



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 119 OF 2017**

**IN THE MATTER OF IMPERIAL BANK LIMITED (UNDER RECEIVERSHIP)**

**-AND-**

**IN THE MATTER OF LICENSING AND REGULATION OF**

**FINANCIAL INSTITUTIONS BY CENTRAL BANK OF KENYA**

**-AND-**

**IN THE MATTER OF RIGHTS ACQUIRED BY AND/OR OWED TO**

**DEPOSITORS BY CENTRAL BANK OF KENYA IN LICENSING**

**AND REGULATION OF FINANCIAL INSTITUTIONS**

**-AND-**

**IN THE MATTER OF THE DEPOSITORS OF IMPERIAL**

**BANK LIMITED (UNDER RECEIVERSHIP)**

**-AND-**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION, 2010**

**-AND-**

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 27, 35, 40 OF THE CONSTITUTION, 2010**

**-AND-**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NUMBER 4 OF 2015**

**BETWEEN**

**KIMANI WAWERU.....1ST PETITIONER**

**DHIREN SURYAKANT SHAH.....2ND PETITIONER**

**MEERA SHAH.....3RD PETITIONER**

**SURYAKANT PREMCHAND SHAH**

**(also known as SURYAKANT SHAH).....4TH PETITIONER**

**MAYURI SURYAKANT SHAH.....5TH PETITIONER**

**AND**

**CENTRAL BANK OF KENYA.....1ST RESPONDENT**

**KENYA DEPOSITINSURANCE CORPORATION...2ND RESPONDENT**

**IMARAN LIMITED.....1ST INTERESTED PARTY**

**REYNOLDS & COMPANY LIMITED.....2NDINTERESTED PARTY**

**EAST AFRICAN MOTOR INDUSTRIES**

**(SALES & SERVICES) LIMITED.....3RDINTERESTED PARTY**

**MOMENTUM HOLDINGS LIMITED.....4THINTERESTED PARTY**

**ABDUMAL INVESTMENTS LIMITED.....5THINTERESTED PARTY**

**KENBLEST LIMITED.....6TH INTERESTED PARTY**

**JUDGEMENT**

**The Parties**

1. The Petitioners herein, **Kimani Waweru, Dhiren Suryankant Shah, Meera Shah Suryakant Premchand Shah (**also known as **Suryakant Shah)** and **Mayuri Suryakant Shah,** pleaded that they were all material times, customers of **Imperial Bank Limited** (hereinafter referred to **"the Bank"**), a bank within the meaning of section 2 of the ***Banking Act***, Chapter 488 Laws of Kenya.

2. The 1st Respondent herein, the Central Bank of Kenya (hereinafter referred to as "the CBK") is described as a constitutional and statutory body within the meaning of Article 231 Constitution, 2010 and the ***Central Bank of Kenya Act***, Chapter 491 Laws of Kenya (hereinafter referred to as **"the CBK Act"**).

3. The 2nd Respondent herein, **Kenya Deposit Insurance Corporation** (hereinafter referred to as "the Corporation") is described as statutory body incorporated under the ***Kenya Deposit Insurance Act***, Number 10 of 2016 (hereinafter referred to as "**the KDI Act**").

**The Petition**

4. According to the petitioners, the CBK's primary duties are set out under Article 231 of the Constitution of Kenya and sections 4 and 4A of the ***Central Bank of Kenya Act*** which duties include licensing and supervision of banks conducting banking business in Kenya pursuant to the ***Banking Act***. In its duties, the CBK has developed Prudential Guidelines for financial institutions carrying out *inter alia* banking business and other regulated business within the Country.

5. According to the to the petitioners, the Bank was able to carry out the regulated banking business as aforesaid only after, it is believed, it made an application for licensing under the ***Banking Act*** Chapter 488 Laws of Kenya and the same considered by the 1st Respondent as the licensing authority pursuant to its statutory mandate. It was however averred that in considering the said application for licensing and/or renewal of such License, the 1st Respondent was obligated in law to interrogate the following relevant, material and/or key statutory considerations;

> ***(a) Be satisfied as to the professional and moral suitability of persons proposed to manage or control the institution;***
>
> ***(b) Certify that such persons who are proposed to manage or control the institution are fit and proper persons to manage and control the institution;***
>
> ***(c) Be satisfied as to the financial condition and history of the institution, character of its management, professional and moral suitability of the persons proposed to manage or control the institution, adequacy of its capital structure and earning prospects, the convenience and needs of the area to be served and the public interest which will be served in granting of the licence; and***
>
> ***(d) Impose such conditions as it deems fit and just on a License issued.***

6. According to the petitioners, having granted a License to the Bank, the CBK is deemed to have conducted an inquiry as to the

considerations set out above and more particularly under section 4 of the ***Banking Act***, Chapter 488 Laws of Kenya and satisfied itself that the Bank had complied with the statutory considerations. In addition, the Petitioners, being customers of the Bank, legitimately expected that the Bank in carrying out the banking business would conduct the banking business within the meaning of section 2 of the ***Banking Act***, Chapter 488 Laws of Kenya which *inter-alia* includes;

***(i) The accepting from members of public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and***

***(ii) The accepting from members of public of money on current account and payment and acceptance of cheques;***

7. The petitioners therefore averred that being members of the public envisaged under the Banking Act, Chapter 488 Laws of Kenya, they proceeded to enter into bank-customer relationship with the Bank and maintained accounts and/or deposits at its branches as more particularized hereinbelow;

a. Account Number 7226000148;

b. Account Number 7400004016;

c. Account Number 7200004340;

d. Deposit Receipt Reference Number 004DEP315160003;

e. Deposit Receipt Reference Number 004DEP3141700003;

f. Deposit Receipt Reference Number 004DEP3142190001;

g. Deposit Receipt Reference Number 004DEP3150400004;

h. Deposit Receipt Reference Number 004DEP3150400001;

i. Deposit Receipt Reference Number 004DEP3140420001; and

j. Deposit Receipt Reference Number 004DEP31132800015160003;

8. The Petitioners averred that after issuance of the license by the CBK, it thereafter continued to renew the license and that up and until October 2015, the Bank was still carrying out banking business and thus, according to members of the public in general and the Petitioners in particular, the 1st Respondent had in renewing the Bank's License;

**(a) Satisfied itself as to the professional and moral suitability of persons managing and controlling the Bank;**

**(b) Certified that such persons managing or controlling the Bank were fit and proper persons to manage and control the Bank;**

**(c) Satisfied itself as to the financial condition and history of the institution, character of its management, professional and moral suitability of the Board of Directors and other persons managing and/or controlling the bank; and**

**(d) Satisfied itself as to the Bank's capital structure and earning prospects, the convenience and needs of the area it was serving and the public interest which will be served in renewing the licence.**

9. It was disclosed that the Board of Directors, being the persons managing and controlling the Bank, as at September 2015 constituted of the following;

**(i) Mr. Alnashir Popat- Chairman;**

**(ii) Abdulmalek Janmohamed – Group Managing Director;**

**(iii) Anwar Hajee;**

**(iv) Hanif Mohamed Amirali Somji;**

**(v) Mukesh Kumar Patel;**

**(vi) Vishnu Dutia;**

**(vii) Eric Gitonga;**

**(viii) Omurembe Iyadi; and**

**(ix) Christopher Angelo Diaz.**

10. According to the petitioners, on 16th September 2015, an official communication was released by the Bank by which the demise of the Bank's Group Managing Director, **Abdulmalek Janmohamed**, was announced and that of the appointment of his interim Successor. However, Bank assured the depositors that with the appointment of **Mr. Naheem Shah** and **Mr. James Kaburu** to act as Managing Director and Deputy Managing Director on an interim basis, the Bank had *"shown its commitment to ensure strong experienced leadership for Imperial Bank Limited to continue the Company's strategies, growth trajectory and record of service to customers and the community"*. However, these appointments were sanctioned and/or approved by the CBK which as did not have a legally constituted Board of Directors.

11. It was the petitioners' case that they had a legitimate expectation, as depositors, that the CBK would at all times discharge its statutory and constitutional obligations. In particular, the Petitioners had a legitimate expectation that the CBK would adhere to all the constitutional provisions including the national values and principles set out under Article 10 of the Constitution and that it would also not unnecessarily limit any of the Petitioner's constitutional rights pursuant to Article 24 of the Constitution.

12. According to the petitioners, section 10 of the ***CBK Act*** enjoins the CBK to have a board of directors constituted pursuant to section 11 of the CBK Act, which board of directors is the decision-making body of the CBK.

13. It was disclosed that over the years, including the year 2015, the CBK issued and renewed the license for the Bank which enabled the Bank to continue undertaking banking business within the meaning of the ***Banking Act*** and that in doing so, the CBK made representations to the public in general and customers of the Bank, the Petitioners inclusive, in particular that the CBK was satisfied, pursuant to section 4 of the ***Banking Act***, Chapter 488 Laws of Kenya as to the;

***a. Financial condition and history of the Bank;***

***b. The character of the Bank's management;***

***c. The adequacy of the Bank's capital structure;***

***d. The convenience of the needs of the area to be served by the Bank;***

***e. The public interest to be served by issuing and renewing the Bank's license.***

14. It was the petitioners' case that at all material times, the CBK certified that the persons who were in management of the Bank were persons suitable to manage the affairs of the Bank pursuant to section 4, 8, 9A and the First Schedule of the ***Banking Act***. They contended that all the representations by the CBK were that the Bank was under a good financial position and was under good management and that it was not against the public interest for the license to be renewed which representations were made during the life of **Abdulmalek Janmohamed**, who was the Bank's Group Managing Director.

15. It was however averred that as of 13th October 2015, the CBK did not have a Board of Directors as required by section 10 of the ***CBK Act*** and that as at the said date, there was no Board of Directors of the CBK appointed under section 11 of the ***Central Bank of Kenya Act***, Chapter 491 Laws of Kenya and in fact it is only on 3rd November, 2016 when such Board was constituted vide a Gazette Notice number 9234 and 9235 in **Vol. CXVIII—No. 137** of the same date. The petitioners disclosed that it was only then that **Rache Bessie Dzombo, Samason K. Cherutich, Ravi J. Ruparel, Nelius W. Kariuki** and **Charity Selina Kisotu** were appointed as members to the Board of the Central Bank of Kenya while the current Governor of the 1st Respondent was appointed on 19th June 2015 as is shown in the Kenya Gazette Notice number 4531 in **Vol.CXVII-No.65.**

16. According to the petitioners, their decision to deposit their money with the Bank was not influenced by the fact that the late **Mr. Janmohamed** was a Group Managing Director of the Bank and neither was his presence within the bank a material consideration to them. To the contrary their decision to open and operate an account at the Bank was solely influenced by its location, its products and the confirmation of its licensing and legal status by the CBK.

17. It was pleaded that on or about 13th October 2015, after the death of the Bank's Chairman and the appointment of a new CBK Governor, the Bank was placed under receivership by a decision made and communicated by the CBK's Governor on 13th October 2015 and contained in the **Kenya Gazette Special Issue Volume CXVII- Number 111 being Gazette Notice number 7715** dated 13th October 2015 and made without any notice to the Petitioners. By the same **Kenya Gazette Special Issue**, the CBK suspended the banking business of the Bank the result of which was that neither of the Petitioners could deposit money, access or demand monies held on their behalf at the Bank nor carry out the business they had been permitted to so carry out with the licensing of the Bank by the CBK since the Gazette Notice informed the public that;

***"no deposits on any types of accounts operated by Imperial Bank Limited (in Receivership) shall be paid nor shall any claims by any other creditors be met."***

18. It was the petitioners' case that this decision was most foul, unjust, illegal, irrational, unreasonable, unconstitutional and unfair as:

**(i) As at the time of the Bank being placed under receivership, the 1st Respondent did not have a constituted Board of**

**Directors capable of meeting, recommending, appointing and/or deciding any regulatory and/or licensing issue with respect to a Financial Institution under the Banking Act, Chapter 488 Laws of Kenya as read together with the Central Bank of Kenya Act, Chapter 491 Laws of Kenya;**

**(ii) The depositors were, in terms of Section 4 and 5 of the Fair Administrative Act Number of 4 of 2015, not consulted, notified and/or in way informed of the inquiry as to the affairs of the Bank being conducted, the recommendation that was made and effected by the 1st Respondent prior to and in placing the Bank under receivership and proceeding to appoint the 2nd Respondent as a Receiver;**

**(iii) The decision was made and is sought to be implemented in violation of the mandatory provisions of Section 4 and 5 of the Fair Administrative Act Number 4 of 2015 which requires of the 1st Respondent in making a decision that is likely to materially and adversely affect the legal rights or interest of a group of persons or the general public to notify them of the proposed decision, consider all their views in relation thereto, consider all relevant facts. This in turn violates Article 47 of the Constitution**

**(iv) No reasons were ever given for the decision having been made;**

**(v) The Appointment of the 2nd Respondent as a Receiver of the Bank can only be lawfully made by the 1st Respondent, through its Board of Directors, in consultation with the Cabinet Secretary and THERE HAVING BEEN NO BOARD OF DIRECTORS at the material time, the placement, appointment and execution of the receivership is laced with illegality;**

**(vi) The Central Bank of Kenya Act, Chapter 491 Laws of Kenya does not donate powers to the Governor to place a financial institution under receivership nor does he have powers to make an appointment under Sections 43 and 44 of the Kenya Deposit Insurance Act, Act Number 10 of 2012;**

**(vii) The Governor of Central Bank of Kenya is not the "Bank" within the meaning of Sections 2 and 3 of the Central Bank of Kenya Act, Chapter 491 Laws of Kenya as read together with Sections 43 and 44 of the Kenya Deposit Insurance Act, Act Number 10 of 2012; and**

**(viii) The mere death of a Managing Director of a Financial Institution cannot in law be the act prompting the illegal and unlawful placement of the Bank under receivership.**

19. The petitioners lamented that their rights to property, consumer rights, a fair administrative process and to information necessary to gain full benefit from my deposits with the Bank have been violated and continue to be so violated as a receivership process has to be a creature of a lawful and constitutional process especially owing to the drastic effect thereof. To them, what is more worrying is that after the placement of the Bank under receivership, the 1st Respondent, which is supposed to have carried out routine statutory inspections and acts aimed at protecting their interests as customers, is now engaged in protracted litigation with the directors and shareholders of the Bank.

20. According to the Petitioners, they established that soon after the illegal placement of the Bank under receivership, the Respondents took out proceedings in Nairobi HCCC No. 392 of 2016 (*Imperial Bank Limited (In Receivership) & Others versus Alnashir Popat & Others)* against persons (in management of the Bank) which it had all along represented to the members of the public and the Petitioners that such were persons morally and professionally suitable to manage and control the Bank and who had in fact been, before the illegal receivership, controlling and managing the affairs of the Bank, and sought orders freezing their assets on claims of fraud perpetuated on the Depositors of the Bank. The petitioners contended that by the said proceedings, specific acts of fraud, irregularities and mismanagement of the Bank which are all acts in contravention of the ***Banking Act*** and the Prudential Guidelines issued by the CBK have been pleaded and a *prima facie* case had been made with the CBK obtaining freezing orders against officials of the Bank based on the averments in its pleadings in the proceedings stated above.

