



**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.....1<sup>ST</sup> APPLICANT**

**REYNOLDS & COMPANY LIMITED.....2<sup>ND</sup> APPLICANT**

**EAST AFRICA MOTOR INDUSTRIES**

**(SALES & SERVICES) LIMITED.....3<sup>RD</sup> APPLICANT**

MOMENTUM HOLDINGS LIMITED.....4<sup>TH</sup> APPLICANT

ABDULMAL INVESTMENTS LIMITED.....5<sup>TH</sup> APPLICANT

KENBLEST LIMITED.....6<sup>TH</sup> APPLICANT

AND

CENTRAL BANK OF KENYA.....1<sup>ST</sup> RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION.....2<sup>ND</sup> RESPONDENT

AND

DIAMOND TRUST BANK LIMITED.....1<sup>ST</sup> INTERESTED PARTY

KENYA COMMERCIAL BANK LIMITED.....2<sup>ND</sup> INTERESTED PARTY

JOSEPHINE AWINO OGWENO

T/A J. KOGWENO & ASSOCIATES.....3<sup>RD</sup> INTERESTED PARTY

NIC BANK LIMITED.....4<sup>TH</sup> INTERESTED PARTY

## JUDGEMENT

### Introduction

1. By a Motion dated 9<sup>th</sup> February, 2016, the ex parte applicants herein seek 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 1<sup>st</sup> Respondent's press release dated 2<sup>nd</sup> 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 2<sup>nd</sup> 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.**

### Applicants' Case

2. According to the ex parte applicants who averred that they are shareholders of Imperial Bank Limited (In Receivership) (hereinafter referred to as "the Bank"), the Bank's immediate former Group Managing Director **Adulmalek Janmohamed** ("hereinafter referred to as "**the GMD**") passed away suddenly on 15<sup>th</sup> September 2015. Shortly thereafter, the Applicants discovered that unbeknown to them, the GMD in collaboration with other senior officers of the Bank and external accomplices, had for several years, been making several illegal and unauthorised disbursements from the Bank which amounted to hundreds of millions of dollars and which transactions had been concealed from the Applicants. With a view to ascertaining the accurate position of the Bank's financial situation, the applicants appointed FTI Consulting LLP of London, England (hereinafter referred as "FTI Consulting") to carry out a forensic audit of the Bank and FTI Consulting gave its report which confirmed *inter alia* that a fraud had been committed on the Bank over a long period of time, by the GMD who acted in cahoots with senior officers of the Bank and other third parties.

3. According to the applicants, soon after receiving the FTI Consulting Report, they, in good faith and with a view to protecting the depositors of the Bank, duly notified the 1<sup>st</sup> Respondent herein, the Central Bank of Kenya (hereinafter referred to as "CBK"), of their discovery of the aforesaid fraudulent transactions and on or about 13<sup>th</sup> October 2015, CBK placed the Bank under receivership and appointed the 2<sup>nd</sup> Respondent herein, the Kenya Deposit Insurance Corporation (hereinafter referred to as "the Corporation"), as Receiver Manager.

4. In this application the applicants averred that the matters that they were aggrieved by relate to the administrative actions of the Respondents in the period after the appointment of the receiver manager, and which administrative actions form the basis for these judicial review proceedings. According to the applicants, the definition of "administrative action" in section 2 of the **Fair Administrative Action Act, 2015** (hereinafter referred to as "the **FAA Act**") includes *acts, omissions and decisions*.

5. The grounds upon which these judicial review proceedings were brought by the Applicants are summarised as follows:

a. the 1<sup>st</sup> Respondent by a Press Release dated 2<sup>nd</sup> December 2015, published its decision to start an exclusion and transfer process and which process entails the transfer and alienation of the assets and liabilities of the Bank to the Interested Parties;

b. the Respondents have in entering into agreements with the Interested Parties, commenced a transfer and exclusion process as envisaged in the **Kenya Deposit Insurance Act** and Regulation 15 of the **Kenya Deposit Regulations, 2015** without complying with the applicable legal requirements;

c. the Respondents have acted unreasonably in failing to consider and engage the Applicants on their Recovery Plan which plan is aimed at facilitating the reopening of the Bank;

d. the Respondents have made demand on the Applicants requiring them to deposit Kshs 20 billion with the 1<sup>st</sup> Respondent without providing any justification as to how this sum is arrived at;

e. the Respondents have discriminated against the Applicants by denying them access to the Bank's data, information, documents and/or records but have given access to other third parties;

f. the Respondents have in their dealings with the Applicants, taken several administrative actions that constitute unfair administrative action, are unprocedural, illegal, unreasonable, and otherwise an affront to the Applicants' Constitutional rights;

g. the Respondents administrative actions go against International Best Practice in the banking industry.

6. According to the applicants, as the administrative actions of the Respondents also constitute gave violations of the Applicants' Constitutional rights and freedoms, the court has the power to grant the orders of certiorari, prohibition and mandamus, as well as the declarations sought, in the Application.

7. With respect to the prayer for prohibition, the applicants sought to have the Respondents prohibited from transferring, assigning, disposing of, dissipating or in any manner whatsoever from dealing with or alienating any of the assets of the Bank unless and until the Respondents have met, discussed, fully engaged and consulted with the Applicants on their Recovery Plan or any other plan that the Applicants and the Respondents may agree on as viable for the reopening of the Bank.

8. Prayer 2 of the Application seeks to prevent the Respondents from undertaking or engaging in any exclusion and transfer process other than as prescribed in law, including as set out in the **Kenya Deposit Insurance Act** (Cap 487), Laws of Kenya ("hereinafter referred to as "the **KDIC Act**"), the Regulations made thereunder, and/or the **FAA Act** and/or doing anything that would prejudice the rights and interests of the Applicants, as well as the Bank's depositors, creditors and bondholders; and an order to have the Respondents prohibited from taking any steps that would cumulatively or otherwise, result in the liquidation of the Bank.

9. In support of this prayer the applicants averred that upon the placement of the Bank under receivership, the Respondents initially engaged the Applicants objectively, with a view to reopening the Bank and publicly avowed to engage the Applicants in doing so and as a result the Applicants became actively engaged in seeking a restructuring solution for the Bank. However, in a meeting held between the Applicants and the Respondents on 27<sup>th</sup> October 2015, the Respondents refused to consider the Applicants' tabled proposal, because it involved the participation of a strategic investor. Instead, the Respondents;

a. presented to the Applicants a single sheet of paper, which they called a recovery plan, which called for capital injection by the Applicants of "between Kshs 10 billion and 20 billion"; and

b. demanded that the Applicants collateralize the unsecured loans taken by W.E. Tilley to the amount of Kshs 20 billion and make recoveries from W.E. Tilley of the sum of Kshs 5 billion; and that the Applicants convert some of the Bank's large deposits amounting to Kshs 5 billion, into equity.

10. It was further averred that on 29<sup>th</sup> October, 2015, the Applicants presented to the Respondents a revised restructuring and recovery plan for the Bank, which plan had been developed by the Applicants' own experts, and at their own cost. Once again, the Respondents refused to consider the Applicants' recovery plan and immediately dismissed it without any consideration. On 3<sup>rd</sup> November, 2015 a further meeting was held between the Respondents and the Applicants, in which the Applicants furnished the Respondents with another revised recovery plan. Again, this plan was summarily rejected by the Respondents who reiterated their previous demand for payment of Kshs 20 billion by the Applicants and further, unreasonably demanded that the Applicants deposit Kshs 10 billion with the CBK by 5<sup>th</sup> November, 2015, a two day period. It was averred that in a subsequent meeting between held the Applicants and the 2<sup>nd</sup> Respondent on 9<sup>th</sup> of November 2015, the Corporation reiterated the Respondents' earlier demand for a Kshs 20 billion cash injection and an immediate payment of Kshs 10 billion. The Applicants and the Respondents then met again on the 11<sup>th</sup> of November 2015 in which meeting the Applicants presented the Respondents with a summary of a further recovery plan and the following day on 12<sup>th</sup> November, 2015 the Applicants forwarded, under cover of a letter of the same date, a copy of the

Applicants' full Recovery Plan. It was however averred that the CBK has to date not issued a formal reply to the aforementioned letter nor the Recovery Plan despite the fact that the Respondents were bound by sections 4(2) and 5(d) of the *FAA Act*, to give their reasons for disregarding the Applicants' Recovery Plan.

11. According to the applicants, the failure to consider their proposals and/or Recovery Plan is also a violation of sections 5(b) and (c) of the *FAA Act*, which requires the Respondents, where their proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons, to consider all views submitted and all relevant and material facts in the matter before taking the mooted administrative action. They averred that the Respondents' demand for Kshs 20 billion came as a surprise to the Applicants given that in the initial meetings held with the Respondents, what had been discussed was the sum of Kshs 10 billion proposed in the Applicants' Recovery Plan. In the applicants' view, their willingness to inject Kshs 10 billion as part of the their Recovery Plan was made in utmost good faith and motivated by the sole desire to protect the Bank's depositors and creditors who had entrusted their money with the institution.

