



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2016

IN THE MATTER OF: AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI, MANDAMUS, INJUNCTIONS AND DECLARATORY ORDERS

AND

IN THE MATTER OF: IMPERIAL BANK LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF: ARTICLES 47, 20(1), 20(2), 20(4), 23(1), 21(3), 27, 35, 40, 10,232(1), 232(2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: CENTRAL BANK OF KENYA ACT CAP 491 LAWS OF KENYA, THE KENYA DEPOSIT INSURANCE ACT CAP 487 C, THE BANKING ACT CAP 488 LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

IMARAN LIMITED.....1ST

APPLICANT

REYNOLDS & COMPANY LIMITED.....2ND

APPLICANT

EAST AFRICA MOTOR INDUSTRIES (SALES & SERVICES) LIMITED.....3RD

APPLICANT

MOMENTUM HOLDINGS LIMITED.....4TH

APPLICANT

ABDULMAL INVESTMENTS

LIMITED.....5TH APPLICANT

KENBLEST LIMITED.....6TH
APPLICANT

AND

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

KENYA DEPOSIT INSURANCE CORPORATION.....2ND
RESPONDENT

AND

DIAMOND TRUST BANK LIMITED.....1ST INTERESTED
PARTY

KENYA COMMERCIAL BANK LIMITED.....2ND INTERESTED
PARTY

JOSEPHINE AWINO OGWENO T/A J. KOGWENO & ASSOCIATES.....3RD INTERESTED
PARTY

NIC BANK LIMITED.....4TH INTERESTED
PARTY

RULING

1. By a Motion dated 9th February, 2016, the ex parte applicants herein sought the following orders:

1) An order of PROHIBITION does issue directing that the Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns prohibiting them from transferring, assigning, disposing of or dissipating or in any other manner whatsoever or howsoever, the dealing with or alienating any of the assets of Imperial Bank Limited (in receivership)(the “Bank”) until and unless the Respondents have met, discussed, fully engaged and consulted with the Ex parte Applicants on the Ex parte Applicants’ Recovery Plan, or any other plan that the Respondents and the Ex parte Applicants may agree on as viable, for the re-opening of the Bank.

2) An order of PROHIBITION does issue directing that the Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns prohibiting them from undertaking or engaging in any exclusion and transfer process of the Bank or any of the assets in any manner other than as prescribed under the applicable Laws including the Kenya Deposit Insurance Act (the “KDIC Act”) and the Fair Administrative Action Act, 2015, (the “FAA Act”) and/or doing anything that would prejudice the rights and interests of the Bank’s depositors, creditors, bondholders and the Ex parte Applicants.

3) An order of PROHIBITION does issue directing that the Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns prohibiting them from taking any steps which would result cumulatively or otherwise in the liquidation of the Bank, and/or doing anything that would prejudice the rights and interests of the Bank’s depositors, creditors, bondholders and the Ex parte Applicants.

4) An order of CERTIORARI does issue to bring into the High Court and quash the Respondents' action and/or decision published in the 1st Respondent's press release dated 2nd December, 2015 by which the Respondent's commenced a transfer and exclusion process, to the benefit of the interested Parties, in total abrogation of the Ex parte Applicants' right to fair administrative action.

5) An order of MANDAMUS directed at the Respondents and each of them compelling them to forthwith allow the Ex parte applicants or their servants, agents, representatives and/or their appointees, including financial and legal advisers, access to and review of information, documents and/or data relating to Imperial Bank Limited (in receivership) as would be customary for a rescue plan or investment in a Bank that is in the current position of the Bank, including for the purposes of the Applicants' Recovery Plan, or any other plan considered to be viable.

6) An order of MANDAMUS directed at the Respondents and each of them compelling them to provide the Ex Parte Applicants herein, together with the other stakeholders including the bondholders and depositors with the information concerning the matters raised in the Respondent's Press Release dated 2nd December, 2015 and more particularly the arrangements entered into with all or any of the Interested Parties, and the manner in which the depositors are to be dealt with.