21. It was the petitioners' case that the urgency and clarity of which the pleadings in the said case were taken out and/or framed does confirm the Petitioners averment that;

***(i) The CBK did not regulate nor supervise the affairs of the Bank;***

***(ii) The CBK did not inquire diligently as to the professionalism and morality of the persons it had sanctioned to manage and control the Bank;***

***(iii) The CBK colluded with the officers of the Bank in suppressing, ignoring and/or failing to detect relevant matters that would have otherwise influenced a decision to license or renew the license of the bank and/or determine what conditions could be imposed on such licenses as issued and/or renewed; and***

***(iv) The CBK was negligent in discharging its supervisory and regulatory statutory duties and/or obligations in so far as the affairs of the Bank were concerned.***

22. To the Petitioners, had the CBK discharged its powers as a regulator prudently, diligently and impartially (which it did not do), it would not have commenced the aforesaid proceedings as the Officers named therein would never have been certified as persons with professional and moral suitability to control and manage the affairs of a bank licensed by the 1st Respondent, the Bank inclusive.

23. The Petitioners disclosed that they have been made aware of proceedings pending elsewhere in this Court being Nairobi Judicial Review Application No. 43 of 2016 (*Republic –versus- Central Bank of Kenya and KDIC ex parte Alnashir Popat and Other*) and Nairobi HCCC

No. 392 of 2016 (*Imperial Bank Limited (In Receivership) & Others -versus- Alnashir Popat & Others)*, by which genuine and well-founded claims for regulatory negligence are levelled as against the Respondents. Further, the Petitioners have also noted from the proceedings taken out by *inter-alia* the shareholders of the Bank in Nairobi Judicial Review Application No. 43 of 2016 (*Republic -versus- Central Bank of Kenya and KDIC ex parte Alnashir Popat and Other*) that specific claims have arisen of impartiality and collusion between the CBK and the directors of the Bank who the said CBK had, to the eyes of the Petitioners, certified to be persons of good professional and moral suitability in terms of section 4 of the ***Banking Act***.

24. The Petitioners averred that of relevance, the following disclosures with respect to the Bank's deceased Group Managing Director **Mr. Janmohamed** (hereinafter referred to **" Janmohamed"**), were said to have been made to the 1st Respondent on 13.10.2015;

(a) **Janmohamed**, who under the ***Banking Act***, Chapter 488 Laws of Kenya, was and had to have been, had the 1st Respondent prudently and diligently exercised its regulatory powers, a person of good moral and professional standing, is said to have over a period of time initiated and authorized systematic and continuous irregular disbursements of substantial sums of monies belonging to the Depositors and which disbursement was in fact concealed from the Bank's Board of Directors;

(b) That a firm engaged by the CBK had in a report said to have presented to the Board on 12.10.2015 established and/or found that **Janmohamed** had over the years been running a scheme of fraudulent and illegal disbursements with certain accomplices, within and outside the Bank which scheme had been made without having gone through a formal credit review and approval process as required by the Prudential Guidelines issued by the CBK, and with the Bank's established internal lending procedures and policies;

(c) That the said fraudulent scheme was run in cahoots with officers of the CBK and senior management officials of the Bank, and that the CBK authorized officers deliberately, alternatively recklessly, failed to exercise its powers and to discharge its duties honestly and in accordance with the relevant statutory regime, intentionally or with reckless indifference that the fraud on Bank continued to be perpetrated;

(d) In breach of its duties as the Regulator and Supervisor provided for under *inter alia*, sections 9A, 21 (2), 22, 24, 27, 28, 31(3)(a), 32, 32A, 33, 33A and 34 of the ***Banking Act***, section 43(1) of ***KDI Act*** and the Prudential Guidelines, the Constitution of Kenya, notwithstanding the monthly information provided to the CBK in the form of the monthly prudential return setting out details of the Bank's fifty largest borrowers known as **"PR4-5s",** and what became known to the CBK during the course of each annual inspection, the CBK deliberately, alternatively recklessly, failed to investigate (whether adequately or at all) and failed to notify the Bank's Board of Directors ("**the Board**") of, and deliberately, alternatively recklessly, concealed from the Board the existence of, certain loans which were unapproved and/or over limits and/or inappropriately classified and thereby presented a false and misleading picture of the Bank's risk exposure to the Board.

(e) In breach of its duties Constitutional and Statutory duties, the CBK failed to investigate and to take appropriate supervisory action in the face of certain whistle-blower e-mails, sent in March, April and September 2012, making allegations of wrongdoing at the Bank; or to make any reference to the whistle-blower e-mails in the Inspection Report prepared by the CBK for the Board in 2012;

(f) In breach of its duties to act carefully and with independence and impartiality, the CBK through its officers, employees, agents and/or servants:

(i) Accepted cash bribes in return for agreeing not to interrogate the Bank's core banking data and agreeing to delete certain key borrowers from the annual Inspection Reports produced for the Board so that those borrowers would remain concealed from the Board;

(ii) Accepted payments which were not met by a corresponding arm's length loan obligation;

(iii) Accepted hospitality, gifts and other benefits which were inappropriate in light of the supervisory relationship between the 1st Respondent and the Bank.

(g) In breach of its supervisory duties, the CBK is said to have:

(i) Permitted to be authorised and failed to require the removal of **Mr. Janmohamed** as an Executive Director and Managing Director of the Bank, despite knowledge that he had caused the Bank to act in contravention of the Banking Act and Prudential Guidelines, had failed to act with honesty and integrity and had acted to the detriment of the interests of the Bank's depositors and other stakeholders and was unsuitable to hold that office; and

(ii) permitted to be authorized and failed to require the removal of the Co-conspirators from their roles at the Bank, despite knowledge that they had caused the Bank to act in contravention of the Banking Act and Prudential Guidelines, had failed to act with honesty and integrity and had acted to the detriment of the interests of the Bank's depositors and other stakeholders and were unsuitable to hold that office.

(h) The 1st Respondent further appointed a **Mr. Peter Gatere** as the Bank's Receiver/Manager in spite of the said person having been part of the supervisory team that failed, omitted and/or deliberately refused to act on "whistle blower" emails;

(i) That there has been no recommendation and or removal of senior officers who are now said not to be morally and/or financially suitable to manage a financial institution and neither has there been any report criminal complaint against any such officers and/or officers of the 1st Respondent in respect to the fraudulent dealings at the Bank;

(j) The Corporation in undertaking the subject receivership has done so, not autonomously, but together with, or under the direction and or supervision of the 1st Respondent, in contravention of the provisions of section 51 of the ***KDI Act***.

(k) It is alleged that the Respondents have breached a Court Order in which they were ordered to *inter alia* provide the relevant information relating to the Bank, including the deals entered into with third parties relating to the assets of the Bank, and to engage all stakeholders including the Petitioners herein, in an indecorous manner, by reason of which an application seeking to cite the Respondent's responsible Officers for contempt has been filed.

25. The petitioners therefore averred that it is therefore not in issue from the said proceedings to which none of them are parties that as between the Respondents and the shareholders of the Bank, there are admitted acts and facts, the commission of which is in violation of the Petitioners Constitutional Rights and the glaring evidence of impropriety and statutory negligence on the part of the 1st Respondent in that;

(a) There was massive mismanagement and fraud by the directors of the Bank that led to loss of close to a whopping Kshs. 3 Billion over the years;

(b) The Bank's business had been, oblivious to the Petitioners, conducted in blatant violation of the Constitution, the Banking Act, the Prudential Guidelines and the Public Officers Ethics Act; and

(c) The persons who were in management of the Bank were not proper persons to serve and that they had furthered commission of acts of illegality.

26. The petitioners noted that from Nairobi HCCC No. 392 of 2016, whereas these allegations were made against the CBK in the Bank's Shareholders Defense and Counterclaim, neither Respondent has responded to the said claims and the Bank, currently under the direction of the 2nd Respondent has in lieu thereof stayed the said proceedings.

27. The petitioners were apprehensive that with all these documented instances of illegality and/or negligent regulation on the part of the Respondents, if they are allowed to effect an exclusion and transfer process that is aimed at the consequential liquidation process of the Bank, the petitioners' property being the monies held at the Bank shall be lost and hence occasioning them substantial loss. They believed that the manner in which the Respondents are running the Bank's affairs is such that come the 13th of April the Bank will inevitable go into liquidation, by operation of law.

28. The petitioners were apprehensive that the Bank is on the brink of being placed under liquidated by dint of section 53 of the ***Kenya Deposit Insurance Act***, upon the expiry of the 6 months extended period of receivership. In their view, a rushed placement of a financial institution under receivership and/or liquidation can only support an inference of failure to regulate and/or supervise or negligent regulation.

29. The petitioners noted that since the beginning of the year 2015, various Banks including Dubai Bank Limited, National Bank Limited, Chase Bank Limited, and Family Bank Limited have been affected by various Governance issues, which have attracted the attention of the CBK and that the Depositors in the said Banks were thereby adversely affected, or stood to be adversely affected. Accordingly, the CBK took measures, including extending financial accommodation, appointing Managers, contracting firms to ascertain the true financial status of the respective Banks, sourcing for interested investment partners, generated restructuring plans for the said Banking Institutions with a view of salvaging the said institutions, thereby protecting their respective depositors and the financial sector at large. However, with regard to the Depositors of Imperial Bank Limited (Under Receivership), other than take any measures that would enable the protection of the Depositors and other Creditors, the Respondents have in lieu thereof acted, or omitted to act, in a manner that is calculated to ensure the liquidation of the Bank, for ulterior To the extent that they have treated the Bank's Depositors in a different manner than that in which they have treated the Depositors of the other Banking Institutions, it was contended that this is discriminatory and an affront to the Petitioner's right to protection form discrimination of any kind as guaranteed by Article 27 of the Constitution.

30. The petitioners averred that before the decision placing the Bank under receivership was made, they were never supplied with the information that warranted the same, they were never notified of the existence of the irregular practices and have never been treated as affected Third Parties that were targeted when the licensing decision was made nor have their inquiries met the same urgency and treatment as those of other customers of banking Institutions within this jurisdiction, those, for instance, Chase Bank Limited for instance, who are able to undertake banking activities, allowed to access information and whose affairs are managed by independent and credible Audit Firms. To them, the deliberate denial to access information that is critical in the enjoyment of their consumer rights, right to property and right to a Fair Administrative Process does and continues to infringe on their rights and hence the reliefs sought in the Petition filed herein since constitutional bodies, cannot and should not choose which of the constitutional and statutory obligations they ought to comply with.

31. It was contended that this Court has previously intervened when illegally constituted Constitutional and/or Statutory Bodies have purported to illegally exercise powers and it is only just and fair that the reliefs sought in the Petition be allowed.

32. It was asserted that Banking institutions remain the core business of any democracy and/or economy and licensing, supervision and regulation of the banks ought to be effected in strict compliance with the law and the people under the Constitution, 2010 whose interests are considered at the licensing stage should not be disregarded when decisions are being made which have the drastic effect of extinguishing their rights in deposits held at such Banks. They believed that that it was never the intention of the law that Banks be closed at the will and discretion of the Governor of Central Bank of Kenya or the Respondents herein. They however noted that the Bank has been under the Management of the 2nd Respondent for a period of fifteen or so months, and have failed to publish the Bank's Annual financial statements contrary to the law applicable thereto. Further, despite their various press statement to the effect that forensic investigations were on going, the Respondents have failed and or neglected to have the same published, and are bent on the liquidation of the bank albeit surreptitiously.

33. By reason of the matters set out herein above, the Petitioners verily believe that the CBK, and its appointee the Corporation, are bent on the Bank's eventual closure by liquidation, with the net effect that these misdeeds will never actually be unravelled by those actually affected

by it, the Petitioners herein, the depositors, bondholders, creditors, employees and other stakeholders in the Bank.

34. It was averred that the Press Release of 13th October 2015 communicating the decision by the CBK and the Gazette Notice Number 7717 and 7715 and dated 13th October 2015 issued by the CBK were illegal, unlawful and unconstitutional and did violate the rights of the Petitioners and that the said actions have grossly violated the Constitution.

35. It was averred that the petitioners' right to fair administrative action was violated. According to the petitioners, Article 47 guarantees every person a right the right a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The CBK, it was averred, infringed this right by proceeding on an unlawful procedure in issuing the Gazette Notices placing the Bank under receivership and appointing the 2nd Respondent as a receiver over the Bank.

36. It was further reiterated that as at the time of the Bank being placed under receivership, the CBK had no constituted Board of Directors capable of meeting, recommending, appointing and/or deciding of any regulatory and/or licensing issue with respect to a Financial Institution under the ***Banking Act***, Chapter 488 Laws of Kenya as read together with the ***Central Bank of Kenya Act***, Chapter 491 Laws of Kenya. According to the petitioners, the depositors of the Bank were, in terms of section 4 and 5 of the ***Fair Administrative Actions Act***, Act Number of 4 of 2015 not consulted, notified and/or in way informed of the inquiry as to the affairs of the Bank being conducted, the recommendation that was made and effected by the CBK placing the Bank under receivership and proceeding to appoint the 2nd Respondent as a receiver.

37. The petitioners lamented that the decision was made and is sought to be implemented in violation of the mandatory provisions of section 5 of the ***Fair Administrative Act*** Number 4 of 2015 which requires of the 1st Respondent in making a decision that is likely to materially and adversely affect the legal rights or interest of a group of persons or the general public to notify them of the proposed decision, consider all their views in relation thereto, consider all relevant facts.

38. They contended that the appointment of the Corporation as a Receiver of the Bank can only be lawfully made by the CBK, through its Board of Directors, in consultation with the Cabinet Secretary and there having been no board of directors at the material time, the placement, appointment and execution of the receivership is laced with illegality since the ***Central Bank of Kenya Act***, Chapter 491 Laws of Kenya does not donate powers to the Governor to place a Bank under receivership nor does he have powers to make an appointment under sections 43 and 44 of the ***Kenya Deposit Insurance Act***, Act Number 10 of 2012. In their view, the Governor of Central Bank of Kenya is not the "Bank" within the meaning of sections 2 and 3 of the ***Central Bank of Kenya Act***, Chapter 491 Laws of Kenya as read together with sections 43 and 44 of the ***Kenya Deposit Insurance Act***, Act Number 10 of 2012.

39. As regards the illegality, unlawfulness and unconstitutionality of the Gazette Notice Number 7717 dated 13th October 2015 appointing the 2nd respondent as a receiver, it was their case that the Corporation was appointed without a lawful appointing authority and as such could not execute a mandate founded on an illegality. Further, no notice was given to the Petitioners who had property in the form of deposits with the Bank and that the decision was made and is sought to be implemented in violation of the mandatory provisions of section 4 and 5 of the ***Fair Administrative Actions Act***, Act No. Number 4 of 2015 which requires of the CBK in making a decision that is likely to materially and adversely affect the legal rights or interest of a group of persons or the general public to notify them of the proposed decision, consider all their views in relation thereto, consider all relevant facts.