12. The applicants' case was that the Respondents' demand for payment of Kshs 20 billion by the Applicants was unreasonable, excessive and oppressive by reason of the fact that the Applicants' Recovery Plan demonstrated clearly that once implemented, the Bank would be able to comply with all its statutory obligations in terms of liquidity and capital adequacy if the Kshs 10 billion was injected by the Applicants. They accused the Respondents of failing to demonstrate to the Applicants how this sum of Kshs 20 billion was arrived at and/or how it relates to the Applicants' Recovery Plan. Similarly, the Respondents have neither provided any financial and legal framework for the injection demanded, nor an opportunity to conduct an independent due diligence. To the applicants, in failing to put the demand for Kshs 20 billion in writing, the Applicants have been deprived an opportunity to be able to substantially respond to the demand and given the very large amount of money being demanded, casual verbal demands such as those made by the Respondents are unreasonable.

13. It was contended by the applicants that, quite apart from the manner in which the sum of Kshs 20 billion was demanded by the Respondents, the time within which payment was required to be made by the Applicants was irrational and oppressive since in one meeting this period was set at just 48 hours. The applicants therefore were of the view that the foregoing facts demonstrate a clear departure from the rules of natural justice and the Respondents ought to be prohibited from ignoring the Applicants' Recovery Plan particularly given the fact that the Plan is specifically aimed at facilitating a reopening of the Bank. The failure to inject the unreasonably demanded funds was then used by the Respondents in various media statements, to repeatedly blame the Applicants for the delay and potential failure to reopen the Bank.

14. The applicants through their learned counsel **Mr Muite, SC, Mr Kilukumi and Mr Wandabwa**, submitted that an order of prohibition lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice and relied on **Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 17; Halsbury's Law of England, 4th Edition, Vol.1 at page 137, paragraph 128; Total Kenya Limited vs. Permanent Secretary, Ministry of Energy & 14 Others Misc. Civil Appli No.1638 of 2004 [2006] eKLR; and Commissioner of Lands and Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 [1996] LLR 6202 (CAK).**

15. It was submitted that to the extent that the Respondents failed to exercise the rules of natural justice by rejection of the Applicants' Recovery Plan, the administrative action of the Respondents is unlawful and reliance was placed on the holding in **Ridge vs. Baldwin [1964] AC 40** that:

**“...the law that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties” -**

16. Further reliance was placed on Uganda HC Civil Misc. Applic. No.18 of 2010 - **Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board** as

cited in **Petition 590 of 2012 Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR** and **Wade & CF Forsyth in *Administrative Law*, 10th edition** as cited in **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**.

17. It is also immaterial for the Respondents, the applicants added, based on **Onyango vs. Attorney General [1986-1989] EA 456 at page 460**, to assert that they would have come up with the same decision had the rules of natural justice been applied. In the applicant's view, lack of procedural fairness and natural justice in the conduct of the Respondent is further demonstrated by the fact that the Respondents refused to meet with the Applicants' technical advisors/Steering Committee and that the Applicants' legal representatives were ejected from the said meetings, whilst the Respondents own legal advisors were allowed to sit in the said meetings.

18. It was submitted that from the collective acts and omissions of the Respondents, it is apparent that the Applicants have been treated by the Respondents as being culpable and guilty of the fraudulent acts unearthed in the forensic report prepared by FTI Consulting and have adjudged them as such, without according them any hearing.

19. The applicants disclosed that from the FTI Consulting Report, it is apparent that CBK was made aware of the fraud the subject of the Bank's woes, and given the fact that CBK's own officers were involved in the manipulation of the Bank's schedules that would guide the publication of the official accounts which were presented to the Board, the Respondents ought to have had due regard to the principles of natural justice as aforesaid. The applicants' case was that the violation of the principles of natural justice are further demonstrated by the failure by CBK to take action, as it was statutorily bound to do, upon receipt of information from a whistle blower in or about April 2012 about the illegal and fraudulent disbursement of funds that was taking place in the Bank perpetrated by *inter alia*, the GMD, W.E. Tilley, Jade Petroleum Limited and Adra International Limited.

20. The Applicants therefore submitted that by reason of the foregoing conduct of the Respondents, it is fair and just that the orders of prohibition do issue since as was held in **Misc. Civ Appli 1638 of 2004 - Total Kenya Limited vs. Permanent Secretary, Ministry of Energy & 14 Others [2006] eKLR**:

**“An order for prohibition lies in the future to prohibit an authority, body or body of persons, an authorized officer, etc. from doing or committing an unlawful act” -.**

21. The applicants also relied on **Judicial Review Civil Application 89 of 2014 - Erick Kibiwott Tarus & 2 Others vs. Director of Public Prosecutions & 7 Others [2014] eKLR** for the holding that:

**“Where the decision is in the process of being made and the only decision that was taken was the action in question be undertaken, I do not see why the court cannot in those circumstances prohibit the decision from being concluded even without quashing the decision that the same be undertaken”**

22. According to the applicants, in a recent decision, **HCCC No.482 of 2015 - Richardson and David Limited vs. Kenya Deposit Insurance Corporation and Central Bank of Kenya Limited** (“the Dubai Bank case”) the court ordered the Respondents to consider proposals what would lead to the revival of Dubai Bank.

23. It was contended by the applicants that by a Press Release published on 2<sup>nd</sup> December 2015, CBK published its decision to start a process of exclusion and transfer, which process entails the transfer and alienation of the assets and liabilities of the Bank, to the Interested Parties herein. The applicants appreciated that section 50(6) of the **KDIC Act** does give the discretion to CBK to carry out a liquidation comprising of a transaction or a series of transactions that involves the sale or other disposal of the Banks assets or liabilities, or both and that section 50(8) thereof provides that the transfer of the said assets and liabilities shall be irrevocable and shall not require the consent of the debtors, creditors or any security holders. The applicants however contended that the shareholders, in this case the Applicants, are not among the class of persons listed as those from whom consent is not required prior to initiating the

liquidation process. To the applicants, if Parliament intended to dispense with the consent of the Applicants in proceeding with a transfer and exclusion process, it would have expressly listed shareholders as one of the class of persons from whom consent is not required.

24. It was further submitted that Regulation 15 of the **Kenya Deposit Regulations, 2015** gives discretion to CBK to issue notice to the directors to provide payments within a stated period of time, failure to which CBK shall commence an exclusion and transfer process, which culminates in liquidation.

25. According to the Applicants, Regulation 15 aforesaid should be looked at within the context of sections 50(6) and (8) of the **KDIC Act** which do not expressly exclude the participation of the Applicants in the transfer and exclusion process. In this regard, it was submitted that where a statutory provision does not expressly or by necessary implication exclude an aspect of procedural fairness, the provision will be interpreted as requiring that aspect of procedural fairness. Accordingly, the discretion to give notice cannot be interpreted as excluding the requirement for notice since like any other administrative discretion, that relates to the giving of notice must be exercised on the basis of established principles, namely that it must be exercised fairly, reasonably and without bias. In this respect the applicants relied on **Petition No. 352 of 2015 Geothermal Development Company Limited vs. Attorney General & Others** where it was held that:

**“... the issue of a notice is a key component of due process. In Kenya Anti-corruption Commission v Lands Limited and Others Nairobi Misc. App. 583 of 2006 the court noted, “Constitutional provisions are procedural safeguards aimed at ensuring due process before any right to property can be taken away and also incorporating the right of hearing. The right of hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of the Constitution must be implied in every Act especially, the right to due process and it cannot be taken away. Constitutional rights cannot be taken away without due process...in many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice.”**

26. To the Applicants, the circumstances of this case particularly given the public interest and impact on the national economy required that CBK gave due notice to the Applicants of the intended exclusion and transfer process which was announced by the Press Release of 2<sup>nd</sup> December 2015, to the extent that the said exclusion and transfer process does directly and adversely affect the Applicants’ propriety interest. Based on **Dubai Bank case** (supra), it was submitted that the rush to a process that culminates in liquidation of a Bank is unreasonable and unfair. In the applicants’ view, the Respondents’ administrative action is not only unfair, but also a violation of the provisions of section 7(2)(n) of the **FAA Act**. Further, the exclusion and transfer process in seeking to move the assets of the Applicants to the Interested Parties without the involvement of the Applicants goes against the principles of natural justice.

27. The applicants relied on **Cause No.187 of 2013 - Kadilo Mtwana & 78 Others vs. Chairman Amalgamated Union of Kenya Metal Workers; Cooper vs. The Board of Works for the Wandsworth District, 21 Apr 1863; Wiseman & Anor vs. Borneman & Others [1971] A.C. 297; Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council [1976] 3 All ER 665; Padfield And Others vs. Minister of Agriculture Fisheries and Food and Others [1968] 1 All ER 694** and submitted that no man is to be deprived of his property without his having an opportunity of being heard and that the principles of natural justice demand that the Applicants ought to have been heard or consulted before such drastic agreements and/or arrangements were entered into with between the Respondents and the Interested Parties.

