accused (most times unfairly) of being unable to respond to the increased pace of change in the 21<sup>st</sup> century and the increased complexity and sophistication of the emerging trends especially in the financial sector. I agree that we cannot cling stubbornly to what was OK in few years ago. Perhaps as a court we must baptize ourselves with the insights of the more modern and complicated financial transactions, which to inattentive bystander may look sound and proper. As a court we have a cardinal responsibility as always to protect and enhance public interest. That was a guiding factor in this determination.

Secondly, let me say to Mr. Odera Advocate who surprisingly looked bitter against our court system, that the conspiracy theory against his client is utterly misconceived and baseless. The subterranean tradition of our courts has been to address each particular case on its peculiar facts and the law applicable. That has not changed because of the dispute between Charterhouse Bank Limited and Central Bank of Kenya. Our mandate, role and duty is fidelity to the law and if the law at one particular time or several times is against a particular client, it is wrong to say that there is no rule of law in this country. May be the gospel songs sung before us by Mr. Odera Advocate and his clients were not from the scriptures. May be Mr. Odera Advocate needs to get his script right and in conformity with the law. I am proud to say that Kenyan Judges have attained the level of comprehension and sophistication in order to make a decision meaningful and in the context of the dispute at hand for determination. We respect the Rule of law but it is not our business to provide softballs to a person who is not entitled. If you are entitled to a hardball because of your transgression, then you must accept the reality and express deep gratitude to our courts for entertaining you. However, as judges our comfort or solace is that through arguments like that of Mr. Odera Advocate and others, our thinking as judges are refined and our insights sharpened.

For the reasons stated hereinabove and having due regard to the peculiar and unique nature of the dispute, it is my judgement the application dated 11<sup>th</sup> June, 2007 is well merited. In exercise of my powers under Section 34(3) of the Banking Act Cap 488 Laws of Kenya, I hereby extend the appointment of Rose Detho for a further period of 12 months effective today 22<sup>nd</sup> June, 2007. The costs of this application shall be borne by two respondents (depositors).

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of June, 2007.**

**M. A. WARSAME**

**JUDGE**