40. The petitioners further contended that the decision was in violation of their consumer rights to information as reserved under Article 35 and 46 of the Constitution, 2010 and resulted in an unreasonable, unjust and illegal deprivation to the Petitioners' right to property under Article 40 of the Constitution, 2010. It was their case that the actions of the CBK are laden with illegality, irrationality and unreasonableness. To them, the various statutory breaches on the part of the Respondents as particularized herein above and after is indicative of the unlawful manner in which they are undertaking their Administrative action, in breach of Article 47 of the Constitution hence their actions are laden with illegality, irrationality and unreasonableness.

41. It was the petitioners' case that Article 40 guarantees every person the right to own and acquire any property in Kenya. The Petitioners reiterated that they continue to maintain their accounts with the Bank which accounts have substantial monies and that their property, being the money held in the Bank is constitutionally guaranteed protection under Article 40. However, this right has been infringed and is threatened with further infringement since the Petitioners cannot access or demand their money from the Bank or from the Respondents; cannot access any information relating to their property, being the monies in various accounts opened at the Bank as the Respondents have surreptitiously dealt with information regarding the depositors of the Bank and have failed to give any information relating to the financial position of the Bank as at 13th October 2015 and thereafter including, the fate of the Petitioners' and other depositors' monies; and the Bank is on the brink of being placed under liquidation on 13th April 2017 which will completely extinguish the Petitioners' right to property in the money.

42. It was further averred that whereas Article 46 guarantees every consumer the right to the protection of their economic interest and that the Petitioners are consumers within the meaning of the ***Consumer Protection Act***, this provision has been violated in the following ways.

43. It was the petitioners' case that the Respondents have by their actions and inactions violated Article 10 of the Constitution because their actions and inactions of failing to adhere to the law are unlawful and are not motivated by the best interests of the depositors of the Bank but by reasons best known to the Respondents and the management of the Bank.

44. It was therefore contended that in failing to uphold the Petitioners fundamental rights of property, fair administrative action and consumer rights, the Respondents have failed to discharge their fundamental duty under Article 19 of the Constitution which includes the fundamental duty to observe, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights provided in Article 19.

45. According to the petitioners, there are no pending civil or criminal cases between the Petitioners and the Respondents save for the

following cases between the CBK and the directors and shareholders of the Bank, of which the Petitioners are not parties to:

a. HCCC No.523 of 2015 *Imperial Bank Kenya Limited (In Receivership) versus Janco Investments Limited & 11 Others*;

b. HCCC No.522 of 2015 *Imperial Bank Kenya Limited (In Receivership) versus W.E. Tilley (Muthaiga) Limited & 19 Others*, and

c. HCCC No. 392 of 2016 *(Imperial Bank Limited ( In Receivership) -vs- Alnashir Popat & 17 Others* being entities related to W.E. Tilley.

46. Since according to the petitioners, the conduct of the Respondents is unreasonable, unlawful and irrational and does infringe upon the Petitioners' Constitutional rights as set out hereinbefore, the petitioners prayed for:-

**a. A DECLARATION that the decision of the 1st Respondent to place Imperial Bank Limited under receivership on 13th October 2015 was unlawful, irrational, unreasonable and was in violation of Article 47 of the Constitution of Kenya, 2010 as read together with Section 5 of the Fair Administrative Actions Act, Act Number of 4 of 2015 and Section 10 and 11 of the Central Bank of Kenya Act;**

**b. A DECLARATION that the decision of the 1st Respondent of appointing the 2nd Respondent as a receiver over Imperial Bank Limited was unlawful, irrational, unreasonably and was in violation to Article 47 of the Constitution of Kenya, 2010 as read together with Section 5 of the Fair Administrative Actions Act, Act Number of 4 of 2015 and Section 10 and 11 of the Central Bank of Kenya Act.**

**c. A DECLARATION that the decision by the 2nd Respondent made on 13th October 2015 declaring a moratorium over the banking business of Imperial Bank Limited was illegal, unlawful, null and void;**

**d. A DECLARATION that any and all the subsequent actions of the Respondents in executing the decisions of 13th October 2015 are illegal, unlawful, null and void;**

**e. A DECLARATION that the Respondents have infringed upon the Petitioners' right a fair administrative process as guaranteed under Article 47 of the Constitution of Kenya, 2010 as read together with Section 5 of the Fair Administrative Actions, Act Number of 4 of 2015, Consumer Rights as guaranteed under Article 46(1)(b) of the Constitution of Kenya, 2010, the discharge of their constitutional obligations pursuant to Article 10 and 19 of the Constitution of Kenya, 2010 and the right to Property as guaranteed under Article 40 of the Constitution of Kenya, 2010;**

**f. AN ORDER OF CERTIORARI to bring to this Honorable Court for purposes of quashing the Kenya Gazette Notice number 7175 dated 13th October 2015 contained in the Special Issue Volume CXVII-No.111;**

**g. AN ORDER OF CERTIORARI to bring to this Honorable Court for purposes of quashing the Kenya Gazette Notice number 7177 dated 13th October 2015 contained in the Special Issue Volume CXVII-No.111;**

**h. AN INJUNCTION restraining the Respondents either by themselves acting jointly or independently or through their agents, servants , agents, officers, successors, assigns, restraining them from recommending, proposing and/or constituting a Committee for purposes of deliberating on, discussing, resolving , recommending, deciding, publishing , gazetting and/or in other way communicating and/or implementing a decision to place Imperial Bank Limited (Under Receivership) in liquidation and/or a conservatory order freezing or suspending the running of time of the period of the Receivership set to expire on the 13th April 2017 resulting in the inevitable liquidation of the Bank.**

i. **A DECLARATION THAT the Respondents violated the Petitioners consumer rights and the Right to Information is failing to deliver to the Petitioners and/or their appointed agents, access to and review of information, documents and/or data relating to Imperial Bank Limited (Under Receivership) as would be necessary to ascertain the true and current position of the Imperial Bank Limited (Under Receivership), prior to the liquidation of the Bank, which information, data and information includes but is not limited;**

**i. The true financial position of the Bank, together with all supporting schedules, as at 15th October 2015;**

**ii. The subsequent annual financial statements of the Bank, together with all the supporting schedules, given that the Receivership has gone for a period in excess of the annual reporting period;**

**iii. An itemized list of all the pay-outs so far made out to the Depositors of the Bank;**

**iv. To the extent that vast amounts of the Bank's and Depositors funds have been expended on forensic investigations, the various reports reportedly furnished to them by FTI Consulting;**

**v. The mandates given to the Forensic investigators, given the possible culpability of the 1st Respondent and its officers in the fraud and malpractices perpetrated against the Bank, including full details of all payments of fees and expenses of FTI Consulting;**

**vi. Agreements entered into between the Respondents and/or the Bank and Diamond Trust Bank, Kenya Commercial Bank and NIC Bank Limited and information and/or documentation relating to the performance of the said Agreements;**

**vii. Information about the manner in which all the depositors of the Bank (both large and small), are to be dealt with as a result of the receivership. This would include confirmation of the cash that will be available for payout, including payment plans as indicated in your respective press releases of 8th November 2016'**

**viii. Due Diligence Report(s) undertaken by the 1st Respondent's with respect to the alleged irregularities and/or malpractices at Imperial Bank Limited for the year before the decision to place the Bank under receivership;**

**ix. The results of the due diligence review conducted on deposits on loans which revealed intricate and close connections as communicated in the 1st Respondent's Press Release of 31st March, 2016;**

**x. information, including copies of legal agreements and of valuation reports received, in respect of the sale by the Bank of its subsidiary Imperial Bank (Uganda) Limited;**

xi. **information, including copies of correspondence, Memorandum of Understanding Letters of Offer/intent and terms of all engagements held by the 1st Respondent on behalf of the Bank and the 2nd Respondent with third party potential investors, lenders, acquirers and co-venturers who expressed interest in a bank resolution and bank rescue transaction;**

**j. AN ORDER FOR RESTITUTION of the Petitioners full deposits at Imperial Bank Limited as at 13th October 2015 being;**

**(i) Dhiren Suryakant Shah.....Kshs. 259,676.33**

**(ii) Suryakant Premchand Shah.....Kshs. 9,030,446.28**

**(iii) Dhiren Suryakant Shah and/or Meera.....Kshs. 10,995,443.83**

**(iv) Dhiren Suryakant Shah.....Kshs. 3,226,831.72**

**(v) Dhiren Suryakant Shah and/or Meera.....Kshs. 4,302,442.30**

**(vi) Dhiren Suryakant Shah and/or Meera.....Kshs. 1,088,178.48**

**(vii) S.B Shah and/or Mayuri S.Shah.....Kshs. 20,979,406.92**

**(viii) S.B Shah and/or Mayuri S.Shah.....Kshs. 2,456,970.82**

**(ix) Kimani Waweru to be ascertained once information sought is availed**

**k. INTEREST on the sums set out at (h) hereinabove at commercial rates from 13th October 2015 until payment in full;**

**l. DAMAGES;**

**m. INTEREST on (j) above from the date of judgement until payment in full;**

**n. COSTS for the Petition; and**

**o. Such further and other Order that this Honourable Court may in its discretion, and in the interests of justice, deem fit to grant.**

**The Interested Parties' Case**

47. The Petitioner was supported by the interested parties herein, **Abdulmal Limited, Imaran Limited**, **Reynolds & Company Limited**, **East Africa Motor Industries (Sales & Services) Limited**, **Momentum Holdings** and **Kenblest Limited.**

48. According to the interested parties, contents of paragraph 24 of the Petition are inaccurate. In their view, the correct position in respect of HCCC No. 392 of 2016 is as follows:

a. The said suit has been filed against all the Directors and Shareholders of the Bank, who include the Interested Parties herein.

b. The Bank's management and or executive functions were undertaken by the Late GMD, and it is not accurate to state that the named Defendants in that suit were persons or entities involved in the management of the Bank, save for their role in the Bank's Board as Directors, and Shareholders in the respective General Meetings.

c. It is also not true as alleged or at all in paragraphs 24, 25 and 26 of the Petition, that the 1st Respondent herein having pleaded fraud, irregularities and mismanagement, in HCCC 392 of 2016, established a prima facie case on the basis of which the Respondents herein have obtained freezing Orders against the named Defendants therein, including the Interested Parties herein. In this respect the true position is as follows:

a. Injunctive and freezing Orders have been obtained by the Bank only in HCCC No. 522 of 2015 and HCCC No. 523 of 2015 being suits against the Late GMD and his associated entities, and the Senior Management staff in the Bank.

b. With regard to HCCC No. 392 0f 2016 which is the suit by the Bank and the Respondents herein against the Bank's Directors and Shareholders, the Bank did under a Certificate of Urgency seek various injunctive relief including freezing and tracing Orders against the named Defendants therein.

c. The said Orders were not granted ex parte, nor were they granted on the various subsequent dates when the matter came up *inter partes*.

d. After the Shareholder Defendants therein filed their Defence and Counterclaim against the Respondents herein and some of its Officers, instead of pursuing its injunction Application, the Bank then filed an application to disqualify various Advocates on record for some of the Defendants, which application was duly dismissed.

e. Being aggrieved by the said ruling the Bank filed a Notice of Appeal and applied for, and was granted a stay of proceedings pending appeal.

49. According to the interested parties, as the regulator of the Banking industry, the 1st Respondent is, pursuant to the *Banking Act* and the Prudential Guidelines, required to, *inter alia*, oversee and supervise Banks in Kenya and that this process involves and includes inter alia;

a. actual inspections of the financial records of a Bank; and

b. review of audited financial accounts of the Bank.

50. The interested parties were of the view that It had become apparent that the 1st Respondent, to whom Imperial Bank Limited reported to by filing monthly financial returns which included a document known as a "PR 4-5" form, which listed Imperial Bank Limited's top 50 borrowers and gave details of the extent of their facilities and security, and how they were performing, then engaged the Senior management of the Bank in correspondence and "on-site inspections" and "off-site inspections". Thus, the 1st Respondent had – consistent with its regulatory duties and supervisory function - "real time" and month to month visibility of Bank's financial position in respect of these accounts. By reason thereof the 1st Respondent had full visibility of the true position of these borrowers of the Bank, not only through their annual on-site inspections of the Bank and the reporting process that those inspections resulted in, but also because the Bank was required to file with the 1st Respondent, monthly financial returns, including the "PR 4-5".

51. It was the interested parties' case that they had now established that over the course of many years, and unbeknownst to the Bank's Board, the 1st Respondent's officials deliberately flouted, breached and/or otherwise acted in disregard of the law in relation to the supervisory processes.

52. According to the interested parties, they have established that year on year, a pattern emerges of the CBK's officials changing the content of the reports furnished to it and presented misleading inspection reports ("**Inspection Reports**") to the Board of the Bank, following CBK's annual on-site inspections of the Bank's activities and books for a particular quarter. In the said inspection reports, they ensured that:

a. loans which had not been approved by the Board did not appear in the 1st Respondent's Inspection Reports;

b. non-performing loans were not correctly re-classified and provided for in the Bank's accounts; and

c. overdraft lending which was grossly over approved limits was not brought to the Board's attention.

53. They contended that the Inspection Reports were intended for the Board's eyes only and were confidential to it and that the Board heavily relied on the said inspection reports. In contrast, the none executive Directors of the Bank, as the interested parties, when they were periodically provided with PR 4-5s, only received doctored versions of the documents filed with the CBK. The interested parties disclosed that a direct comparison of the PR 4-5s provided to the CBK and the Board respectively in the same months of the same year show very striking differences between them, and explain how and why Bank's exposure to certain large and badly performing borrowers had to be misrepresented (by their omission) from the Inspection Reports the CBK produced. According to the interested parties, unlike the CBK, therefore, the Board performed its functions properly but unwittingly did so through a smokescreen of false information engineered by the Bank's management, which was maintained by means of the façade of supervisory scrutiny which the CBK provided through its annual on-site inspections and the deliberately misleading Inspection Reports it produced thereafter and addressed to the Board.

54. It was averred that the motivation of the CBK's officials concerned appears to have been simple venality. There was a complex web of inappropriately close relationships between the Bank's Senior management and the 1st Respondent's officials concerned. They contended that the perversion of the CBK's supervisory function, and the misfeasance of its officials' public offices, was purchased by the Bank's management through a transactional exchange of favours with CBK's officials including, it is to be inferred, by straightforward bribery of them.

55. As such, the only possible and logical explanation for the collusion between the Bank's management and CBK's officials to include misleading and false information in the Inspection Reports is that the Board was entirely unaware of the fraud and the true position of the Bank's balance sheet. The interested parties believed that had the Inspection Reports not been doctored, the Board would have discovered the fraud much sooner and taken immediate steps to bring it to an end, as they did in October 2015, after the GMD's death, by notifying the CBK of the discovery of the fraud. The 1st Respondent then appointed the 2nd Respondent as Receiver, who is bent on *inter alia*, concealing any information relating to the Bank's affairs, the liquidation of the Bank, thereby burying the role of its appointing Authority in the malpractices that went on in the Bank.