28. It was submitted further, that the liquidation of the Bank is not in the public interest or in the interests of the Bank’s depositors, creditors and bondholders as the public interest would best be served by reopening of the Bank, not by liquidation. According to the applicants, judicial review is aimed at *inter alia*, safeguarding and promoting public interest and reliance was placed on **Michael Fordham’s Judicial Review Handbook** (6th Edition), at page 5 and **Re McBride’s Application [1999] NI 299** where 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.”**

29. It was submitted further, that the Respondents’ move towards liquidation is in clear contradiction of the previous position taken by the Respondents that they were committed to reopening the Bank and that in so doing, the Respondents created a legitimate expectation on the part of the Applicants that the Respondents would take *bona fide* steps directed towards the reopening of the Bank, including consideration of all means by which that avenue could reasonably be achieved. However in making the Press Release of 2<sup>nd</sup> December 2015, the Respondents violated the Applicants’ legitimate expectation as aforesaid, particularly given the fact that the Applicants had presented a detailed and comprehensive Recovery Plan to the Respondents and which plan was specifically aimed at facilitating the reopening of the Bank. Based on **Cr. Appl. No. 271 of 1985 - Githunguri vs. Republic**, it was submitted that an administrative action will be reviewed by the courts where it goes against the legitimate expectation created in the mind of the aggrieved party, by the public body. The applicants further relied on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] KLR 240**, cited in **Judicial Review No. 81 of 2013 Town Council of Kikuyu vs. The National Social Security Fund Board of Trustees & Others** where the Court expressed itself as hereunder:

**“.....legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.....public authorities must be held to their practices and promises by the courts.....thus I hold that the frustration of the applicants’ legitimate expectation based on the application of tariff amounts to abuse of power”**

30. Further reliance was placed on the decision of the High Court of Australia in **Haoucher vs. Minister for Immigration and Ethnic Affairs Reference [1990] 169 CLR 648** and **Attorney General of Hong Kong vs. Ng Yuen Shiu [1983] 2 All ER 346**

31. It was submitted that the aforesaid violation of the Applicants’ legitimate expectation entitles the Applicants to an order of judicial review as provided by section 7(2)(m) of the **FAA Act** which section allows for this court to review an administrative action or decision that violates the legitimate expectations of the persons to whom it relates.

32. The applicants further submitted that the Respondents’ aforesaid conduct is an abuse of process and a violation of the provisions of section 7(2)(o) of the **FAA Act** and that to the extent that there is no reasonable or justifiable basis for the sudden change in course from restructuring and reopening of the Bank to exclusion and transfer, the decision of 2<sup>nd</sup> December 2015 is an abuse of process hence amenable to judicial review pursuant to section 7(2)(o) of the **FAA Act**.

33. It was further submitted that the Respondents were enjoined by the principles of International Best Practice in the banking industry, to refrain from engaging in administrative action that is inconsistent with the best interests of the Applicants, the Bank’s depositors, creditors and bondholders. It was contended that Kenya’s bank regulation and supervision is undertaken by the Respondents pursuant to, *inter alia*, the **Banking Act** (Chapter 488), Laws of Kenya and the **KDIC Act** and that further guidance is provided by the **Central Bank of Kenya Prudential Guidelines for Institutions Licensed under the Banking Act – January 2013** (hereinafter referred to as “Prudential Guidelines”).

34. It was the applicants' case that the provisions of the aforementioned statutes and Prudential Guidelines are broadly in line with the "**Basel Committee on Banking Supervision – Core Principles for Effective Banking Supervision – September 2012**" (hereinafter referred to as "Basel Principles") which Principles are the international standard for bank regulation and supervision. The said principles, it was submitted state that "*the core principles are a framework of minimum standards for sound supervisory practices and are considered universally applicable*" and that they are used by countries as a benchmark for assessing the quality of their supervisory systems and for identifying future work to achieve a baseline level of sound supervisory practices. The same principles are also used by the International Monetary Fund and the World Bank to assess the effectiveness of countries' banking supervisory systems and practices.

35. It was submitted that though there are 29 core principles set out in the Basel Principles, for present purposes the most relevant principles are Principles 8 to 11.

36. The Applicants also referred to the **Basel Committee on Banking Supervision – Guidelines for identifying and dealing with weak banks – July 2015** (hereinafter referred to as "**Basel Guidelines**") with regard, in particular, to contingency and recovery planning and corrective action (paragraphs 94-115) and in particular paragraph 137 of thereof regarding the formulating of a plan of corrective action which states that:

***A key factor in determining whether the action plan will be successful is the commitment of the board of directors, and ultimately of the major shareholders, of the bank. It is important for the supervisor to establish an open and frank dialogue with the board, particularly the major shareholders, so as to secure their commitment to the bank, including the possibility of promptly injecting new capital or finding new shareholders.***

37. It was therefore submitted that the **Basel Principles** envisage a significant degree of cooperation and interaction between the supervisor and the bank, for resolution and that this is an important function and guidance for any regulator. It was the applicants' case that the CBK/PG 21 of the **Prudential Guidelines** provides for corrective action that is prompt. However, the exclusion and transfer process and/or consequential liquidation of the Bank is not the corrective action contemplated under the **Prudential Guidelines**, in a case such as this where the Applicants have provided a viable option for reopening of the Bank. According to the Applicants, it is clear from the foregoing, that the provisions of the **Prudential Guidelines** follow the **Basel Principles** and show not only the powers of CBK, but explain the purpose of the provisions and provides for interaction with the Bank to resolve problems.

38. The Applicants therefore submitted that the broad cooperation processes as provided in respect of general supervision and monitoring as set out in the **Prudential Guidelines**, particularly, in respect of recovery plans and internal monitoring and governance, and as equally shown by the **Basel Principles** should equally apply following the appointment of a Receiver, to ascertain all relevant facts from all relevant parties and to assess all potential outcomes. Such cooperation would further the general principles of bank regulation, namely protection of the banking system and bank customers. However, failure to fully engage the Applicants in relation to their Recovery Plan and the possible reopening of the Bank is prejudicial to the general principles of bank regulation and counter-productive in seeking resolution of challenging Bank situations such as receiverships.

39. It was therefore the Applicants' case that the Respondents were by reason of both local law, guidelines as well as international best practice, obliged to:

- a. fully consider the Applicants' Plan and the Revised Plan and to assess their relative viability; and in any event
- b. engage with the Applicants regarding the content and viability of the Plan and Revised Plan.

40. The Applicants' case was that section 52(1) of the **KDIC Act** creates a specific remedy for parties disaffected by the Corporation's exercise of its powers and that the power afforded to the court is broad

and permits it to make any “*order which it considers appropriate*”. Axiomatically, the existence of a statutory review mechanism of the Corporation’s conduct and exercise of its powers means that the conduct and exercise of its powers must at all times be fair, reasonable and comply with the obligations set out in the Constitution and other applicable local and international regulatory frameworks.

41. However, in view of the failure of the Respondents to engage properly with the Applicants with regard to the Plan and the Revised Plan, the request in the Application that the proposed transfer to the First and Second Interested Parties be suspended is fair, reasonable and in keeping with international best practice and for the above reasons, the Applicants prayed that it is fair and just that the orders of prohibition as set out in prayers 1, 2 and 3 of the Application be granted.

42. With respect to the prayer for certiorari, the Applicants sought to bring into the court and quash, CBK’s action and/or decision contained in the Press Release dated 2<sup>nd</sup> December 2015 and by which decision the Respondents commenced a transfer and exclusion process to the benefit of the Interested Parties. While reiterating the foregoing submissions, the Applicants, based on **Misc. Civ Appli 1638 of 2004 - Total Kenya Limited vs. Permanent Secretary, Ministry of Energy & 14 others [2006] eKLR** submitted that:

**“an order of Certiorari lies to quash a decision of an authority or body which has been made either without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”.**

43. The Applicants also relied on **J.R. Miscellaneous Civil Application 289 of 2014 - Republic vs. Public Procurement & Administrative Review Board Exparte MFI Leasing Limited [2012] eKLR**, where the court stated *inter alia*, that:

**“I have previously set out the considerations to be taken into account when granting an order of certiorari, in the case of Paul Kiplagat Birgen & 25 Others vs. Interim Independent Electoral Commission & 2 others [2011] eKLR:**

**“Certiorari issues to quash a decision which is ultra vires. Certiorari is also concerned with the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed... Judicial review must be accurately focused upon the actual exercise of a legal power and not upon mere preliminaries. The concern of certiorari is about a decision whether or not made under a legal power or a legal authority”.**

44. To the Applicants an order of certiorari will issue on grounds of procedural errors or illegality. See **Petition 23 & 25 of 2013 John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 Others [2013] eKLR**. Illegality might also consist of using powers in a manner totally different from that envisaged. See **Attorney-General vs. Fulham Corporation [1921] 1 ch. 440** as cited in **John Kipng'eno Koech** (supra).