7) An order of MANDAMUS directed at the Respondents and each of them compelling them to formally engage the Ex Parte Applicants herein, together with the other stakeholders including the bondholders and depositors of 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.

8) A DECLARATION that the Respondents, in treating the Ex Parte Applicants and/or the Directors nominated by them to the Board of Directors of the bank (the "Board"), as being culpable in the frauds perpetrated against the Bank, have abrogated the Ex Parte Applicants' right to the presumption of innocence, as enshrined in Article 50 of the Constitution of Kenya and amounts to an unfair administrative action as contemplated under the FAA Act.

9) A DECLARATION that the Respondents, on account of the various matters complained of in this application have breached the Ex Parte Applicants' right to a fair administrative action as guaranteed under Article 47 of the Constitution and as provided for under sections 3, 4, 5 and 6 of the FAA Act.

10) A DECLARATION that the Respondents have in their dealings with the Ex Parte Applicants, treated the Ex Parte Applicants unfairly, in an unequal manner and have discriminated against the Ex Parte Applicants in violation of Article 27 of the Constitution, resulting in an inherently unfair administrative process, contrary to the provisions of Article 47 of the Constitution of Kenya, and the provisions of the FAA Act.

11) A DECLARATION that by withholding information to which the Ex Parte Applicants are lawfully entitled, the Respondent's have breached the Ex Parte Applicants' rights to information, as enshrined in Article 35 of the Constitution and amounts to an unfair administrative action contrary to section 6 of the FAA Act.

12) A DECLARATION that the actions and/or omissions by the Respondents herein to the extent that they violate the Ex Parte Applicants' rights to property as enshrined by Article 40 of the Constitution without hearing them or affording them a reasonable opportunity to be heard, amounts to an unfair administrative action.

13) A DECLARATION that in exercise of their powers as vested in them by statute and otherwise, the Respondents' have failed to comply with the requirements and tenets of fair

administrative action contrary to the provisions of section 5 of the FAA Act and Articles 10 and 232 of the Constitution.

14) An order for monetary compensation on account of the Respondents' violations of the Ex Parte Applicants' Constitutional and statutory rights, such damages to comprise general, aggravated and punitive damages.

15) The costs of this Application be provided for.

2. After hearing the application, this Court on 4th day of November, 2016 made the following findings:

1. That the Respondents are under both constitutional and legal obligation to inform the applicants of their actions which are likely to adversely affect the applicants and this includes the actual decision to commence the exclusion and transfer process.

2. That the Respondents are under an obligation to consider any reasonable and viable proposals or recovery plans put forward by the applicants towards the revival of the normal business of the bank.

3. That the Respondents ought not to drive the Bank into liquidation unless and until all options of reviving the bank have been considered.

4. That the applicants were afforded an opportunity of being heard and their proposals and/or Recovery Plan considered.

5. The Respondents are under obligation to furnish the applicants with information which is unlikely to prejudice the ongoing investigations.

3. Based on the said findings the Court proceeded to make the following orders:

1) An order prohibiting the Respondents, jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns from undertaking or engaging in any exclusion and transfer process of the Bank or any of the assets in any manner other than as prescribed under the applicable Laws including the *Kenya Deposit Insurance Act* and the *Fair Administrative Action Act, 2015*.

2) An order of prohibiting the 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.

3) An order of *mandamus* directed at the Respondents and each of them compelling them to furnish the Ex parte 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.

4) An order of *mandamus* directed at the Respondents and each of them compelling them to provide the Ex Parte Applicants herein, together with the other stakeholders including the bondholders and depositors with the information concerning the arrangements entered into with all or any of the Interested Parties, and the manner in which the depositors are to be dealt with.

5) An order of *mandamus* directed at the Respondents and each of them compelling them to formally engage the Ex Parte Applicants herein, together with the other stakeholders including the bondholders and depositors of 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.

6) Save for the foregoing the rest of the prayers are disallowed.