56. It was their case that upon the receivership, the CBK in appointed the Corporation as the Receiver, who then appointed **Mr. Peter Gatere**, as the Bank's Receiver Manager. The said **Mr. Peter Gatere** had been involved in the supervision of the Bank on behalf of the CBK, and was aware of the malpractices going on in the Bank as particularized herein above. Furthermore, the Corporation retained the Bank's management, namely **Naeem Shah**, **James Kaburu**, **Alisager Esmailjee**, **Peter Nzuki**, **Nina Shah**, **Robinson Boreh** and **Mehbooba Shamji** all of whom had been identified as having been involved on behalf of the Bank in the manipulation of and concealment of the true depiction of the Bank's financial position. It was therefore their case that in the appointment of **Mr. Peter Gatere** as the initial Receiver Manager, and the retention of Bank staff who had been involved in the concealment of the Bank's true position was to enable a cover of the CBK's culpability in the matter. They further averred that the 1st and 2nd Respondents have failed and or refused to make any complaints to the relevant state investigative agencies to investigate the failing of their Authorised Officers who were involved in the concealment of the true status of the Bank as particularized herein above, despite them being aware of their involvement as aforesaid and that the Respondents have suppressed the said investigations.

57. According to the interested parties, though various proceedings cited herein above have been commenced against the Bank's Staff, Directors, Shareholders and companies allied to them, the Corporation has failed and or refused to commence proceedings as against other known beneficiaries of the funds looted from the Bank, some whom include **Jade Petroleum**, **Adra International Limited**, **Metro Petroleum Limited**. Further, the Corporation has refused and or failed to trace and globally freeze the assets of the beneficiaries of the subject fraud, and particularly has failed to trace funds which were established as having been routed through Fidelity Commercial Bank and Diamond Trust Bank Limited. They therefore believed that the failure to initiate relevant proceedings from the relevant parties, and/or trace their assets is meant to ensure that the Bank is irredeemable, by reason of which it will be liquidated by the Corporation, thereby continue with the obscuring of the CBK's role in the malpractices that transpired in the Bank.

58. It was disclosed that in order to further ensure the liquidation of the Bank, the Respondents herein commenced a transfer and exclusion process under the ***KDI Act*** intended to culminate in the liquidation of the Bank, albeit in breach of their statutory duty to the Plaintiff's herein, and the relevant Laws. However, the Respondents have failed and or neglected to develop a comprehensive plan which takes into account the interests of all concerned parties, established best international practices applicable in the industry and have failed to develop a policy to govern troubled banking Institutions, and their actions are not based on any identifiable policy.

59. Being aggrieved by the aforesaid conduct of the 1st and 2nd Respondents, the Shareholders herein were then prompted to file the Judicial Review Proceedings, namely J.R. No. 43 of 2016 seeking in essence to prohibit the Respondents from taking any steps that would culminate in the liquidation of the Bank, exercise fair administrative action in dealing with the Shareholders' proposals, and to compel the Plaintiffs to consider the Shareholders' proposals. It was disclosed that the said Judicial Review Proceedings were heard by this Court and the following orders issued;

> **a) An order prohibiting the 1st and 2nd Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns from taking any steps which would result cumulatively or otherwise in the liquidation of the Bank unless and until the relevant legal provisions are complied with.**
>
> **b) An order of mandamus directed at the 1st and 2nd Respondents and each of them compelling them to furnish the Applicants or their servants, agents, representatives and/or their appointees, including financial and legal advisers, with information relating to the process of receivership as long as such information is not prejudicial to the investigations being undertaken.**
>
> **c) An order of mandamus directed at the 1st and 2nd Respondents and each of them compelling them to provide the Applicants together with the other stakeholders including the bondholders and depositors with the information concerning the arrangements entered into with all or any of the following:- Diamond Trust Bank Limited (DTB), Kenya Commercial Bank Limited (KCB), Kogweno Associates, and NIC Bank Limited (NIC), and the manner in which the depositors are to be dealt with.**
>
> **d) An order of Mandamus, the Respondents compelling them to formally engage the Applicants herein, together with the other stakeholders including bondholders and depositors of Imperial Bank Limited (In Receivership) ("the Bank") with a view to jointly, and to the extent permissible by law, finding a workable legal framework for an outcome that is in the interests of the Bank and all its stakeholders.**

60. The interested parties believed that there is sufficient material upon which the Respondents impropriety in the exercise of their statutory mandates can be discerned, on the required balance, on the basis of which the relevant sanctions by this Court ought to be invoked, as prayed for, and particularly for the Respondents to make good the loss suffered by the Depositors.

**1st Respondent's Case**

61. The application was opposed by the 1st Respondent, the CBK.

62. According to it, the Bank was licensed under the ***Banking Act*** in 1992 as a Non-Bank Financial Institution under the name **Imperial**

**Finance and Securities Limited**, at the point of being placed under receivership, the bank operated 28 branches in Kenya while its subsidiary in Uganda operated 5 branches with a total of over 50,000 accounts.

63. It was averred that the admitted massive fraud of approximately Kshs. 38 billion committed at Imperial Bank Limited was first brought to the attention of the Central Bank of Kenya by way of a letter dated 12th October 2015, addressed to the Governor CBK, from **Alnasir Popat**, Chairman, for and on behalf of the board of Imperial Bank Limited, as follows;

> ***Having examined the primary data, financial system, control and reports, FTI has presented to the board a preliminary interim report, as attached in Appendix (A), disclosing the following:***
>
> ***a) The Bank was running two sets of accounts, within Flexcube system:***
>
> ***i. One regularly reported, which did not reflect the true financial position of the Bank by excluding some of the transactions and***
>
> ***ii. The other, not disclosed in the financial statements presented to the board of Directors, which comprised fraudulent disbursements of approximately Kshs. 20 bn involving at least 3 customers (WE Tilley, Jade Petroleum and Adra) via a number of modus operandi including GMD's handwritten chits, fictitious journals and ghost accounts. These are detailed in the attached report.***
>
> ***The fraudulent transactions resulted in a total loss of approximately Kshs. 38 bn which included approximately Kshs. 20bn of fraudulent disbursements and accrued interest thereon approximately 18bn. These amounts were not reflected in the financial statements as audited and as presented to the board.***
>
> ***b) This formed part of the fraudulent transactions; more investigations are still being carried out.***

64. The CBK's case was that the then admitted fraud of Kshs. 38 billion of depositors funds would render Imperial Bank Limited insolvent to the tune of Kshs. 28 billion and once confirmed independently by the 2nd Respondent, would expose Imperial Bank Limited to liquidation unless the amounts in question are immediately recovered from the alleged fraudsters, or an equivalent amount injected by the Shareholders, the amount / level of insolvency may further increase at the completion of the investigation. Despite the massive fraud of depositors' funds, the directors in the letter dated 12th October 2015 requested the CBK to assist in protecting the "integrity of the bank" which integrity was by then totally non-existent with the late GMD and the directors being presumed by law to be culpable.

65. It was disclosed that the directors presented a hurriedly prepared preliminary forensic report dated 12th October 2015, by FTI Consulting, an international financial forensic investigation firm, (hereinafter FTI), based on limited information provided by the directors, in which they proposed, *inter alia*, that;

> a) CBK place Imperial Bank Limited under statutory management under section 34 of the ***Banking Act;***
>
> b) They enter into an agreement with CBK to permit recapitalization;
>
> c) They collaborate with CBK to execute a full recovery plan;
>
> d) They secure support from CBK to approach potential new investors;
>
> e) There be a joint Public Relations plan and consistent message from Imperial Bank Limited and CBK.

66. In the CBK's view, the proposals put forward by directors of Imperial Bank Limited were designed to deflect attention away from the non-executive directors associated with the Shareholders, and draw CBK into an elaborate cover up scheme, in which all attention would be focused on the late GMD and associated entities while the surviving directors would not be subjected to any or thorough investigations. However, the CBK after examining and rejecting directors proposals on 13th October, 2015, appointed the 2nd Respondent as the Receiver of Imperial Bank Limited for a period of twelve months pursuant to section 43(1) and (2) and section 53(1) of the ***Kenya Deposit Insurance Act, 2012***, Cap 487C of the laws of Kenya, and it is this decision that is impugned in the instant petition.

67. The CBK averred that by an application dated 9th February 2016, supported by the the Statutory Statement dated 3rd February 2016, the Verifying Affidavit sworn by **Anwar Hajee** on 3rd February 2016, and the Further Affidavit sworn on 8th March 2016, the Shareholders of Imperial Bank Limited (In Receivership) commenced legal proceedings before this Court vide Misc. JR. No. 43 of 2016. According to the CBK, prior to the delivery of the said case this Court delivered rulings on various interlocutory applications filed therein.

68. The instant motion seeks 15 prayers, the Central Bank of Kenya proposes to submit in opposition of the Motion by answering the following questions, being its issues for determination.

69. In response to the issue whether the decision of the CBK to place Imperial Bank Limited under receivership on 13th October 2015, and to appoint the 2nd Respondent as a receiver over Imperial Bank Limited was unlawful, irrational, unreasonable and was in violation of Article 47 of the Constitution of Kenya, 2010 as read together with section 5 of the ***Fair Administrative Actions Act***, Act No. 4 of 2015 and section 10 and 11 of the ***Central Bank of Kenya Act***, the CBK relied on the words of this Court in Misc. Civil Application 251 of 2014 (J.R) - **Republic v Kenya Revenue Authority *exparte* Interactive Gaming & Lotteries Limited [2016] eKLR,** that specialized bodies established under statutes ought to be given the leeway to conduct their proceedings freely without unnecessary interference by the Court.

Where such bodies are acting within their jurisdiction, the Court only ought to step in to ensure that the proceedings are being conducted fairly.

70. It was CBK's case that it is a Statutory body corporate incorporated under the ***Banking Act***, CAP 491 of the Laws of Kenya, constituted to formulate and implement monetary policy and foster the liquidity solvency and proper functioning of a stable market based financial system license and supervise banks and implement policies to promote and establish efficient payment, clearing and settlement systems. It also averred that it had the statutory mandate under to section 43(1) and (2) and section 53(1) of the ***Kenya Deposit Insurance Act, 2012***, Cap 487C of the laws of Kenya, to act as it so did in placing **Imperial Bank Limited** under receivership.

71. In the CBK's view, the Receivers mandate pursuant to section 44(2)(b) of Cap 487C includes, but is not limited to assuming control of the whole of the assets, liabilities and business affairs of the Bank and carrying on the whole of the business of the Bank and managing its assets, liabilities and affairs.

72. Having established the existence of jurisdiction, the CBK took the view that the pertinent question therefore is whether it acted within its jurisdiction, to warrant this Court to step in and submitted that it acted within its jurisdiction.

73. As to the issue of the absence of a full Board of Directors, the CBK contended that it is a body corporate with perpetual succession and a common seal hence has no capacity to act or think for itself. It acts through persons who are identified and recognized in accordance with the laws governing its operations. Apart from determining CBK's Policy & Objectives, the Board of Directors reviews the performance of the Governor in discharging the responsibility of his office and ensuring that the Bank achieves its objectives. The CBK relied on section 10 of the ***Central Bank of Kenya Act*** as being specific on the functions of its Board of Directors, none of which is to meet, recommend, and appoint a Receiver over a banking institution, as impugned by the Petitioners.

74. According to the CBK, its Governor is empowered by ***Central Bank of Kenya Act*** Cap 491 of the Laws of Kenya to act in the manner he has acted and continues to act and is also empowered to delegate powers under the said act. Neither the CBK nor its Governor is responsible for the appointment of members of its Board of Directors under section 11 of the ***Central Bank of Kenya Act***, and it would be an abdication of duty for the statutory mandated Governor not to execute the functions of his office, and those of the CBK on the basis of the absence of the Board of Directors, when such functions do not require approval of the said Board of Directors.

75. The CBK contended that under section 13 of the ***Central Bank of Kenya Act***, the Governor is the principal representative of the Bank and in that capacity, has authority to represent the Bank in its relations with other persons or bodies including meeting with the shareholders of Imperial Bank Ltd, when they admitted the monumentous fraud of Depositors funds. In its view, having considered the representations and proposal made by the shareholders of **Imperial Bank Limited**, which included the conversion of depositors funds to equity, which would have meant a further loss of depositors funds, it would have amounted to an abdication of duty, and in contravention of Article 10(c) of the Constitution not to place Imperial Bank Limited, under receivership.

76. It was CBK's position that it is incidental that while the Petitioners impugn the decision to place Imperial Bank Limited under receivership they have, without complaint, benefited from the decisions to make payments of Kshs. 2.5 Million to depositors by the Corporation, subsequent to its being appointed the receiver, and cannot therefore approbate and reprobate.

77. The CBK relied on this Court's Ruling delivered on 25th April 2016, in Misc. JR. No. 43 of 2016, in respect of an application of joinder by a Depositor to the suit and took the position that since it is the function of the Corporation to cater for the interest of depositors, it is unavailable for the Petitioners to state that the CBK failed to give them notice, and to consider their views, in relation to the decision to place Imperial Bank Limited under receivership. Reliance was further sought from the Court of Appeal in its Judgment in Civil Appeal No. 66 of 2016, consolidated with Civil Appeal No. 67 of 2016 - **Kenya Deposit Insurance Corporation vs. Richardson & David Limited & Central Bank of Kenya** and it was submitted, in line with the decision of the Court of Appeal, that the Petitioners are not experts in management of financial institutions. The constitution has bestowed the mandate on parliament to enact statutes to create bodies to manage and regulate such institutions and that the ***KDI Act*** and the ***Central Bank of Kenya Act*** are Acts of Parliament which have vested and entrusted CBK and KDIC with powers to regulate the financial sector. Further, section 4(6) of the ***Fair Administrative Action Act*** provides that where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

78. It was submitted that the power to appoint the Corporation as Receiver over a trouble institution is provided under the ***KDI Act***, which Act confers on the Corporation the mandate to cater for the Petitioners' interest, and finally both the 1st and 2nd Respondents in their press numerous press releases and Gazette Notices and in conformity with Article 47(2) notified the all depositors, and the general public of the actions and reasons for the actions taken as regards Imperial Bank of Kenya. The said Article 47 (2) requires that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

79. It was submitted that given the over 50,000 accounts at Imperial Bank Limited (IR) the most appropriate and effective mode of written communication and or notification was by press releases which were issued from time to time by the Respondents and it is not disputed that the 1st Respondent on 13th October 2015 issued a Press Release notifying *inter alia*, the Petitioners, of its decision to appoint the Corporation as a Receiver over Imperial Bank Ltd which Press Release provides reasons for the decisions, and the CBK has over the period of the receivership proceeded to not only provide further information, including payment plans by way of press releases but meet with Depositors in public forums.

80. It was the CBK's case that there is no merit in the Petitioners' complaints since its decision to place Imperial Bank Limited under receivership on 13th October 2015 was lawful, took into consideration all matters pertinent, including the protection of the financial and banking sector, including the depositors and other millions of Kenyans who hold deposits of their hard earned money with commercial banks. The CBK therefore denied that the Respondents' action were not in violation of Article 47 of the Constitution of Kenya, 2010 as read together with section 5 of the ***Fair Administrative Actions Act***, Act No. 4 of 2015 and section 10 and 11 of the ***Central Bank of Kenya Act***.

In this respect the CBK relied on this Court's Ruling delivered on 9th January 2017, in Misc. JR. No. 43 of 2016.