45. It was submitted that to the extent that the Respondents have commenced an exclusion and transfer process to the benefit of the Interested Parties, they have violated the Applicants’ rights to fair administrative action and also demonstrated bias in their entire decision making process. According to the Applicants, this court has power, by virtue of section 7(2)(a)(iv) of the *FAA Act* to review an administrative decision if “*the person who made the decision was biased or may reasonably be suspected of bias*”. In this respect the Applicants relied on the holding in **Porter and Weeks vs. Magill (House of Lords) [2001] UKHL 67** to the effect that:

**“In assessing whether there had been bias, the court should take all relevant circumstances into account: The ultimate question is whether the proceedings in question were and were seen to be fair”.**

46. The court was urged to look at the issue of bias through the eyes of a reasonable man and ascertain the relevant circumstances from the available evidence. The test is in terms of real danger rather than real

likelihood of bias, to ensure that the court is thinking of possibility rather than probability of bias. It was submitted that this test was elucidated further in the case of **Glencot Development and Design Co. Ltd vs. Ben Barrett & Son (Contractors) Ltd** Reference: HT 00/401 where the High Court of Justice, Queen's Bench Division held that in considering the circumstances of the case the test is whether a fair-minded and informed observer can conclude that there was a real possibility or danger that the Adjudicator was biased. See also **Lawal vs. Northern Spirit Limited [2004] 1 All ER 187**; **Regina vs. Gough [1993] 2 All ER 727**; **Glencot Development and Design Co. Ltd vs. Ben Barret & Sons Contractors Limited QBD Case No. HT 00/401**; and **Re Pinochet [1998] [1999] HL**.

47. It is submitted that the Respondents, in making the various injudicious and unfounded remarks regarding the conduct of the Applicants, and in treating them in the manner they have as being culpable in the fraud perpetrated against the Bank, and denying them vital information whilst giving it to the Interested Parties, have exhibited bias as against the Applicants and their resultant administrative action should be viewed against this background of bias in the standard articulated herein above.

48. With respect to the prayer for *mandamus*, by prayers 5, 6 and 7, the Applicants seek orders directed at the Respondents compelling them to *inter alia*, give the Applicants access to the information, documents and/or data relating to the Bank; information relating to the arrangements entered into with the Interested Parties as captured in the Press Release of 2<sup>nd</sup> December 2015; and to compel the Respondents to formally engage with *inter alia*, the Applicants with a view to finding a workable legal framework for the re-opening of the Bank. To support their case, the applicants relied on **Petition No. 278 of 2011 - Nairobi Law Monthly Company Ltd & Others vs. Kenya Electricity Generating Company & Others**.

49. The Applicants contended that the Respondents unlawfully, unfairly and unprocedurally barred the Applicants from accessing the Bank's books of accounts and other documents for the purposes of determining the Bank's financial position, thus disabling the Applicants from meaningfully participating in the restructuring of the Bank. Accordingly the Applicants were particularly aggrieved by the fact that whilst the Respondents denied them access to the necessary Bank's information and records, the Respondents granted access to this information to third parties, such as the Interested Parties, yet as the shareholders of the Bank, it is crucial that the Applicants have access to this information as they are the primary investors in the Bank's business.

50. To the applicants, it is clear that the Interested Parties, have been given access to the Bank's information, based on their agreement to participate in the dealing with the assets and liabilities of the Bank, even though the Applicants' interest in effecting a rescue of the Bank *vide* the Applicants' Recovery Plan had been well documented for the Respondents, by the Applicants. According to them, allowing the third parties access to this information to the exclusion of the Applicants is a clear violation of the Applicants' rights to fair and unbiased administrative action as well as the guarantees in the Constitution, against discrimination of any form or kind. However, the respondents knew and/or ought to have known that this information on the Bank's position as contained in various data, documents and information which the Applicants have been denied access to, would be required by the Applicants in order to commence the required due diligence for the restructuring and recapitalisation process.

51. As a consequence, the Applicants have been seriously impeded in taking such steps as would be necessary toward eventual reopening of the Bank, a situation that is now being exploited by the 1<sup>st</sup> Respondent to cast the Applicants as uncooperative and obstructive of the reopening process.

52. As regards the declaratory orders sought, the Applicants by prayers 9, 10, 11, 12 and 13 of the Application sought to have various declarations made in respect of the conduct of the Respondents and their administrative action concerning the Bank and it was submitted that the court has power by virtue of section 11(2)(b) of the *FAA Act* to grant the declaratory orders. In this respect the applicants relied on **Nicholas Njeru vs. Attorney General & 8 others [2013] eKLR** where it was held that "...the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words"

53. With respect to the claim for monetary/pecuniary compensation, it was held that the court has the power, pursuant to section 11(1)(j) of the *FAA Act*, to make such an award for pecuniary compensation.

The applicants' case was that they have, by reason of the closure of the Bank since October 2015, suffered and continue to suffer, huge financial losses which would have been avoided or otherwise mitigated, had the Respondents taken the time to consult and engage with the Applicants on their Recovery Plan and the feasibility thereof.

54. Quite apart from being in violation of the **FAA Act**, it was contended that the conduct of the Respondents constitutes a contravention of the Applicants' Constitutional rights as enshrined in Articles 47, 50, 27, 35 and 40 of the Constitution and this Court was urged to so find. To the applicants, the **FAA Act** is specifically aimed at expanding the traditional judicial review remedies available to aggrieved persons, and expand them to include other considerations such as violations of the Constitution and in support of this position, the applicants relied on **JR Misc. Civil Application No. 333 of 2014 - David Ndolo Ngiali & 2 Others vs. Director, Directorate of Criminal Investigations & 4 Others [2015] eKLR** where it was held that:

**“Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the Fair Administrative Action, Act, 2015”.**

55. It was submitted that Article 47 of the Constitution guarantees the Applicants the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and reliance was placed on **Geothermal Development Company Limited vs. Attorney General & Others**. (supra) to the effect that:

**“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law ... but is to be measured against the standards established by the Constitution...the Common law in its evolution has defined the rules of conduct for a public authority taking a public decision, entrusting the overall control-jurisdiction in the hands of the Courts of law; but for Kenya a general competence of the Courts is now no longer confined to the terms of Statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya, 2010, Article 47 which imposes a duty of fair administrative action and Article 10(2)(c) demands, “good governance, integrity, transparency and accountability”**

56. In the applicants' view, the Respondents have in their handling of the matters surrounding the Bank, contravened Article 47 of the Constitution, in that:

- a. they have demanded without justification or explanation, that the Applicants put into the bank at least Kshs 20 billion yet they have failed to give any response to the Applicants' Recovery Plan which would include a voluntary investment of Kshs 10 billion by the Applicants;
- b. they have entered into agreements with the Interested Parties whilst no consideration had been given to the Applicants' Recovery plan; and
- c. the 1<sup>st</sup> Respondent has engaged in several other violations of Article 47 which when taken as a whole further demonstrate bias, unreasonableness and procedural unfairness on the part of the Respondents.

57. As set out above, in the various meetings between the Applicants and the Respondents, the Respondents verbally indicated that they required the Applicants to put into the Bank at least Kshs 20 billion, and not the Kshs 10 billion the Applicants had voluntarily offered to capitalize the Bank, to enable it to re-open.

58. It was submitted that in clear disregard of the spirit of Article 47 of the Constitution, the Applicants were not consulted prior to the demand for Kshs 20 billion and that this violation is further compounded

by the fact that there is no obligation in law for the Applicants who are shareholders of a limited liability company, to be compelled to inject additional funds into a company above the amounts paid-up or agreed to be paid-up for their ordinary shares in the company in this case the Bank.

59. However, whilst the Applicants' Recovery Plan was pending before the Respondents, the Respondents entered into agreements with the Interested Parties, for the purposes of what can only be described as a process by which the Interested Parties would acquire the Bank's assets, on unknown terms. However, it was unreasonable and procedurally unfair for the Respondents to engage the Interested Parties whilst the Applicants' Recovery Plan had not even been considered by the Respondents.