4. Subsequent to the said judgement, the 3rd interested party herein, **Josephine Awino Ogweno T/A J. Kogweno & Associates**, moved the Court vide an application dated seeking the following order:

Whether the judgement and orders of the court delivered by Honourable Justice Odunga on the 4th of November, 2016 permits or prohibits the process of transfer of assets and liabilities of IBL (In Receivership) to enable depositor access their remaining deposits and in particular, the payment of deposits in a structured manner of up to 40% percent (sic) as earlier stated by the Respondents.

5. According to the 3rd interested party, pursuant to the Judgement and Orders of the court delivered on the 4th of November, 2016 the 2nd Respondent vide a press release dated 8th November 2016 stated or announced that Imperial Bank Limited in Receivership's (the Bank) shareholders had up to the date of the press release failed to provide adequate assurances to implement a proposal that will enable the lifting of the receivership, re-opening of the Bank, and resumption of normal activities for its customers. The press release further stated that the 1st and 2nd RespondentS would continue the processes that were suspended by the Court, and in particular, the 4th Interested Party's due diligence and contract review which is expected to lead to a structured access to the remaining deposits by the depositors.

6. However on the 10th of November 2016, the ex parte applicants issued a Press Statement in which they stated or announced that the Judgement and Orders of the court delivered on the 4th of November 2016 were misinterpreted and distorted by the 2nd Respondent and in particular, that the Judgement and Orders given did not permit the continuation of the agreement with the 4th Interested Party to assume certain assets and liabilities of the Bank in receivership. The statement further stated that the Judgement of 4th November 2016 maintained and confirmed the Orders made on 29th June 2016 which stated that "...CBK and KDIC shall not dispose of other assets of IBLR pending the determination of the proceedings or other orders of this Court."

7. As a depositor, it was the 3rd interested party's understanding that the Court permitted the proposals by KDIC to pay depositors and, in particular, the 40% as the prayers to quash any decisions by CBK and/or KDIC to pay depositors were specifically disallowed. It was her further understanding that payment to depositors was allowed provided all provisions of law were adhered to. It was further her understanding that since the 40% is only a small portion of the Bank's assets in deposits, payment of these sums does not amount to a liquidation process which was particularly prohibited except through lawful processes.

8. It was apparent based on the above that the 3rd interested party opined that there is a conflict of interpretation as to the true meaning, mischief, findings and orders of this court dated 4th November 2016 as a result of which the depositors were confused and continue to be deprived of their deposits in view of the conflicting interpretation of the orders of this Court dated 4th November 2016.

9. To the 3rd interested party, it was in the interest of justice that this court clarified to the depositors whether the orders of this Court pursuant to the Judgement delivered on the 4th of November 2016 allows the transfer of assets and liabilities to enable depositors to access their deposits and in particular, the access to the 40% of the deposits earlier communicated through the press release of 21st July 2016.

10. In my judgement of 4th November, 2016, this Court was clear in its mind that it cannot stop the Respondents from carrying out their statutory mandate. However such mandate had to comply with the law and the Constitution in particular Article 47 of the Constitution. Whereas the Respondent could legally take actions whose effect would result in adversely affecting the interests of the applicant such

actions had to be strictly within the confines of the law and the Constitution and that the Respondents were under an obligation to consider any reasonable and viable proposals or recovery plans put forward by the applicants towards the revival of the normal business of the bank. Further the Respondents were directed not to drive the Bank into liquidation unless and until all options of reviving the bank have been considered. Subject to the foregoing, the Court did not stop and even during the pendency of the application had not stopped the Respondents in conjunction with the 1st, 2nd and 4th interested parties from disbursing funds to the depositors.

11. In other words this Court only restated the legal and constitutional position that the actions of the Respondents must bow to the due process of the law and nothing else.

12. I trust that this short ruling clarifies this Court's decision and if there was any confusion the same has been dispelled.

Dated at Nairobi this 9th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mweseli for Mr Wandabwa for the ex parte applicants

Mr Chege for the 1st Respondent

Mr Ouma for the 2nd Respondent

Miss Kogweno, the 3rd interested party/applicant

CA Mwangi