81. It was CBK's submission that having demonstrated that the decision to place Imperial Bank Limited under receivership and the appointment of the Corporation as receiver having been conducted in accordance with the provisions of the law, there is absolutely no justification to declare any and all the subsequent actions of the Respondents in executing the decisions of 13th October 2015, as illegal, unlawful, null and void, particularly considering the fact that not a single action is complained about and its illegality particularized, the Petitioners have benefited from some of those actions including accessing part of their deposits with Imperial Bank Kenya Limited (In Receivership).

82. As to whether there is justification to issue an order of certiorari to bring to this Honourable Court for purposes of quashing the Kenya Gazette Notice No. 7175 dated 13th October 2015 contained in the **Special Issue Volume CXVII No. 111**, and **Kenya Gazette Notice No. 7177** dated 13th October 2015 contained in the **Special Issue Volume CXVII No. 111**, it was the CBK's case that an order of certiorari will only issue if the decision impugned is made without or in excess of jurisdiction, where the rules of natural justice are not complied with, or for such like reasons. However, the instant case falls way below the provided threshold since the Respondents have demonstrated the existence of authority and jurisdiction of the Respondents, all statutory actions carried out under the said receivership are valid. It has not been demonstrated by the Petitioners that the Respondents have acted *ultra vires* their authority, hence the reason that the prayer for certiorari must fail. The CBK maintained that the decision sought to be quashed, communicated vide gazette notices 7175 & 7177 dated 13th October 2015, were issued as provided for by the law and therefore do not violate the Constitution.

83. As to whether the Respondents are in violation of the Petitioners' Right to information under Article 35 of the Constitution, the CBK reproduced Article 35(1)(b) which states that '*Every citizen has the right of access to- (b) information held by another person and required for the exercise or protection of any fundamental right or freedom",* and submitted that in order to enforce this right, a citizen claiming a right to access information must not only show that they are entitled to such information, have requested for such information, the information is held by the person from whom it is claimed; but the citizen must go further and show that the information sought is required for the exercise or protection of another right. In this respect it relied on **Cape Metropolitan Council vs. Metro Inspection Services Western Cape CC and Others (10/99) [2001] ZASCA 56** as adopted in **Unitas Hospital vs. Van Wyk and Another (231/05) [2006] ZASCA 34.**

84. It also relied on the judgment delivered on 4th November, 2016 in Misc. Civil Application 43 of 2016 - **Imaran Limited & 5 Others vs. Central Bank of Kenya & 5 others [2016] eKLR** and submitted that apart from failing to demonstrate the manner in which the information sought herein for the first time would assist the Petitioners in enforcement of another right, it should not be forgotten that though Imperial Bank Limited is under the control of the Corporation, the information sought legally belongs to Imperial Bank Limited, which for all intent and purpose is not the state as envisioned by the Constitution.

85. The CBK disclosed that a process aimed at an attempt to restore Imperial Bank Limited has been commenced with requests for Expression of Interest made on 8th September 2017, from possible investors and that the information sought by the Petitioners being proprietary information, is key for any potential investor whose access must be restricted in order to ensure that the proposed transaction is not jeopardized.

86. As regards the issue whether the Respondents are in violation of the Petitioners' Right to Property under Article 40 of the Constitution, and whether is it justified and or legal for this Honourable Court to issue an order for restitution of the Petitioners full deposits at Imperial Bank Limited as at 13th October 2015, it was submitted that the Petitioners apprehension that their right to property would be infringed by the placement of Imperial Bank Limited in liquidation on 13th April 2017, was premature particularly considering the fact that the Respondents on 7th September 2017, way after 13th April 2017 publicly invited investors to present an initial Expression of Interest ("EOI") to take an equity interest in Imperial Bank Limited (In Receivership) or propose other transaction structures with respect to Imperial Bank Limited (In Receivership).

87. The CBK's position was that the Respondents cannot in any manner be termed as acting in contravention of the Constitution when carrying out their statutory mandate and that section 50(2) of the ***KDI Act*** provides that for the purposes of discharging its responsibilities as receiver, the Corporation shall have power to declare a moratorium on the payment by the institution to its depositors and other creditors and the declaration of the moratorium shall be applied equally and without discrimination to all classes of creditors. The CBK's view was that since it has neither been alleged or demonstrated that the powers conferred on the Corporation under section 50(2) of the *KDI Act* have been exercised *ultra vires* or *mala fides,* the purported violation of right to property lacks merit.

88. With respect to the prayer for restitution, it was CBK's contention that the **KDI Act** provides the *modus operandi* for dealing with problem institutions, and making of payments to depositors and that the Corporation in exercising its mandate is enjoined by the said KDI Act under section 50(2) in dealing with depositors and other creditors during the moratorium equally and without discrimination to all classes of creditors.

89. The CBK submitted that broadly founded on the aim of equity to do justice between parties, the remedy of restitution established to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law. It was its case that for the Petitioners to seek an order of restitution is an attempt to circumvent the clear provision of the ***KDI Act***, and in essence amount to discrimination against other depositors and creditors. Further, based on ***Goff & Jones, op cit, at pp 46-72; and Burrows, The Law of Restitution , (1993), Chapter 15, pp 420 – 477,*** a claim of restitution must demonstrate the conferment of a benefit, which it was submitted does not exist in the current circumstances, there are limits to claims for restitution, for instance, a restitutionary claim may fail:

a) If public policy precludes restitution (such as in case of *res judicata*, statutes of limitation and laches, illegality, statutory bar);

b) If the defendant cannot be restored to his original position (such as that there can be no restitution *in integrum*

c) If the defendant has so changed his position which has cancelled out his unjust enrichment, that it would be inequitable in all the circumstances to require him to make restitution at all or in full, and restitution should either be terminated or diminished *pro tanto.*

90. In this case it was submitted that no benefit had been conferred, or even demonstrated to have been conferred by the Petitioners on the CBK as would amount to a unjust enrichment, more so as the ***Kenya Deposit Insurance Act***, specifically provides for the manner in which the deposits, and or assets of a troubled institution is to be dealt with, which provides a statutory bar to the order of restitution as sought by the Petitioners.

91. The CBK reiterated that it was not in dispute that the admitted massive fraud of approximately Kshs. 38 billion committed at Imperial Bank Limited was first brought to the attention of the Central Bank of Kenya (CBK) by way of a letter dated 12th October 2015, addressed to the Governor CBK, from **Alnasir Popat**, Chairman, for and on behalf of the board of Imperial Bank Limited, and that given the position reported by the interested parties, and the massive fraud committed, unless the Respondents are allowed to carry out their mandate towards management of the trouble institution that is Imperial Bank Limited (In Receivership) the depositors may not in any event, restored to their original position.

92. The CBK submitted on the allegations of breach of supervisory duty that as part of its mandate to regulate the financial sector the 1st Respondent is mandated under section 32 of the ***Banking Act*** Chapter 488 Laws of Kenya to carry out regular inspection of institutions licensed by it and that it exercises this power of regulation and supervision with a view to promoting the soundness of the financial institutions to protect integrity of the banking system and the interest of the depositors whilst ensuring an effective and efficient banking system that finances economic growth.

93. According to the CBK, the inspection is undertaken by it once a year and based *inter alia* on the information provided by the management appointed and supervised by the board of directors, the Interested Parties herein. However, the inspection is not intended to replace the statutory audit undertaken by the financial institutions auditors. According to it, the true position, and contrary to the averments by the interested parties, is that the 1st Respondent does not manage financial institutions and cannot assume responsibility for their proper management which role is the sole responsibility of the board of directors and Senior Management including the deponent himself. It therefore contended that it cannot always prevent the failure of financial institutions and that its primary responsibility in such cases is to take action to protect the interest of the financial system to prevent one bank failure resulting to that of several others, including depositors interest, thus endangering the wellbeing of the economy as a whole.

94. The CBK submitted that the principal objects for which it is constituted to formulate and implement monetary policy and foster the liquidity solvency and proper functioning of a stable market based financial system license and supervise banks and implement policies to promote and establish efficient payment, clearing and settlement systems. Under section 33(4) of the ***Banking Act*** it is empowered to issue prudential guidelines to be adhered to by institutions in order to maintain a stable and efficient banking system, and did in fact issue Prudential Guidelines in the years 2006 and 2013. It was submitted that Prudential Guidelines are the general norms issued by the CBK for the proper and accountable functioning including corporate governance applicable to all financial institutions licensed under the ***Banking Act*** Cap 488 of the Laws of Kenya. Corporate governance however involves the manner in which the business and affairs of the Bank are governed by its board, shareholders and senior management, and provides the structure through which the objectives of the company are met and the means of attaining those objectives, and monitoring performance are determined. These Prudential Guidelines are regarded as a minimum.

95. It was therefore CBK's case that under the CBK Prudential Guidelines 3.2.1.8 issued by it, it was the duty of the Interested Parties to ensure the appointment of competent management as follows:

***Appoint, dismiss and define the duties of management***

***It is the duty of the Board of Directors to define the duties of management and appoint those persons who are competent, qualified and experienced to administer the institution's affairs effectively and soundly. It is also the responsibility of the Board to dispense with the services of staff considered undesirable.***

96. According to the CBK, the Prudential Guidelines part III issued by the 1st Respondent provide principles of sound corporate governance as follows: -

a) Principle (1) Ethical Leadership & Integrity- Ethical leadership and integrity under which the ethical leadership and integrity which lists the four ethical values for good corporate governance as responsibility, accountability, fairness and transparency.

b) Principal (2) Responsibility of Shareholders- Shareholders of banking institutions shall jointly and severally protect, preserve and actively exercise the supreme authority of the institution in general meetings. They have a duty jointly and severally to exercise that supreme authority.

c) Principal (3) Overall Responsibilities of the Board – The board has overall responsibility for the bank, including approving and overseeing the implementation of the bank's strategic objectives, risk strategy, corporate governance and corporate values. The board is also responsible for providing oversight of senior management.

d) Principal (4) Role and competence of Board Members - Board members should be and remain qualified, including through training and Continuous Professional Development (CPD) for their positions. They should have a clear understanding of their role in corporate governance and be able to exercise sound and objective judgment about the affairs of the bank.

e) Principal (5) Board's Governance Practices the Board should define appropriate governance practices for its own work and have in place the means to ensure such practices are followed and periodically reviewed for improvement.

f) Principal (6) Governance in a Group Structure the Board of a parent company has the overall responsibility for adequate corporate governance across the group and ensure that there are governance policies and mechanisms appropriate to the structure business and risks of the group and its entities.

g) Principal (7) Senior Management under the direction of the Board senior management should ensure the bank's activities are consistent with the business strategy, risk tolerance / appetite and policies approved by the board.

h) Principal (8) Risk Management Framework the Board must ensure that the banking institution has adequate systems to identify, measure, monitor and manage key risk facing the banking institution and adopt and follow sound policies and objectives which have been fully deliberated.

i) Principal (9) compliance with the Laws, Rules, Codes & Standards the Board should ensure that the institution complies with the applicable laws and considered adherence to the institutions rules, codes and standards.

j) Principal (10) Internal Control Functions the Board and senior management should effectively utilize the work conducted by internal audit functions, external auditor and internal control functions.

k) Principal (13) Bank's Operational Structures the Board and senior management should know and understand the bank's operational structure and the risks that it poses.

l) Principal (14) Disclosure Requirements the governance of the bank should be adequately transparent to its shareholders, depositors, other relevant stakeholders and market participants.

97. The CBK submitted that the Interested Parties were at all material times under an obligation to apply and comply with the aforesaid CBK's Prudential Guidelines and that by reason of the director's obligation spelt out in the Prudential Guidelines and the ***Banking Act***, the Interested Parties owed a fiduciary Duty to Imperial Bank Limited (IR) and to all the depositors and other customers and a further duty of care to ensure that there was no fraud or negligence that would result in loss and damage. However, between year 2006 to 2014 the Interested Parties caused to be published Annual Reports and Financial Statements indicating to the 1st Respondent and the public that Imperial Bank Limited (IR) was a profitable institution that traded profitably. It was averred that between 2006 to 2014, the CBK accepted the audited financial statements of Imperial Bank Limited (IR) as true based on the representation of the directors in all the above cited financial statements where the Interested Parties expressly accepted responsibility and warranted the authenticity of the same, as well as accepted the responsibility for the preparation and fair presentation of financial statements that were declared to be free from material misstatement whether due to fraud or error.

98. The CBK contended that owing to the fact that the information contained in the CBK's report is always based upon books and records of the institution, upon statements and returns made to the officers during the course of the inspection process by Directors, officers or employees and upon information obtained from other sources believed to be reliable and presumed by the officers to be correct, the CBK at all times after an inspection:

> ***It is recommended that each Director, in accordance with his/ her responsibilities both to depositors and to shareholders, thoroughly reviews the report. In making this review it should be kept in mind that while an inspection includes some audit tests, it is not to be construed as an audit and does not in any way attempt to replace an audit report.***

99. According to the CBK, at all material times, its Banking Supervision Department relied on information provided by the Interested Parties and the management of Imperial Bank Limited and hence is not responsible for not acting on information that was withheld. However, when information of malpractice or violations was brought to its attention it made the necessary enquiries. However, in this particular case the anomalies which were brought to the attention of the CBK, malpractice or violations mentioned above were not in its opinion such as to warrant the revocation of the banking license of the Bank.

100. The CBK maintained that it is never required to approve or further audit the financial statements of Imperial Bank Limited or any other financial institutions, save that the said financial statements must be submitted to the CBK, and must fully comply with the format prescribed by the CBK, as per Prudential Guideline on Publication of Financial Statements and other disclosures CBK/P/10, before publication.

101. The CBK submitted that its primary responsibility in such cases is to take action to protect the interest of the financial system to prevent one bank failure resulting to that of several others thus endangering the wellbeing of the economy as a whole.

102. It was disclosed that as a result of the breaches of fiduciary duty stated herein above, Imperial Bank Limited instituted the proceedings in HCCC No. 392 of 2016 against the Interested Parties who either assisted, conspired and/or or colluded to defraud the Bank by unlawful means either by breaching their fiduciary duties and/or by dishonest assistance and/or were beneficiaries or recipients of monies and secret profits unlawfully and/or fraudulently obtained from Imperial Bank Limited (IR). It was therefore contended that the allegations by the Defendants in HCCC No. 392 of 2016 that the 1st Respondents officials were involved in defrauding the bank are mere allegations calculated to divert the attention from the shareholders and directors Imperial Bank Limited (IR) which allegations have now been conveniently adopted by the petitioners without any proof whatsoever.

103. According to the CBK, since the actions complained of by the Petitioners were undertaken on 15th October 2015, it is telling of the interested parties' true and malicious intention, particularly given the fact that they have conveniently neglected to explain their over one (1) year and seven (7) months of slumber.

104. The CBK asserted that its authority to appoint a receiver to take over the management of Imperial Bank Limited (IR) as defined under

section 10 of the ***Central Bank of Kenya Act*** Cap 491 of the Laws of Kenya was lawfully exercised and the authority of the 2nd Respondent Corporation provided by law under section 45(3)(a), and section 50(1)(a), as read with section 2 of Cap 487C, remain unchallenged in these proceedings. In any event this Court expressed itself in J.R. Case No. 43 of 2016 and affirmed the 1st Respondent's decision to place Imperial Bank Limited (IR) in receivership and the 2nd Respondents to proceed with the management and control of Imperial Bank Limited (IR) including the agreement dated 21st June 2016 between the 2nd Respondent and NIC Bank.