60. The Respondents' violation of Article 47 is further compounded by the fact that it is clear from the 1<sup>st</sup> Respondent's Press Release of 2<sup>nd</sup> December 2015 that the Respondents relied on the Applicants' Recovery Plan in so far as the immediate pay-out is concerned and the carrying out of a due diligence on the Bank's books. It was averred that the 1<sup>st</sup> Respondent has further breached the Applicants' Constitutionally-guaranteed right to an expeditious, efficient, lawful and procedurally fair administrative process as is evident from the following, amongst other, unlawful acts against the Applicants:

- a. insisting that the Applicants approach the persons behind W.E. Tilley for recovery of monies on the basis that they are members of the same community as the Applicants and despite the 2<sup>nd</sup> Respondent having initiated legal proceedings against W.E. Tilley which would render any shareholder dialogue with W.E. Tilley meaningless, improper, and potentially harmful to the recovery efforts;
- b. pressurising the Applicants to provide security for advances made by the Bank of up to Kshs 10 billion that were a part of the monies fraudulently misappropriated by W.E. Tilley, Jade Petroleum Limited and Adra International Limited and others, despite the Applicants informing the 1<sup>st</sup> Respondent verbally, and through their letter dated 12<sup>th</sup> November, 2015, that the aforesaid companies are in no way related to any of the Applicants;
- c. warning the Applicants against engaging with the media, but at the same time using the media to run a prejudicial campaign against the Applicants;
- d. despite repeated requests from the Applicants to communicate with all depositors, staff and stakeholders, warning the Applicants not to communicate with them, thereby propagating a feeling of mistrust among the stakeholders and diminishing the confidence in the Bank, and undermining the credibility of the Applicants and their commitment towards reopening the Bank;
- e. at the meeting held on 11th November, 2015 instructing the Applicants to engage with certain substantial depositors to encourage them to enter into a voluntary conversion of deposits and then publicly disowning such an initiative through various press channels;
- f. failing to subject the 1<sup>st</sup> Respondent's own staff to any form of scrutiny or accountability in view of the supervisory roles that the 1<sup>st</sup> Respondent had over the Bank and its duties in this regard to all stakeholders in the Bank, including the Applicants;
- g. refusing to engage with the Applicants' technical advisers/Steering Committee that had been appointed by the Applicants to work with the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent to finalise and implement the Applicants' Recovery Plan that was formulated and presented to the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent by the Applicants;
- h. ejecting the Applicants' legal representatives from key discussions held at the 1<sup>st</sup> Respondent whilst the 1<sup>st</sup> Respondent's own legal representatives were allowed to sit in and continue with the discussions;

i. making misleading comments/promises around the re-opening of the Bank, resulting in loss of confidence and credibility in the Applicants;

j. failing to protect shareholders' and depositors' rights in allowing complicit staff free access to the Bank's highly sensitive and confidential data, and information, which the Applicants' fear may have been passed to unauthorised third parties to the detriment of the Bank; and

k. failing to consider, act and/or take into account the findings in the forensic audit report by FTI Consulting dated 12th October, 2015.

61. The above administrative actions, failures or omissions by the Respondents, it was submitted strongly suggest that at all material times there was no intention on the Respondents' part to reopen the Bank, with consequent blame being placed on the Applicants. It was contended that upon receipt of the FTI Consulting report from the Applicants, and bearing in mind the damning facts raised therein including the apparent involvement of its staff in the fraudulent transactions undertaken by the Former GMD, the 1<sup>st</sup> Respondent was, in the spirit of Article 47 of the Constitution, under an obligation to, at the very least, cause an inspection and/or independent forensic audit to be done of the Bank's books, accounts and records. However, despite the interim report by FTI Consulting showing who the real perpetrators were, the Respondents have only taken action against W.E. Tilley Limited (*vide* HCC 522 of 2015 Imperial Bank Limited (in receivership) versus W.E. Tilley Limited and 19 others) but have failed to take steps to recover from other named culprits in the scheme, who include **Adra International Limited** and **Jade Petroleum Limited**. It was therefore the applicants' belief that the 1<sup>st</sup> Respondent, and its appointee the 2<sup>nd</sup> Respondent, are bent on the Bank's eventual closure, with the net effect that these misdeeds will never actually be unravelled by those actually affected by it, the Applicants herein, the depositors, bondholders, creditors, employees and other stakeholders in the Bank.

62. To the applicants, the foregoing clearly demonstrate that the 1<sup>st</sup> Respondent, and its appointee the 2<sup>nd</sup> Respondent, have failed in their duty to the Applicants to apply their regulatory and statutory powers, and to conduct the affairs of the Bank since the receivership in a procedurally fair administrative manner that is expeditious, efficient, lawful, open, impartial, objective and non-partisan, to the grave detriment of the Applicants. This has been done in violation of Article 47 of the Constitution which entitles every person to, "administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair" as read with section 4(1) of the **FAA Act** to act lawfully, to be reasonable and procedurally fair. See **Petition No. 352 of 2015 Geothermal Development Company Limited vs. Attorney General & Others.**

63. It was the applicants' case that the collective acts and omissions of the Respondents make it clear that the Applicants have been treated by the Respondents as guilty persons and adjudged as such, as concerns the illegal disbursements made from the Bank by the Former GMD and his accomplices and that this, the Respondents did, without any irrefutable evidence that the Applicants were involved in, those illegal disbursements and that this is contrary to Article 50(2)(a) of the Constitution. As an example the applicants cited their treatment as guilty persons as demonstrated by the manner in which the Respondents directed the actions of the Banking Fraud Investigations Department ("**BFID**") as more particularly set out in the Verifying Affidavit. In particular on 22<sup>nd</sup> of November 2015, the day after the Bank Directors had been to BFID, the 1<sup>st</sup> Respondent falsely issued a press statement indicating that the Applicants were stalling the process of re-opening the Bank. In addition, it was incorrectly reported that the Applicants were, as a pre-condition of injecting more capital into the Bank, insisting on not being charged for any criminal offence. According to the applicants, in none of the meetings the Applicants have had with 1<sup>st</sup> and 2<sup>nd</sup> Respondents, or in any forum, has the question of the criminal culpability on the part of any individual director, or collectively as a Board ever arisen, been broached or discussed in connection with the proposed capital injection, into the Bank as alleged.

64. In the applicants' view, Bank Directors being summoned to the BFID offices on 21<sup>st</sup> November 2015 in full view of the press, and the recording of their statements under inquiry was all meant to lend credence to the aforesaid press release. In their view, the touting of criminal proceedings against the Bank Directors was meant to exert pressure on the shareholders of the Bank to accede to the 1<sup>st</sup> Respondent's

unreasonable demand for the shareholder to inject Kshs 20 billion into the Bank. Further, that the same was meant to cause disaffection amongst the depositors and other stakeholders against the Applicants herein. It was averred that in treating the Applicants as guilty persons as set out above, the Respondents have acted contrary to Article 50 of the Constitution, yet the Applicants herein have not been involved in, nor were they aware of, the frauds perpetrated against the Bank. Quite apart from the fact that the Respondents have not put forward any evidence to show that the contrary is true, no court of law has found that the Applicants are guilty.

65. It was disclosed that as late as the day before the 2<sup>nd</sup> Respondent was appointed as receiver manager, some Applicants by themselves, or their related entities, had been making deposits and payments into their accounts held at the Bank. Furthermore, the Applicants, their families, and their related companies currently maintain substantial deposits in the Bank.

66. It was submitted on behalf of the applicants that to the extent that they have been denied access to the data, information and/or documents concerning the Bank whilst access has been given to other third parties including the Interested Parties, the applicants have been discriminated against by the Respondents and have been treated in an biased and unequal manner, contrary to Article 27 of the Constitution. In so doing, the Respondents have also violated the Applicants' right to information guaranteed under Article 35 of the Constitution.

67. The applicants' case was that by reason of being shareholders of the Bank, it is in the Applicants' direct proprietary interest that the Bank be restructured and reopened and that the monies misappropriated fully recovered so that all depositors and other creditors are all made-good. However, in total abrogation of the Applicants' Constitutional rights to their property as enshrined in Article 40 of the Constitution, the Respondents have, using the methods of blame, innuendo of culpability, discrimination and bias, refusal of access to information and commencing a process of exclusion and transfer, denied the Applicants the right, through the Applicants' Recovery Plan, to restore the value of their property in the Bank, and at the same time impaired the prospects of recovery for the Bank's depositors and other creditors.

68. In deciding the fate of the Bank both the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent are enjoined by section 4(3) of the *FAA Act* to take into account the proprietary interests of the Applicants, and to ensure that as they discharge their Constitutional and statutory functions, they do not irregularly and illegally deprive the Applicants herein of the right to their shareholding. In support of this position the applicants relied on **Kadilo Mtwana & 78 Others v Chairman Amalgamated Union of Kenya Metal Workers Cause No.187 of 2013** and **Cooper vs. The Board of Works for the Wandsworth District; 21 Apr 1863.**

69. To the applicants, by reason of the matters set out in the Statutory Statement, Verifying Affidavit and these submissions, it is clear that the Respondents have engaged in conduct that violates various Constitutional provisions and requirements that govern and guide their conduct and to which they are bound, including the following:

- a. Article 10 of the Constitution which enjoins the Respondents to adhere to and apply the national values and principles of governance which include good governance, integrity, transparency and accountability.
- b. The Respondents are enjoined by Article 232 of the Constitution to *inter alia*; act with high standards of professional ethics, be accountable for their administrative acts and be transparent in their provision to the public of timely and accurate information.

70. The applicants further submitted that the totality of the Respondents' administrative action is unreasonable and based on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] 2 All ER 68** and **Council of Civil Service Unions vs. Minister for the Civil Service [1983] UKHL 6; Judicial Review 92 of 2011 - Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR** and **J.R. Misc. Application No.137 of 2015; JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd; Pride Enterprises vs. Public Procurement Administrative Review**

**Board & 2 Others [2015] eKLR; Pastoli vs. Kabale District Local Government Council & Others [2008] 2 EA 300**, submitted that to have the right to intervene, the court would have to conclude that:

- a. in making the decision, the respondent took into account factors that ought not to have been taken into account, or
- b. the respondent failed to take into account factors that ought to have been taken into account, or
- c. the decision was so unreasonable that no reasonable authority would ever consider imposing it.

71. The case of **Misc. Appli. No. 30 of 2007 Republic v Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwathi and Another [2008] eKLR** was cited as an authority for the proposition that judicial review orders are available where the decision is irrational and unreasonable.

72. In addition, the Respondents administrative action, it was contended was unreasonable contrary to section 4(1) and 7(2)(k) of the **FAA Act**.

73. In summary therefore the applicants contended that the Respondents violated several principles of administrative action as well as provisions of the **FAA Act** and the Constitution, in their conduct since the placement of a receiver over the Bank; the Respondents also failed to uphold International Best Practice, in their management of the affairs of the Bank; the manner in which the Respondents are managing the affairs of the Bank has adversely affected and will continue to adversely affect the Applicants unless this Court intervenes by way of the Orders sought; and that also adversely affected are the Bank's other depositors, creditors, bondholders the Banking and financial Sector and the Countries economy at large.

74. It was therefore the applicants' position that by reason of all of the breaches and violations of all of their Constitutional rights herein they have suffered and shall continue to suffer losses by way of damages which losses give rise to claims for, *inter alia*, general, aggravated and punitive damages as against the Respondents hence the application is ripe for the granting of the orders of prohibition, certiorari and mandamus, as well as the declarations sought.

### **1<sup>st</sup> Respondent's Case**

75. According to the 1<sup>st</sup> Respondent (herein referred to as the CBK), the principal objects for which it is constituted are to formulate and implement monetary policy and foster the liquidity solvency and proper functioning of a stable market based financial system licence and supervise banks and implement policies to promote and establish efficient payment, clearing and settlement systems. As part of its mandate to regulate the financial sector the 1<sup>st</sup> Respondent is mandated under Section 32 of the **Banking Act** Chapter 488 Laws of Kenya to carry out regular inspection of institutions licenced 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.

76. It was disclosed that the inspection is undertaken by the 1<sup>st</sup> Respondent once a year and based *inter alia* on the information provided by the management appointed and supervised by the board of directors. However, the inspection is not intended to replace the statutory audit undertaken by the financial institutions auditors. Consequently the 1<sup>st</sup> 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. It was therefore the 1<sup>st</sup> Respondent's case that it cannot always prevent the failure of financial institutions and by extension the interest of depositors since 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.

77. According to the 1<sup>st</sup> Respondent, following discovery of extensive fraudulent transactions within Imperial Bank Limited (In receivership) the 1<sup>st</sup> Respondent exercised its powers under section 34(2)(b) of

the **Banking Act** and section 43 and 53(i) of **Kenya Deposit Insurance Act 2012** and appointed the 2<sup>nd</sup> Respondent to assume the management and control of the said Bank for a period of twelve (12) months. According to CBK section 34(1) of the **Banking Act** empowers it to intervene pursuant to the provision of section 34(2) of the **Banking Act** in the management of an institution if it discovers or becomes aware of any fact or circumstances which in the opinion of the 1<sup>st</sup> Respondent, warrants the exercise of the relevant power in the interests of the institution and creditors.

78. It was contended that by virtue of section 45(1), (2) of the **Kenya Deposit Insurance Act** as a consequence of the appointment of the receiver the functions of board of directors of the Bank stands suspended and are vested in the 2<sup>nd</sup> Respondent as an agent of the institution hence reference to directors or board of directors of the Bank means the directors as at the date of appointment of the receiver. It was contended that the board of directors of the Bank brought to the attention of CBK the inappropriate banking practices being carried out by the Bank that warranted immediate remedial action. These concerns arose as a result of both internal investigations and those carried out by a consultant hired by the Bank FTI Consulting LLP (FTI) to carry out limited investigations into alleged fraud which the directors stated had come to their attention following the death of the Group Managing Director **Abdulmalek Janmohamed**. CBK disclosed that as at the date the 2<sup>nd</sup> Respondent Corporation was appointed the Receiver of the Bank the banks directors were:-

- Alnashir Popat (Chairman);
- Abdulmalek Janmohamed (deceased);
- Anwar Hajee (Non-executive Director);
- Jinit Shah (Non-executive Director);
- Hanif Mohamed Amirali Somji (Non-executive Director);
- Mukesh Kumar Patel (Non-executive Director);
- Vishnu Dhutia (Non-executive Director);
- Eric Gitonga (Independent Non-Executive Director) and;
- Omurembe Iyadi (Independent Non-Executive Director).

79. The applicants were accused of having conveniently omitted to disclose in their affidavits the constitution of the board of directors of Imperial Bank Limited (In receivership) which board was ultimately responsible for the financial affairs of the Bank and that the directors had an interest in entities that held shares in the Bank and in the circumstances, the interest of the directors and shareholders were intimately interlinked and the shareholders were therefore at all times aware of the affairs of the Bank by virtue of being privy of decisions of the board of directors.

80. CBK emphasised that the Applicants did not contend that the appointment of the receiver was irregular having conceded in their pleadings the existence of fraudulent transactions resulting in a total loss of Kshs.38 Billion. According to CBK, FTI Consulting Investigation report exhibited by the Applicants was a preliminary report and that the Corporation with the knowledge of CBK appointed FTI Consulting in December 2015 to carry out a thorough forensic review and audit of the affairs of the Bank which audit is still ongoing. This audit is complemented by concurrent investigations by Banking Fraud Investigations Department and the Ethics and Anti-corruption Commission with a view to determining with whom rest the culpability for the massive fraud.

81. It was averred that prior to and after the receivership of the Bank CBK and the Applicants representatives held several consultative meetings but the Applicants were not in a position to raise the

capital shortfall required to re-open the bank within the required timeframe as they stated that they needed to partner with unidentified investors who required to undertake due diligence and have access to the Bank's books of accounts which books were subject of forensic audit. In the meetings held and as part of the revival plan put forward by the directors of the Bank to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with a view to bridging the liquidity gap was a promise to obtain collateral security to cover part of the exposure due from W.E. Tilley (Muthaiga) Ltd who were according to the books of the Bank indebted in the sum of Kshs.34Billion. To this end the directors produced a letter addressed to the Bank dated 10<sup>th</sup> October 2015 purporting to be an undertaking from W.E. Tilley (Muthaiga) Ltd. to collateralize Kshs.10Billion of the outstanding debt. However, CBK learnt that this letter was intended to mislead CBK and in its Defence dated 15<sup>th</sup> February 2016 and filed in HCCC No 522 of 2015 - **Imperial Bank Ltd (In Receivership) - Vs- W.E. Tilley (Muthaiga) Ltd & 19 Others**, at paragraph 41, W.E. Tilley (Muthaiga) Ltd pleads as follows:-

***41. ....the letter was only written upon representation of the Plaintiff's directors to the 1<sup>ST</sup> Defendant that it was intended as a "letter of comfort" to pacify the Central Bank of Kenya who were conducting in-depth investigations of the Plaintiff's operations. It was stated to the 1<sup>ST</sup> Defendant's directors that the Central Bank would otherwise close down the Plaintiff's operations.***

***42. It was only upon the representation and assurance of the 1<sup>ST</sup> Defendant's directors that the letter of comfort was not intended to have any binding effect whatsoever that the 1<sup>ST</sup> Defendant in reliance thereto wrote the letter.***

***In fact the Plaintiff's directors representation was false and fraudulent as the Plaintiff knew:-***

***i. That the letter to have a legal effect and was intended to found a cause of action against the 1<sup>ST</sup> Defendant;***

***ii. The Plaintiff's directors did not reveal to the 1<sup>ST</sup> Defendant that after the Death of Mr. Janmohammed, investigations reveal massive fraud allegedly perpetrated by the Plaintiff's directors.***

***iii. The Plaintiff's directors knew that the 1<sup>ST</sup> Defendant was not indebted to the Plaintiff for Kshs. 10 Billion.***

82. According to CBK, this demonstrates that the proposals put forward by the Applicants to CBK were not made in good faith and was merely intended to hoodwink CBK that the shortfall was not going to result in insolvency. It was CBK's case that the Applicants have been treated fairly, openly and in accordance with the rules of natural justice. According to CBK, the role of the board elected by the shareholders is to provide leadership within a framework of prudent and effective controls that enable risk to be assessed and managed while CBK issues regulations and guidelines pursuant to the **Banking Act** Chapter 488 with a view to providing *inter alia* the minimum standards required from shareholders, directors, chief executive officers, management and employees of a financial institution so as to promote proper standards of conduct and sound banking practice.