105. It was the CBK's position that the orders sought cannot be granted as the purported grievance that the Petitioners seek this court to remedy as apparent from pleadings, are either statute barred, or remain unproved. It submitted that the Respondents have exercised their mandate in compliance with the law and indeed will continue to follow due process in undertaking the affairs of Imperial Bank Limited in Receivership.

106. According to it, the Petitioners have failed to demonstrate to the required standard, the constitutional violations alleged, to warrant that the orders of Declaration, Certiorari, Restitution, and Injunctions be granted. It was of the view that the orders sought by the Petitioners if granted would have far reaching effects in so far as the financial sector is concerned, and particularly the abuse of court process to reverse the decision of the CBK to place a problem institution under receivership, and to stop the 2nd Respondent Corporation in carrying out its statutory mandate for the benefit of a few individuals, at the detriment of the entire banking sector, and more grievously at the expense of the millions of Kenyans who hold deposits of their hard earned money with the banks.

107. The CBK contended that in line with the orders issued in Misc. JR. 43 of 2016, there is constructive engagements between the Respondents, and Interested Parties, and Depositors and potential investors regarding Imperial Bank Limited (In receivership), and it is therefore important and a matter of public interest that it be allowed to carry out its statutory mandate as the orders sought by the Applicants, if granted would be detrimental, and against public interest. It was therefore its case that no sufficient grounds or case has been presented by the Petitioners, to warrant the issue the writs for prohibition, certiorari or mandamus as sought and that the Petition herein dated 29th March 2017 should be dismissed with costs, to allow the Respondents carry out their statutory mandate, to the benefit of the entire banking sector, and more grievously at the expense of the millions of Kenyans who hold deposits of their hard earned money with the banks.

**2nd Respondent's Case**

108. According to the 2nd Respondent, the Corporation, the Petitioners have omitted to frame their case with precision as is required in that while Articles 27, 35 and 40 are specified on the face of the Petition, the reliefs sought are predicated on Articles 46(1) and 47 as well as seeking judicial review rights and restitution. In this respect the Corporation relied on the decision of the Court of Appeal decision in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others Civil Appeal No. 290 of 2012 (2013)eKLR** at paragraph 42 and **AnaritaKarimi Njeru vs. The Republic [1976 – 1980] KLR 1271**.

109. According to the Corporation, by dint of the provision of Article 47, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The said Article further empowered Parliament to enact legislation to give effect to the rights under that clause to provide for:

***a. Review of administrative action by a court or if appropriate an independent and impartial Tribunal and***

***b. Promote efficient administration.***

110. Pursuant to the foregoing Parliament by the ***Fair Administrative Action Act, 2015,*** (*hereinafter "**FAAA**"*) enacted a legislative effect to Article 47 of the Constitution and by provision of section 7 of the ***FAAA***, any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to:-

a. A court in accordance with section 8: or

b. A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

111. In this case it was contended that the Petitioner had not established any ground upon which it can seek an exemption. In this regard the Corporation relied on Accordingly the finding of the High Court in the case of **Diana KethiKilonzo& Another vs. Independent Electoral Boundaries Commission & Others Petition No. 359 of 2013**, and submitted that if the Petitioners had any grievance arising from the administrative process conducted by the Respondents, then their relief was within the ***FAAA***.

112. As regards the petitioners' contention that the Respondents should not only have given them notice but also granted them a right of representation before placing the Bank under receivership, it was averred that the Bank was placed under receivership under the provisions of ***Kenya Deposit Insurance Act*** (*hereinafter "**the KDI Act"***) which by its memorandum is defined as:

***An Act of Parliament to provide for the establishment of a deposit insurance system and for the receivership and liquidation of deposit taking institution to provide for the establishment of Kenya Deposit Insurance Company and for connected purposes.***

113. The Corporation also relied on section 43 of the ***KDI Act*** which provides as follows:-

***43. Appointment of Corporation as receiver***

***(1) The Central Bank shall, whenever the circumstances require, appoint the Corporation to be the sole and exclusive receiver of any institution.***

***(2) The Central Bank shall appoint the Corporation as sole receiver of any institution if the Central Bank determines that—***

***(a) the institution's assets are less than the institution's obligations to its creditors;***

***(b) an unsafe or unsound condition to transact business exists or other cause that warrants the exercise of the relevant power in the interests of the institution, its depositors, or other creditors;***

***(c) there is a wilful violation of a regulatory or supervisory order;***

***(d) there is a concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the Central Bank or the Corporation;***

***(e) the institution is likely to fail to meet any financial obligation or meet its depositors' demands in the normal course of business;***

***(f) the institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the institution to become adequately capitalized without assistance;***

***(g) there is violation of any law or regulation, or an unsafe or unsound practice or condition that is likely to cause insolvency or substantial dissipation of assets or earnings, weakening the institution's condition or otherwise seriously prejudice the interests of the institution's depositors or the Fund;***

***(h) the institution is undercapitalized or significantly undercapitalized and fails to comply with requirements imposed by the Central Bank or the Corporation under section 45 or otherwise has substantially insufficient capital;***

***(i) the institution has engaged in malpractices or activities contrary to the provisions of any Kenyan law or other applicable law.***

114. It was averred that the appointment of the Corporation as a receiver is predicated upon the occurrence of any of the events which are specified under the said provision of the statute aforesaid each of which are tumultuous and would lead to a run and collapse of an institution hence the CBK is conferred with the exclusive authority to make such determination. Therefore section 44 of the ***KDI Act*** deals with notification to the Corporation upon determination by the CBK that an institution has ceased or is likely to cease to be viable, to assume control as a receiver and to exercise the powers under section 44(2)(b) of the ***KDI Act.*** The Corporation also relied on sections, 3, 51, 56 of the ***KDI Act*** and was of the view that there is no universal code of fair administration and that indeed the ***FAAA*** at section 4(b) permits for the application of the procedure provided under any other written law. In this case, the ***KDI Act*** provides access to court pursuant to the provisions of section 51(2). In support of its position the Corporation cited the case of **Kenya National Examination Council vs. Republic, Ex parte Kemunto Regina Ouru Civil Appeal No. 127 of 2009 [2010] eKLR** and contended that in this case, the legislature has not only created elaborate statutory frame work for matters to be considered in order to determine viability of an institution but also made provision to ensure that depositors are protected, and that lack of liability does not result in systemic collapse of the financial industry. It has further granted freewheeling access to court by any person who feels aggrieved. The provision of the FAAA cannot therefore be applicable in the circumstances. It was therefore the Corporation's case that the Petitioners' claim for a fair administrative process has no merit.

115. As regards the issue whether at the time the Bank was placed under receivership, the 1st Respondent did not have a Board of Directors contrary to section 10 and 11 of the ***Central Bank of Kenya Act*** (*hereinafter the* "***CBK Act***") and that the functions of the Board are set out under section 10 of the ***CBK Act*** and it is the decision making body for the CBK, it was averred that the functions of the Governor are pursuant to section 13 of the ***CBK Act*** as read with section 10 thereof and that the function of the CBK Board is therefore to determine policy and conduct oversight over the Governor and reliance was placed on the ***Concise Oxford Dictionary.***

116. It was therefore contended that the Board of CBK is therefore not concerned with the day to day management but with formulation of policy and oversight. The power of management is provided under section 13 of the ***CBK Act***. According to the Corporation, the Office of the Governor is established by statute to be occupied by a person appointed by the President as the Chief Executive Officer of the CBK. He is responsible for the management of CBK, including organization, appointment and dismissal of staff in accordance with the general terms and conditions of service and has authority to incur expenditure subject to approval of the budge. He is the principal representative of the Bank with statutory authority;

(a) To represent the Bank in its relations with other public entities, persons or bodies.

(b) To represent the Bank either personally or through counsel in any legal proceedings to which the Bank is a party;

(c) To sign individually or jointly with other persons, contracts concluded by the Bank, notes, securities issued by the Bank, reports, balance sheets and other financial statements, correspondence and other documents of the Bank.

117. Accordingly, the office of the Governor thus derives its power and authority from statute. On the other hand, the role of the Board of Central Bank of Kenya is provided by statute with the objective of limiting its role to that of creating overall policy and an oversight in specific areas expressly specified by the CBK Act. It is not therefore an executive Board as submitted by the Petitioners. To the Corporation, the power of the Governor to exercise executive authority and execute all the documents relating to Central Bank of Kenya is conferred by statute and it relied on section 42 of the ***Interpretation and General Provisions Act*** (Cap 2 of the Laws of Kenya) for the position that the Board of the Central Bank of Kenya does not exercise executive authority and have neither the power nor the authority to exercise the power of appointment of the Corporation as a Receiver under the Act.

118. The Corporation therefore was of the view that the cases of **Michael Sistu Mwaura Kamau –vs- Ethics & Anti Corruption Commission & 4 others (2017) eKLR** and **Charity Kaluki Ngilu –vs- Ethics & Anti Corruption Authority** have no application to this case as the Ethics& Anti-corruption Commission is an Independent Commission established by the Constitution of Kenya. It its view, independent commissions are subject only to the Constitution and the law and are not subject to direct control by any person or authority in the performance of their functions or authority. The Constitution further provides for the composition of the Commission. There can therefore be no commission unless constituted in the manner prescribed by the Constitution. The Central Bank of Kenya is on the other hand constituted by statute and established various organs with specific powers as provided for by the ***CBK Act***. The actions of the governor were accordingly not *ultra vires* the statute.

119. As regards the plea of legitimate expectation, it was contended that the said plea has been made without any factual or evidentiary basis. However, while such a plea can form a foundational basis for a Judicial Review with appropriate evidence, it cannot be elevated to the level of a fundamental right as the Petitioners wish to do in this Petition.

120. According to the Corporation, the Petitioners sought a number of reliefs among which is the request for an order of certiorari to bring to this Honourable Court for purposes of quashing the Kenya Gazette Notice Number 7175 and 7177 dated 13th October, 2015. While it is conceded that this Honourable Court has the jurisdiction under Article 23 of the Constitution to grant orders of Judicial Review and there is no time limit therefore was contended that it cannot therefore not be the basis of avoiding to comply with the provisions of the ***Law Reform Act*** and Order 53 of the ***Civil Procedure Rules, 2010*** where it applies as an alternative remedy. To invoke the fundamental rights provisions for the purposes of Judicial Review is an abuse of process particularly as is in this case where the petition seeks relief beyond Judicial Review. To the extent that the Petitioner has thrown in a prayer for Judicial Review by way of Certiorari it is therefore time barred under the ***Law Reform Act***.

121. It was therefore the Corporation's position that the Petitioners are not entitled to any of the reliefs they seek which in the event are contrary to the provisions of the ***KDI Act*** and lack any foundational basis either in law or the Constitution. In any event, the period for receivership has expired but has been extended by consent of the stake holders by the orders of this Honourable Court. It was therefore its case that the Petition ought to be dismissed with costs.

**Determination**

122. I have considered the issues raised in this petition.

123. It is important in my view to deal with circumstances which properly call for this Court to invoke its powers to grant orders which merit being granted in a constitutional petition as opposed to a civil action.

124. In **Muiruri vs. Credit Bank Ltd & Another [2006] 1 KLR 385, Nyamu, J** held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution; for example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193**, Court the expressed itself as hereunder:

> **"We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on the point… Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn triviliase the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry… It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters… In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one… The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

125. Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:**

> **"Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process…A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it**

**must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action… The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms."**

126. Therefore it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

127. It is in that light that I understand the Court's position in **John Harun Mwau vs. Peter Gastrow& 3 Others [2014] e KLR** that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

**"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights…It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so."**

128. Similarly, in **Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J** (as he then was) held that:

**"Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions."**

129. Fore important as was held in **Jeminah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012** that:

**"…each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution."**

130. The rationale for this was given in **Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011** where it was held that:

**"All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true…..I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof".**

131. I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

**"A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing…Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution."**

132. So, in **General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR**, **Wendoh, J** expressed herself as hereunder:

***"The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See Ben Kipeno& Others vs. AG Pet15/07 and Bahadur vs. AG (1986) LRC Const 297 where the court said;***

***"The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution."***

***In Speaker of National Assembly vs. Njenga Karume (1990-1994) EA 546 the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also Harrikisson vs. AG (1979) 3 WLR 63."***

133. Further afield, in **NM & Others vs. Smith and Others (REEDOM OF Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC)** the Constitutional Court of South Africa stated that:

**"It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention."**

134. Similarly in **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ** held as follows;

**"It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22)."**

135. The judge added that:

**"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."**

136. Our own Supreme Court has clarified its position with regard to appeals filed in accordance with Article 163(4)(a) and in ***Peter Oduor Ngoge v Hon. Francis Ole Kaparo Petition No. 2 of 2012*** declined to hear an appeal and stated:

**"In the petitioner's whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court...the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court."**

137. Subsequently, in **Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board Petition No. 5 of 2012** the Court held that:

**"…a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained."**

138. Although several issues were raised by the parties before me and in particular the interested parties, this Court is aware that apart from these proceedings, there are other proceedings both commercial and criminal in nature whose subject is the manner in which the Imperial Bank Limited (in liquidation) was managed. Accordingly, in this decision I will avoid dealing with and making determinations whose effect may prejudice those other related proceedings. Issues such as the manner in which some of the interested parties were removed from the management of Imperial Bank are matters which are better of being ventilated before the civil courts and not as a constitutional petition since a matter which can be resolved by a civil suit is not and ought not to be transmuted into a constitutional issue.

139. It was however contended that by seeking orders in the nature of judicial review in a petition, this matter was rendered incompetent as the petitioners should have instituted judicial review proceedings instead. In determining this question, one needs to recall the holding in **O'Reilly vs. Mackman [1982] 3 WLR 604, 623** where **Lord Denning** expressed himself as follows:

**"Just as the pick and shovel is nolonger suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty."**

140. In our case, it is my considered view that this Machinery was achieved by the promulgation of the current Constitution under which Article 23(3) of the provides:

***In any proceedings brought under Article 22, a court may grant appropriate relief, including—***

***(a) a declaration of rights;***

***(b) an injunction;***

***(c) a conservatory order;***

***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***

***(e) an order for compensation; and***

***(f) an order of judicial review.***

141. The current Constitution provides in Article 47 as follows:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

142. It is therefore clear that the right to fair administrative action is nolonger just a judicial review issue but a Constitutional issue as well. As was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)** judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. In my view it is nolonger possible to create clear distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted. Whereas the remedies in judicial review are limited and restricted, the grounds cut across both.

143. It is therefore my view and I so hold that the citation of the provisions of the Constitution in a judicial review application is nolonger fatal to such an application. As was held in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261:**

**"Procedure is a handmaid to justice. Procedure requires that proper provision of the law upon which the application is grounded, be cited. However, where a non-existent provision of the law is cited but after a careful reading of the body of the application and the prayers sought the court is able to tell with certainty the nature of the application, such an application should not be struck out for incompetence. This would be a drastic step to take, not at least in the Constitutional Court. A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice. The very Constitution that imposes a duty on the Court to administer justice without undue regard to technicality. As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing…The applicant is seeking the intervention, enforcement and protection of its Constitutional rights against alleged violations by the respondent. Since there are general averments in the originating summons and in the affidavit in support thereof about breach or likely breach of the applicant's constitutional rights, the applicant was perfectly entitled to come to the Constitutional Court in the manner he did in the circumstances. He could have opted to come to Court by way of judicial review for a limited remedy excluding the alleged constitutional contravention but he chose to come under the Constitution. A Constitutional application is much wider and may in suitable cases such as the instant one also include judicial review. The proviso to sections 70 to 83 (inclusive) gives the Court such wide latitude in the kind of remedies it can grant on a Constitutional reference including orders available in judicial review in a Constitutional reference…Invoking constitutional jurisdiction in the place of judicial review jurisdiction where there is a Constitutional issue for determination does not by itself amount to invoking a wrong procedure and consequently that the application should fail."**

144. The 2nd Respondent, the Corporation herein, cited **AnaritaKarimi Njeru vs. The Republic (1976-80) 1 KLR 1283** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance, CANO 290/2012 [2013] eKLR,** for the proposition that infringement of human right and fundamental freedoms must be stated with precision and not merely generalized devoid of proof thereof. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in **AnaritaKarimi Njeru vs. Attorney General** (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss an application merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What in means is that:

**"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding**

**objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."**

See **Deepak ChamanlalKamani& Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

145. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

146. In our my where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former.

147. In my view the main issue for determination in this petition is the obligation of the CBK under the Constitution with regard to the manner in which financial institutions in particular banks are being managed in the country; whether the CBK carried out that constitutional mandate; and if not whether the petitioners' constitutional rights were thereby violated.

148. Article 231(2) and (4) provide as follows:

***2. The Central Bank of Kenya shall be responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.***

***5. An Act of Parliament shall provide for the composition, powers, functions and operations of the Central Bank of Kenya.***

149. Under section 4A(1)(c ) of the ***Central Bank of Kenya Act***, one of the duties of the CBK is to license and supervise authorised dealers. Section 2 of the said Act defines the term **"authorized dealer"** to mean "*an authorized bank, authorized bureau, authorized mortgaged finance company, an authorized money remittance provider or an authorized microfinance bank licensed by the Bank under section 33B*." It is not in doubt that the **Imperial Bank Limited** (now in receivership) was under that definition an authorised dealer. It follows that the Central Bank was under a statutory and constitutional duty to not only licence the Bank but to also supervise it. To therefore contend that the CBK's obligations were only in respect of formulation of policies cannot be correct. The public relied on the expertise of the CBK to make decisions whether to invest their monies in Imperial Bank and therefore the CBK owed a reciprocal duty to the public to ensure that it took all the necessary steps to ensure that the Imperial Bank was operating within the guidelines set out by the CBK. In order to attain its objectives, the CBK developed Prudential Guidelines for financial institutions carrying out *inter alia* banking business and other regulated business within the Country.

150. In this case it was the petitioners' case that, having granted a License to the Bank, the CBK is deemed to have conducted an inquiry as to the considerations set out above and more particularly under section 4 of the ***Banking Act***, Chapter 488 Laws of Kenya and satisfied itself that the Bank had complied with the statutory considerations. That statement is in my view correct. However section 4 aforesaid applies to the initial application for licensing since it does not talk about the renewal of licences by the CBK.

151. However, the Petitioners have made very damning allegations against the CBK in an attempt to show that the CBK either by omission or deliberately failed to carry out its constitutional and statutory duties to the detriment of the petitioners. The Petitioners averred that of relevance, the following disclosures with respect to the Bank's deceased Group Managing Director **Mr. Janmohamed**, were said to have been made to the CBK on 13th October, 2015;

(a) **Janmohamed**, who under the ***Banking Act***, Chapter 488 Laws of Kenya, was and had to have been, had the CBK prudently and diligently exercised its regulatory powers, a person of good moral and professional standing, is said to have over a period of time initiated and authorized systematic and continuous irregular disbursements of substantial sums of monies belonging to the Depositors and which disbursement was in fact concealed from the Bank's Board of Directors;

(b) That a firm engaged by the CBK had in a report said to have presented to the Board on 12th October, 2015 established and/or found that **Janmohamed** had over the years been running a scheme of fraudulent and illegal disbursements with certain accomplices, within and outside the Bank which scheme had been made without having gone through a formal credit review and approval process as required by the Prudential Guidelines issued by the CBK, and with the Bank's established internal lending procedures and policies;

(c) That the said fraudulent scheme was run in cahoots with officers of the CBK and senior management officials of the Bank, and that the CBK authorized officers deliberately, alternatively recklessly, failed to exercise its powers and to discharge its duties honestly and in accordance with the relevant statutory regime, intentionally or with reckless indifference that the fraud on Bank continued to be perpetrated;

(d) In breach of its duties as the Regulator and Supervisor provided for under *inter alia*, sections 9A, 21 (2), 22, 24, 27, 28, 31(3)(a), 32, 32A, 33, 33A and 34 of the ***Banking Act***, section 43(1) of ***KDI Act*** and the Prudential Guidelines, the Constitution of Kenya, notwithstanding the monthly information provided to the CBK in the form of the monthly prudential return setting out details of the Bank's fifty largest borrowers known as **"PR4-5s",** and what became known to the CBK during the course of each annual

inspection, the CBK deliberately, alternatively recklessly, failed to investigate (whether adequately or at all) and failed to notify the Bank's Board of Directors ("**the Board**") of, and deliberately, alternatively recklessly, concealed from the Board the existence of, certain loans which were unapproved and/or over limits and/or inappropriately classified and thereby presented a false and misleading picture of the Bank's risk exposure to the Board.

(e) In breach of its duties Constitutional and Statutory duties, the CBK failed to investigate and to take appropriate supervisory action in the face of certain whistle-blower e-mails, sent in March, April and September 2012, making allegations of wrongdoing at the Bank; or to make any reference to the whistle-blower e-mails in the Inspection Report prepared by the CBK for the Board in 2012;

(f) In breach of its duties to act carefully and with independence and impartiality, the CBK through its officers, employees, agents and/or servants:

(j) Accepted cash bribes in return for agreeing not to interrogate the Bank's core banking data and agreeing to delete certain key borrowers from the annual Inspection Reports produced for the Board so that those borrowers would remain concealed from the Board;

(iv) Accepted payments which were not met by a corresponding arm's length loan obligation;

(v) Accepted hospitality, gifts and other benefits which were inappropriate in light of the supervisory relationship between the 1st Respondent and the Bank.

(g) In breach of its supervisory duties, the CBK is said to have:

(i) Permitted to be authorised and failed to require the removal of **Mr. Janmohamed** as an Executive Director and Managing Director of the Bank, despite knowledge that he had caused the Bank to act in contravention of the Banking Act and Prudential Guidelines, had failed to act with honesty and integrity and had acted to the detriment of the interests of the Bank's depositors and other stakeholders and was unsuitable to hold that office; and

(ii) permitted to be authorized and failed to require the removal of the Co-conspirators from their roles at the Bank, despite knowledge that they had caused the Bank to act in contravention of the Banking Act and Prudential Guidelines, had failed to act with honesty and integrity and had acted to the detriment of the interests of the Bank's depositors and other stakeholders and were unsuitable to hold that office.

(h) The 1st Respondent further appointed a **Mr. Peter Gatere** as the Bank's Receiver/Manager in spite of the said person having been part of the supervisory team that failed, omitted and/or deliberately refused to act on "whistle blower" emails;

(i) That there has been no recommendation and or removal of senior officers who are now said not to be morally and/or financially suitable to manage a financial institution and neither has there been any report criminal complaint against any such officers and/or officers of the 1st Respondent in respect to the fraudulent dealings at the Bank;

(j) The Corporation in undertaking the subject receivership has done so, not autonomously, but together with, or under the direction and or supervision of the 1st Respondent, in contravention of the provisions of section 51 of the ***KDI Act***.

(k) It is alleged that the Respondents have breached a Court Order in which they were ordered to *inter alia* provide the relevant information relating to the Bank, including the deals entered into with third parties relating to the assets of the Bank, and to engage all stakeholders including the Petitioners herein, in an indecorous manner, by reason of which an application seeking to cite the Respondent's responsible Officers for contempt has been filed.

152. The petitioners therefore averred that it is not in issue from the said proceedings to which none of them are parties that as between the Respondents and the shareholders of the Bank, there are admitted acts and facts, the commission of which is in violation of the Petitioners' Constitutional Rights and the glaring evidence of impropriety and statutory negligence on the part of the CBK in that;

a. There was massive mismanagement and fraud by the directors of the Bank that led to loss of close to a whopping Kshs. 3 Billion over the years;

b. The Bank's business had been, oblivious to the Petitioners, conducted in blatant violation of the Constitution, the ***Banking Act***, the ***Prudential Guidelines*** and the ***Public Officers Ethics Act***; and

c. The persons who were in management of the Bank were not proper persons to serve and that they had furthered commission of acts of illegality.

153. It is clear that the Imperial Bank was placed under the management of the Kenya Deposit Insurance Corporation on 13th October 2015. I have no doubt in my mind that if prior to 13th October, 2015, the CBK was made aware of the irregularities and the illegalities that were taking place within the Bank and did not take any remedial action in good time or at all, then the CBK would be guilty of the failure to undertake its constitutional and statutory obligations and any person sustaining loss or injury as a result thereof would be entitled to seek compensation for the same from the CBK. However before such a determination can be arrived at the Court must be satisfied that the said allegations are actually proved. The mere fact that the said allegations have been made and are part of the pleadings pending before the Court

cannot be the basis upon which this Court can find the CBK liable.

154. I however disabuse the CBK of the notion that its obligations rests only in ensuring that the Banks comply with the regulatory guidelines. As appreciated by the CBK as part of its mandate to regulate the financial sector it is mandated under section 32 of the ***Banking Act*** Chapter 488 Laws of Kenya to carry out regular inspection of institutions licensed by it and that it exercises this power of regulation and supervision with a view to promoting the soundness of the financial institutions to protect integrity of the banking system and the interest of the depositors whilst ensuring an effective and efficient banking system that finances economic growth. Accordingly I disagree that the CBK, in undertaking its said mandate only bases its decision on *inter alia* the information provided by the management appointed and supervised by the board of directors. This must be so because the CBK is empowered to scrutinise the audit reports with a view to determining the correctness thereof. In other words the CBK is not simply a conduit-pipe for transmission of decisions made by financial institutiona. That is not what inspection and supervision entails. Whereas there is a requirement that a statutory audit be undertaken by the financial institutions auditors, that duty does not relieve the CBK from independently carrying out its mandate of supervising the financial institutions concerned.

155. I therefore disagree with the blanket position adopted by the CBK that it cannot assume responsibility for their proper management of the institutions which role is the sole responsibility of the board of directors and Senior Management. It is therefore my view that it amounts to abdication of duty for the CBK to contend that it cannot always prevent the failure of financial institutions and that its primary responsibility in such cases is to take action to protect the interest of the financial system to prevent one bank failure resulting to that of several others, including depositors interest, thus endangering the wellbeing of the economy as a whole. Where credible information is placed at its disposal which indicates that a particular Bank is being mismanaged, it behoves the CBK to take appropriate steps to forestall further crisis.

156. The position adopted by the CBK that between 2006 to 2014, it accepted the audited financial statements of Imperial Bank Limited (IR) as true based on the representation of the directors the financial statements where the Interested Parties expressly accepted responsibility and warranted the authenticity of the same, as well as accepted the responsibility for the preparation and fair presentation of financial statements that were declared to be free from material misstatement whether due to fraud or error, cannot be taken as from their constitutional and statutory mandate to supervise the said Bank.

157. In this case the CBK averred that the admitted massive fraud of approximately Kshs. 38 billion committed at Imperial Bank Limited was first brought to its attention by way of a letter dated 12th October 2015, addressed to the Governor CBK, from **Alnasir Popat**, Chairman, for and on behalf of the board of Imperial Bank Limited. To that extent I agree with the CBK that it may not be responsible for not acting on information that was withheld and that when information of malpractice or violations is brought to its attention it has to make the necessary enquiries. I however disagree with the CBK's position that it is never required to approve or further audit the financial statements of Imperial Bank Limited or any other financial institutions, save that the said financial statements must be submitted to the CBK, and must fully comply with the format prescribed by the CBK, as per Prudential Guideline on Publication of Financial Statements and other disclosures CBK/P/10, before publication.

158. The CBK however, contended that in this particular case the anomalies which were brought to its attention, malpractice or violations mentioned above were not in its opinion such as to warrant the revocation of the banking license of the Bank. Based on the material placed before me and in light of the pendency of legal proceedings surrounding that issue, this Court cannot properly and conclusively pronounce itself as to which version is the correct one.

159. In my view, the issues raised herein are weighty issues and in light of the joinder of issues on the same, they cannot be resolved on cold-print affidavits without the benefit of *viva voce* evidence subjected to cross-examination in the usual manner.

160. It was the petitioners' case that their right to fair administrative action was violated. Based on Article 47 and section 4 and 5 of the ***Fair Administrative Actions Act***, Act Number of 4 of 2015 the petitioners contended that they ought to have been consulted, notified and/or in way informed of the inquiry as to the affairs of the Bank being conducted, the recommendation that was made and effected by the CBK placing the Bank under receivership and proceeding to appoint the 2nd Respondent as a receiver.

161. That the decision to place the Bank under receivership clearly adversely affected the rights of the depositors and shareholders of the Bank cannot be in doubt. However, section 43 of the ***KDI Act*** which provides as follows:-

> ***43. Appointment of Corporation as receiver***
>
> ***(1) The Central Bank shall, whenever the circumstances require, appoint the Corporation to be the sole and exclusive receiver of any institution.***
>
> ***(2) The Central Bank shall appoint the Corporation as sole receiver of any institution if the Central Bank determines that—***
>
> ***(a) the institution's assets are less than the institution's obligations to its creditors;***
>
> ***(b) an unsafe or unsound condition to transact business exists or other cause that warrants the exercise of the relevant power in the interests of the institution, its depositors, or other creditors;***
>
> ***(c) there is a wilful violation of a regulatory or supervisory order;***
>
> ***(d) there is a concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the Central Bank or the Corporation;***

***(e) the institution is likely to fail to meet any financial obligation or meet its depositors' demands in the normal course of business;***

***(f) the institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the institution to become adequately capitalized without assistance;***

***(g) there is violation of any law or regulation, or an unsafe or unsound practice or condition that is likely to cause insolvency or substantial dissipation of assets or earnings, weakening the institution's condition or otherwise seriously prejudice the interests of the institution's depositors or the Fund;***

***(h) the institution is undercapitalized or significantly undercapitalized and fails to comply with requirements imposed by the Central Bank or the Corporation under section 45 or otherwise has substantially insufficient capital;***

***(i) the institution has engaged in malpractices or activities contrary to the provisions of any Kenyan law or other applicable law.***

162. On the face of it, the Act does not expressly exclude the application of Article 47 of the Constitution. Ordinarily where the said Article is not expressly excluded, the Court would infer that the provisions of Article 47 must apply. However, as was appreciated by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72** while citing with approval ***The Discipline of Law*** 1979 *London Butterworth* at page 12 by ***Lord Denning*****:**

> **"The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is nolonger necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."**

163. Therefore it is an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. All the constituents' parts of a statute are to be taken together and each word, phrase or sentence is to be considered in light of the general purpose of the Act itself hence the words, phrase occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself.