83. It was contended that the Prudential Guidelines issued by CBK provide in part that the board of directors are jointly and severally responsible for the effective supervision of the affairs of the institution and are responsible for formulating policies and procedures and are tasked to define the duties of management and appoint persons who are competent, qualified and experienced to administer the affairs of the institution effectively and soundly. The regulations further provide with respect to shareholders that shareholders shall protect, preserve and exercise supreme authority and ensure that the board of directors is held accountable and responsible for the efficient and effective governance of the financial institution. However, it is evident from this application that the Applicants have abdicated their role to hold the directors of the Bank whom they elected accountable for failure to ensure sound corporate governance principles and the specific requirement to ensure that management cultivates a culture of ethical conduct.

84. CBK's position was that a receiver appointed pursuant to the **Kenya Deposit Insurance Act** is not subject to the direction or supervision of any other entity and CBK cannot direct the Corporation but will support it as part of its wider mandate to ensure stability in the financial sector and it is with this objective in mind that CBK supported the decision of the Corporation to pay the depositors of the Bank up to Kshs.1,000,000.00 to help alleviate the suffering of the smaller depositors and restore some confidence in the banking sector keeping in mind that the payment to the depositors is consistent with one of the basic reasons for regulation in the financial sector and that is depositor protection.

85. With regards to the arrangements with the interested parties as stated in CBK's press release dated 2<sup>nd</sup> December 2015, it was averred that pending the ongoing forensic investigations the Corporation had not commenced a transfer and exclusion process and the interested parties had not been accorded access to the Bank. It was therefore CBK's case that the present application is intended by the Applicants to terminate the statutory receivership with a view to further:-

- a. Ousting clear statutory legal provisions of the **Banking Act** and **Kenya Deposit Insurance Act**.
- b. Forestalling the ongoing forensic audit and criminal investigations and therefore protect any officials of the Applicants and who may be found culpable in the very extensive fraudulent transactions within the Bank.
- c. Seeking to take over the management of the Bank notwithstanding the statutory protected rights of the depositors and creditors to have the receiver conduct the affairs of the bank.

86. It was therefore contended that the orders sought would leave the Bank at the control of Applicants who are themselves under investigations and consequently without a statutory custodian for the protection of the creditors and depositors as intended by the law.

87. These issues were highlighted by **Mr Chege**, learned counsel for the 1<sup>st</sup> Respondent in his submissions.

## **2<sup>nd</sup> Respondent's Case**

88. According to the 2<sup>nd</sup> Respondent herein, the **Kenya Deposit Insurance Corporation** (hereinafter referred to as "the Corporation"), the instant suit is a blatant attempt to stop the forensic investigation into the admitted grand theft of Kshs. 38 billion in order to ensure that both the extent of the fraud and its perpetrators will never be known, and hence an abuse of this Honourable Courts process and that the request for documents is calculated by the Applicants to establish the nature, extent and progression of the ongoing investigations.

89. According to the Corporation, it is not under any law or at all, obliged to accept any recovery plan from the Applicants, or the board of directors, that further jeopardizes the interest of the depositors and creditors of the Bank and that it is empowered by law under sections 45(3)(a), and 50(1)(a), as read with section 2 of Cap 487C to exclude and transfer the assets of a problem institution, and it is not required to notify or obtain the approval of shareholders or creditors of the institution in a general meeting or otherwise notwithstanding any rule of law, contract or anything in any law including the **Companies Act** or anything in the constituent documents of the institution.

90. The Corporation deposed that the Bank was licensed under the **Banking Act** in 1992 as a Non-Bank Financial Institution under the name **Imperial Finance and Securities Limited**, and 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. It was disclosed that the Bank's shareholders and board of directors are all seasoned business men who run their own companies, and who fully recognize and appreciate the need for governance structures in a company, checks and balances, audits and accountability.

91. It was averred that PKF Kenya was appointed by the board of directors and remained the auditors to the Bank since inception of the Bank and it is well known to the Applicants as seasoned businessmen that PKF Kenya as auditors are required by law and professional standards that govern the conduct of auditors to be independent of all clients over whom they conduct audits. However, in order to compromise the said auditors, and prevent them from rendering accurate audits, and conceal the monumental fraud the Applicants through the board of directors approved a massive loan at a concessionary interest to the partners of PKF Kenya, trading as East Africa Property Holdings (K) Limited and that at the point of receivership, East Africa Property Holdings (K) Ltd was listed as number 16 in the list of “Top 50 Borrowers”, with an exposure to the Bank of Kshs. 371,283,849.32 and that the available evidence revealed that an interest rate of 19% was agreed with PKF in relation to a three month deposit being placed by East Africa Property Holdings (K) Ltd.

92. It was averred that from the formation of the Bank in 1992, the late Abdulmalek Janmohamed was appointed and served as the Bank’s Group Managing Director (GMD) until 15<sup>th</sup> September, 2015, when he unexpectedly passed away following an alleged heart attack though the circumstances surrounding the death had not been disclosed by the Applicants. The directors of the Bank allege that they thereafter appointed **Mr. Naeem Shah** and **Mr. James Kaburu** the principal officers used to effect the fraud, as Acting Managing Director and Deputy Managing Director respectively, in the full knowledge that the two were responsible for the fraudulent activities in the Bank, and would continue to suppress and cover up the fraud within the Bank.

93. According to the Corporation, the admitted massive fraud of approximately Kshs. 38 billion committed at the Bank was first brought to the attention of the Central Bank of Kenya (CBK) by way of a letter dated 12<sup>th</sup> October 2015, addressed to the Governor CBK, from **Alnasir Popat**, Chairman, for and on behalf of the board of the Bank disclosed that FTI had presented to the board a preliminary interim report, which disclosed the existence of fraudulent transactions resulting in a total loss of approximately Kshs. 38 billion which included approximately Kshs. 20 billion of fraudulent disbursements and accrued interest thereon approximately 18 billion which amounts were not reflected in the financial statements as audited and as presented to the board. It was averred that the then admitted fraud of Kshs. 38 billion of depositors funds would render the Bank insolvent to the tune of Kshs. 28 billion and once confirmed independently by the 2<sup>nd</sup> Respondent, would expose the Bank to liquidation unless the amounts in question were immediately recovered from the alleged fraudsters, or an equivalent amount injected by the Applicants and that the amount / level of insolvency may further increase at the completion of the investigation.

94. According to the Corporation, despite the massive fraud of depositors funds, the directors in the letter dated 12<sup>th</sup> October 2015 requested the CBK to assist in protecting the “integrity of the bank” which integrity was by then totally nonexistent with the late GMD and the directors being presumed by law to be culpable. However the directors presented a hurriedly prepared preliminary forensic report dated 12<sup>th</sup> October 2015, by FTI Consulting, an international financial forensic investigation firm, based on limited information provided by the directors, in which they proposed, *inter alia*, that;

- a. CBK place IBL 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 IBL and CBK.

95. These proposals were, in the Corporation’s view designed to direct attention away from the non executive directors associated with the Applicants, 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. To the Corporation, an example which implicates the Applicants' representatives on the board of the Bank that requires to be investigated is with respect to the Tilley debacle discussed hereinabove. It was contended that in the recovery plan proposal put forward by the Applicants to CBK was supported by purported acknowledgements by W.E. Tilley dated 10<sup>th</sup> October 2015. However only exhaustive investigations by the Corporation will determine who between the Applicant's directors and W.E. Tilley is fraudulent.

96. It was averred that CBK after examining and rejecting directors proposals on 13<sup>th</sup> October, 2015, appointed the 2<sup>nd</sup> Respondent as the Receiver of the Bank 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, with **Mr. Peter Gatere** as the Bank's Receiver Manager who was later replaced by on 16<sup>th</sup> November 2015, and mandated pursuant to section 44(2) (b) of Cap 487C to inter alia assume control of the whole of the assets, liabilities and business affairs of the Bank and carry on the whole of the business of the Bank and managing its assets, liabilities and affairs.

97. To the Corporation, the appointment of a receiver over the Bank, following the unprecedented fraud, requires that its records cannot be accessed by the shareholders and directors whose accounts, actions and omissions are under investigation and that section 45(3) (a) of Cap 487C provides that during the period of control of an institution by the 2<sup>nd</sup> Respondent, no director of the institution shall, either directly or indirectly, engage in any activity in relation to the institution, except as may be required or authorized by the 2<sup>nd</sup> Respondent or the appointed person, as the case may be. Further, Section 51 of Cap 487C provides that the 2<sup>nd</sup> Respondent shall not be subject to the direction or supervision of any other entity in the exercise of the its rights, powers, and privileges.