164. In this case I agree with the Corporation that the appointment of the Corporation as a receiver is predicated upon the occurrence of any of the events which are specified under the ***KDI Act*** each of which are tumultuous and would lead to a run and collapse of an institution. It must be remembered that the object of the ***KDI Act*** is to protect the interests of the stakeholders in the subject bank and considering the nature of the banking industry any indication that the affairs of the Bank are not been run properly would clearly defeat the purpose of receivership and make it impossible for the CBK to carry out its mandate of protecting the public. As this Court held in Misc. Civil Application 43 of 2016 - Nairobi Judicial Review Application No. 43 of 2016 - **Republic –versus- Central Bank of Kenya and KDIC ex Imaran Limited & 5 Others [2016] eKLR**:

> **"The role of a receiver, generally, is to enter into the management of the company under receivership, assess its viability and determine whether the Company can be salvaged or is beyond redemption. It is however my view that contrary to the experience of receivership in this country where the tendency is to milk the Company dry before hurriedly jumping ship, a prudent receiver ought to start from the premise that everything ought to be done in order to facilitate the company being resuscitated. Therefore whereas the receiver is empowered to take whatever appropriate steps necessary to ensure that the Company does not degenerate further into the state of abyss, it ought as much as possible manage and run the company as a going concern. This in my view, and this is supported by the Corporation's position, is the principle behind section 45 of Cap 487 C which authorizes the Corporation to *inter alia* carry on the businesses and manage the assets, liabilities and affairs of a problem institution in the name and on behalf of that institution until such appointment is revoked."**

165. I therefore associate myself with the position adopted in **Richardson and David Limited vs. Kenya Deposit Insurance Corporation & Another [2015] eKLR** in which **Ogola, J** eloquently expressed himself as hereunder:

> **"A bank is a very important financial institution, and decisions concerning its operations should not appear to be made whimsically. Those decisions must be seen to be based on some policy principles which can be stated and dependent upon. This policy principle, when stated, will not only give assurance to the entity to be liquidated, its shareholders and depositors, but more important to the banking public."**

166. In this instance, I therefore associate myself with the position adopted by the Canadian Supreme Court in **Brosseau vs. Alta Securities Commission [1989] 1 S.C.R. 301** at p. 303 is to the effect that:

> **"Securities commissions, by their nature, undertake several different functions. The Commission's empowering legislation clearly indicates that the Commission was not meant to act like a court in conducting its internal reviews and certain activities which might otherwise be considered "biased", form an integral part of its operations…A security commission's protective role, which gives it a special character, its structure and responsibilities, must be considered in assessing allegations of bias…"**

167. Considering the objects and functions of the CBK and the precarious nature of the banking industry, it is my view that it is prudent that a pre-emptive action be taken by the CBK in order to avert a run on the bank and that any challenge to the decision taken by the CBK be taken thereafter. As this Court stated in Court in Misc. Civil Application 251 of 2014 (J.R)- **Republic v Kenya Revenue Authority *exparte* Interactive Gaming & Lotteries Limited [2016] eKLR,** specialized bodies established under statutes ought to be given the leeway to conduct their proceedings freely without unnecessary interference by the Court. Where such bodies are acting within their jurisdiction, the Court only ought to step in to ensure that the proceedings are being conducted fairly.

168. I therefore associate myself with the decision of the the Court of Appeal in its Judgment in Civil Appeal No. 66 of 2016, consolidated with Civil Appeal No. 67 of 2016 - **Kenya Deposit Insurance Corporation vs. Richardson & David Limited & Central Bank of Kenya** that:

> **"A court of law is not an expert in management of financial institutions. The constitution has bestowed the mandate on parliament to enact statutes to create bodies to manage and regulate such institutions. The KDI Act and the Central Bank of Kenya Act are Acts of Parliament which have vested and entrusted CBK and KDIC with powers to regulate the financial sector."**

169. Where the action contemplated is geared towards the protection is public interest, it is clear that private interests may, on occasion, give way though each case must be decided on the basis of its own facts. As appreciated by **Francis Bennion** in ***Statutory Interpretation,*** 3rd Edition at page 606:

> **"it is the basic principle of legal policy that law should serve the public interest. The court…should therefore strive to avoid adopting a construction which is in any way adverse to the public interest."**

170. In **Re McBride's Application [1999] NI 299** the Court expressed itself as follows:

> **"…it appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group…it seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity."**

171. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

172. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

173. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

174. In **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR** the Court of Appeal set out principle of public interest as follows:

> **"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"**

175. My view is supported by the provisions of section 44(2)(b) of the ***KDI Act*** which empower the Corporation to:

> ***(b) assume control as a receiver of the whole of the assets, liabilities, businesses and affairs of the institution; and***
>
> ***(i) carry on the whole of its businesses and manage the assets, liabilities and affairs; or***

***(ii) assume control of such part of its assets, liabilities, businesses and affairs including disposal of assets, and carry on such part of its business and affairs; or***

***(iii) appoint any person to carry on the whole of the businesses and manage the assets, liabilities and affairs of the institution on its behalf.***

176. In these exceptional circumstances a purpose approach ought to be adopted and pursuant to section 6 of the ***Fair Administrative Action Act***, a procedure that may not be in strict compliance with Article 47 of the Constitution may be adopted as long as those affected are not thereby locked out from challenging the decision subsequently.

177. It was however averred that as of 13th October 2015, the CBK did not have a Board of Directors as required by section 10 of the ***CBK Act*** and that as at the said date, there was no Board of Directors of the CBK appointed under section 11 of the ***Central Bank of Kenya Act***, Chapter 491 Laws of Kenya and in fact it is only on 3rd November, 2016 when such Board was constituted vide a Gazette Notice number 9234 and 9235 in **Vol. CXVIII—No. 137** of the same date. The petitioners disclosed that it was only then that **Rache Bessie Dzombo, Samason K. Cherutich, Ravi J. Ruparel, Nelius W. Kariuki** and **Charity Selina Kisotu** were appointed as members to the Board of the Central Bank of Kenya while the current Governor of the 1st Respondent was appointed on 19th June 2015 as is shown in the Kenya Gazette Notice number 4531 in **Vol.CXVII-No.65.**

178. The factual contention by the petitioners is not in dispute. The only point of divergence is the legal effect of the absence of the CBK Board. Before delving into the said issue I must state that such a state of affairs does not augur well for the interest of the banking industry and those entrusted with the task of constituting Boards, Authorities or Tribunals should not take unduly too long before doing so as the delay in so doing invariably impacts negatively on the public.

179. Section 13 of the ***CBK Act*** and that section 10 of the ***CBK Act*** provides that:-

***10. Board of Directors***

***There shall be a Board of Directors of the Bank, constituted as provided in section 11 which shall, subject to the provisions of this Act, be responsible for—***

***(a) determining the policy of the Bank, other than the formulation of monetary policy;***

***(b) determining the objectives of the Bank, including oversight for its financial management and strategy;***

***(c) keeping under constant review the performance of the Bank in carrying out its functions;***

***(d) keeping under constant review the performance of the Governor in discharging the responsibility of that office;***

***(e) keeping under constant review the performance of the Governor in ensuring that the Bank achieves its objectives;***

***(f) determining whether the policy statements made pursuant to section 4B are consistent with the Bank's primary function and policy objectives under section 4; and***

***(g) keeping under constant review the use of Bank's resources.***

180. **Assuming without deciding that it is the Governor that has the power to place a Bank under receivership and to appoint receivers, it is clear that the absence of a Board may render such powers susceptible to abuse since under the above provisions, it is the duty of the Board to** keep under constant review the performance of the Governor in discharging the responsibility of that office and to ensure that the Central Bank achieves its objectives. In other words a decision of the Governor is subject to review or ratification by the Board. I therefore do not agree with the petitioners that the mere absence of the Board disables the Governor from taking such urgent measures as the placing of a Bank under receivership.

181. According to the petitioners, the manner in which the Respondents treated Imperial Bank was discriminatory because since the beginning of the year 2015, various Banks including Dubai Bank Limited, National Bank Limited, Chase Bank Limited, and Family Bank Limited have been affected by various Governance issues, which have attracted the attention of the CBK and that the Depositors in the said Banks were thereby adversely affected, or stood to be adversely affected. Accordingly, the CBK took measures, including extending financial accommodation, appointing Managers, contracting firms to ascertain the true financial status of the respective Banks, sourcing for interested investment partners, generated restructuring plans for the said Banking Institutions with a view of salvaging the said institutions, thereby protecting their respective depositors and the financial sector at large. However, with regard to the Depositors of Imperial Bank Limited (Under Receivership), other than take any measures that would enable the protection of the Depositors and other Creditors, the Respondents have in lieu thereof acted, or omitted to act, in a manner that is calculated to ensure the liquidation of the Bank, for ulterior. To the extent that they have treated the Bank's Depositors in a different manner than that in which they have treated the Depositors of the other Banking Institutions, it was contended that this is discriminatory and an affront to the Petitioner's right to protection form discrimination of any kind as guaranteed by Article 27 of the Constitution.

182. This contention calls for a determination of what constitute discrimination and under what circumstances the court can interfere in allegations of discrimination. The ***Black's Law Dictionary*** defines discrimination as follows: *"The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between*

*those favoured and those not favoured."* ***Wikipedia, the free encyclopedia*** defines discrimination as *prejudicial treatment of a person or a group of people based on certain characteristics*. ***The Bill of Rights Handbook, Fourth Edition 2001***, defines discrimination as follows:- *"A particular form of differentiation on illegitimate ground."*

183. In his decision in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J** (as he then was) held:

> **"The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification…The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim."**

184. It is therefore clear that the law does not prohibit discrimination but rather unfair discrimination. In this case the only complaint by the petitioners is that Imperial Bank is being treated differently from the other banks. There is no evidence that those other banks were in similar circumstances as Imperial Bank. Without such evidence there is no material upon which this Court can conclusively determine that Imperial Bank and its depositors or shareholders are being treated unfairly to warrant a finding that such differential treatment is discriminatory.

185. As to whether the Respondents are in violation of the Petitioners' Right to information under Article 35 of the Constitution, I agree with that in order to enforce this right, a citizen claiming a right to access information must not only show that they are entitled to such information, have requested for such information, the information is held by the person from whom it is claimed; but must go further and show that the information sought is required for the exercise or protection of another right. In this respect I am in agreement with the decision in **Cape Metropolitan Council vs. Metro Inspection Services Western Cape CC and Others (10/99) [2001] ZASCA 56** as adopted in **Unitas Hospital vs. Van Wyk and Another (231/05) [2006] ZASCA 34,** where the South African Court of Appeal stated that:

> **"[17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough."**

186. It also relied on the judgment delivered on 4th November, 2016 in Misc. Civil Application 43 of 2016 - **Imaran Limited & 5 Others vs. Central Bank of Kenya & 5 Others [2016] eKLR**, where this Court stated as follows:

> **"In my view the right to information where a company in the nature of the Bank herein is under receivership ought to be treated in light of the decision by Hewett, J in *Flagship Carriers Ltd. vs. Imperial Bank Ltd. & 2 Others Nairobi (Milimani) HCCC No. 1643 of 1999*, where the learned Judge expressed himself as follows:**
>
> **"once the assets have been removed from the control of the directors, they have no access thereto and may only enter the company's premises with the permission of the receiver. They may take no action in relation to the business of the company, which could be construed by third parties as indicating control or ownership of that business...The appointment of the receivers relates solely to the assets and business of the company and in no way interferes with the statutory duties of directors who must continue to fulfil statutory duties such as maintaining the statutory books of the company and therefore they must retain possession of the company's statutory books together with the company seal which are not considered the assets of the company."**
>
> **In this case however, it is contended that part of the investigations being undertaken revolves around fraudulent activities committed by or with the knowledge of the applicants. While this Court is not competent to determine that allegation, it would prejudice the said investigations if the very subject of investigations were placed at the disposal of the applicants. I am however of the view that where specific information is sought which cannot prejudice the investigations, the Respondents are obliged to furnish the same."**

187. I am therefore not satisfied that the threshold for directing that information be disclosed to the petitioners herein has been met.

188. In this case I am not satisfied based on the material before me that the Respondents have been lethargic in taking the necessary steps towards the revival of the Imperial Bank and that the petitioners deserve the order of restitution. This is so because there is no satisfactory evidence before me that the Respondents have been responsible for the loss, if any occasioned to the petitioners. At this stage, it is my view that it is premature to conclude that the petitioners have in fact suffered any loss. According to CBK, in line with the orders issued in Misc. JR. 43 of 2016, there is constructive engagement between the Respondents, and Interested Parties, and Depositors and potential investors regarding Imperial Bank Limited (In receivership), and it is therefore important and a matter of public interest that it be allowed to carry out its statutory mandate as the orders sought by the Applicants, if granted would be detrimental, and against public interest. It was therefore its

case that no sufficient grounds or case has been presented by the Petitioners, to warrant the issue the writs for prohibition, certiorari or mandamus as sought and that the Petition herein dated 29th March 2017 should be dismissed with costs, to allow the Respondents carry out their statutory mandate, to the benefit of the entire banking sector, and more grievously at the expense of the millions of Kenyans who hold deposits of their hard earned money with the banks.

189. There is non credible evidence before me on which I can determine that the CBK's position is far-fetched.

190. As regards the issue whether the petitioners' actions with respect to the prayer for certiorari was time barred, in **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004[2004] eKLR**, and **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned therein and to nothing else. Two conclusions arise from the foregoing. Firstly that the six months limitation applies to a "*judgment, order, decree or conviction*". In my view the decision of the Respondents placing the Imperial Bank Limited on receivership cannot amount to a judgement, order decree or conviction. Such an action is merely a decision. The next issue is however whether such an act amounts to "*other proceeding"* for the purposes of the said limitation. According to the *ejusdem generis* rule where there are general words following particular and specific words the general words must be confined to things of the same kind as those specified. In other words, when a series of particular words in a statute is followed by general words, the general words are confined by being read as the same scope of genus as *(ejusdem generis* with) the particular words. See **R vs. Edmundson [1859] 28 LJMC 213 at 215** and **Registered Trustees of Kampala Institute vs. Departed Asians Custodian Board SCCA No. 21 of 1993 [1994] IV KALR 110**.

191. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

192. In the premises it is my view and I so hold that the six months limitation period prescribed under the ***Law Reform Act*** is inapplicable to the present proceedings.

**Disposition**

193. The petitioners have sought various reliefs from the Court with regard to the acts of the respondents. Whereas I have no doubt that this Court has the jurisdiction and power to issue the orders sought when merited, it is my finding that the petitioners have failed to prove that the same are deserved in this petition.

194. In the premises the petition fails and is dismissed but with no order as to costs as it is my view that the issues raised herein were largely issues of public interest.

195. Orders accordingly.

**G V ODUNGA**

**JUDGE**

**Delivered at Nairobi this 3rd day of May, 2018**

**P NYAMWEYA**

**JUDGE**

**In the presence of:**