98. It was the Corporation's view that the directors of the Bank are representatives and directors of the Applicants, and allowing them to either directly or indirectly, engage in any activity in relation to the institution, would be a criminal offence punishable under section 45(6) of Cap 487C and that by filling this suit in their own names, the Applicants are attempting to circumvent the provisions of section 45(3) (a) of Cap 487C, which specifically excludes the involvement of directors in the affairs of the Bank while under receivership. In addition, the directors of the Bank are well aware that they are not eligible to hold directorship of any banking institution under the provisions of section 8 of Cap 487C, which refers to the Schedule on the Provisions as to the Conduct of Schedule Business and Affairs of the Board as follows;

***No person shall be appointed or shall remain, as a member of the Board if such person is a director or chief executive officer or a manager of an institution which was placed under receivership or which was placed under liquidation.***

99. It was contended that section 45(2) of Cap 487C provides that throughout the period of control of an institution, there shall be vested in the 2<sup>nd</sup> Respondent or in the appointed person, as the case may be, all the powers of the institution, and of its directors, under the constituent documents of that institution, or exercisable by the institution or its directors under any law, regardless of whether such powers are exercisable by resolution, special resolution or in any other manner. Accordingly, the Applicants as shareholders and/or directors of the Bank have no role whatsoever to play in its management and or revival once it was placed under receivership, except as may be required or authorized by the 2<sup>nd</sup> Respondent or the appointed Receiver.

100. It was disclosed that initial preliminary investigations that were conducted by FTI, with the assistance of the Applicants and directors in the limited time, established that the fraudulent manipulation of the Bank accounts started as far back as 2003. The Corporation reiterated that CBK has a duty to ensure the stability and health of the financial sector in the country and that the purpose and spirit of Cap 487C, is to ensure that the banking public have complete faith and trust in licensed banks and financial institutions, and shall not be left destitute following the fraudulent actions of those in management and ownership, and are therefore duty bound to investigate every questionable transaction at the Bank. The Corporation averred that the Respondents, assisted by FTI, the Bank Fraud Investigations Department and the Ethics and Anti Corruption Commission, are currently undertaking forensic fraud investigations into

the activities of the shareholders, directors and management of IBL and 3<sup>rd</sup> parties, whoever they may be, with a view to taking the necessary action upon conclusion and that currently over 700 individual, corporate and institutional accounts were being investigated within the bank which work involved preliminary investigations on specific high priority accounts amount to 22,520 transactions and 60 members of the Bank staff were deployed in the go-downs on documents retrieval alone with the volume or quantity of data being investigated being 1.2 Terabytes (TB) requiring months to interrogate. It was disclosed that so far the forensic auditors, Banking Fraud Investigations Department, and the Ethics & Anti Corruption Commission were investigating the following categories of fraud, and suspected fraudulent conduct;

- a. Money Laundering
- b. Fraudulent False accounting
- c. Theft
- d. Bribery and corruption
- e. Fraudulent “Window dressing”
- f. Diversion of funds
- g. Breaches of fiduciary duties
- h. Breaches of the Companies Act
- i. Conflict of interest

101. The Corporation further revealed that the preliminary investigations by FTI in respect of specific alleged fraudulent false activities have unearthed the following;

- a. Significant round sum amounts being withdrawn apparently in cash,
- b. Entries identified as cash withdrawals and cash payments relating to transfers between accounts held with the Bank,
- c. Cash withdrawals which cannot be linked to the specific customer accounts,
- d. Credits to accounts which cannot be linked to deposits coming to term,
- e. Systematic manipulation of accounts to suppress and conceal loans and significant overdrawn balances,
- f. Deliberate manipulation of schedules presented to Regulatory Authorities;
- g. Significant transactions occurring on fictitious customer accounts,
- h. Favourable loans being created at 0% interest,
- i. Loans granted with apparently insufficient security,
- j. Accounts with overdrawn balances significantly in excess of agreed facilities and,
- k. Funds being received into IBL bank accounts over month end or quarter end periods, and then subsequently returned to source accounts with other banks.

102. While contending that at this stage the exact nature and interim results of the forensic audit could not be revealed as it would jeopardize the same, it was averred that there were also investigations of numerous accounts operated by the Applicants, directors and related parties, many of which would take time to audit and reconcile and that the deponent of the supporting affidavit, **Mr. Anwar Hajee**, was fully aware of, and benefitted from the fraudulent activities within the Bank.

103. To the Corporation, being the Bank's directors and shareholders, the Applicants owed the Bank fiduciary duties including but not limited to;

- a. Acting as trustees of such asset and property belonging to the Bank and its depositors as were placed under their care and control;
- b. Duty not to act for purposes collateral to the purposes contained in the **Banking Act**, the Prudential Guidelines, and the Bank's Memorandum and Articles of Association;
- c. A duty of fidelity to act in good faith, faithfully and in the best interest of the Bank, and account holders;
- d. A duty not to place themselves in a position in which their personal interests might or did conflict with those of IBL and account holders;
- e. A duty not to make any secret profit or receive any secret payment from any third party with whom they were dealing whether in their capacity as officials of the Bank or otherwise;
- f. A duty to account for any secret profit or secret payment.

104. In addition, pursuant to section 10 of the **Banking Act**, the Bank was prohibited from granting any advances, credit facilities, financial guarantees or other liabilities in excess of 25% of the bank's core capital while section 11 of the **Banking Act** prohibited, *inter alia*, the grant of advances, loans or other credit facilities which are unsecured and or grants of advances, loans or other credit facilities in a fraudulent or reckless manner or otherwise that in not only the principal Shareholders of the Applicants, but were also seasoned businessmen who frequently transacted with and borrowed from the Bank, either in their personal capacities or through their various other companies. It was emphasised that t the Chairman and directors of the Bank apart from **Mr. Omurembe Iyadi**, and **Mr. Eric Gitonga** are all the majority or significant shareholders of the Applicants and at the appropriate stage the Corporation intimated that it would apply for the lifting of the corporate veil to demonstrate that the Applicant companies, and many others, were merely for the use of the directors of the Bank, to perpetrate the wanton fraud at the bank.

105. It was revealed that **Mr. Eric Gitonga**, apart from being a director at the Bank, was the advocate of the majority shareholder of the Bank, the 1<sup>st</sup> *ex-parte* Applicant, represented on the board of the Bank by **Mr. Alnashir Popat**, the Chairman, and cannot therefore be described as independent. Since the Directors of the Bank conceded that they had regular board meetings, it was contended that they must have known the state, and financial health of the bank. The Court was urged to understand the relationship between the Applicants and the directors of the Bank, and the intentions of the said directors disguised as shareholders, particularly in light of;

- a. Section 8 of Cap 487C, which refers to the Schedule on the Provisions as to the Conduct of Schedule Business and Affairs of the Board which provides that no person shall be appointed or shall remain, as a member of the Board if such person is a director or chief executive officer or a manager of an institution which was placed under receivership or which was placed under liquidation.
- b. Part B of Cap 487C on Criteria For Determining Moral Suitability of Significant Shareholders Proposed to Manage or Control Institutions, and

c. Section 48(b) of the **Banking Act**, Cap 488 of the Laws of Kenya which provides that a person who is an officer of an institution shall cease to hold office and shall not thereafter be eligible to hold office in any institution if he is convicted of an offence involving dishonesty or fraud.

106. To the Corporation, the instant application is nothing but a red herring to direct blame for the manifest fraud at the Bank by its shareholders through its directors, on **Mr. Abdulmalek Janmohamed**, and divert attention from the Applicants' involvement in the fraud. It was averred that in a deliberate disregard, and in breach of the aforesaid fiduciary obligations and restrictions contained in the **Banking Act**, the Prudential Guidelines and the law, the Applicants in collusion with other senior officials of the Bank, whom they now allege were coerced, by unlawful means intended at injuring the Bank, conspired to defraud the Bank of billions of shillings and to conceal such fraud and proceeds of such fraud, and to the detriment of account holders and depositors. In the Corporation's view, this suit is a mechanism by the Bank's directors to create a smoke screen to distract the Respondents from finalizing investigations to determine the extent of their culpability and is also intended to delay the investigations undertaken, and due diligence to ascertain the level of irregularities and malpractices and determine the most appropriate resolution mechanism as fast as possible, at the detriment of the bank and the depositors' interest yet the Bank is currently insolvent to the tune of Kshs. 28 billion based on the preliminary findings by FTI and the directors' admissions, and in need of massive capitalization by the shareholders before any consideration of a strategic investor and any other options.

107. According to the Corporation, the proposals by the directors, all comprise conversion of deposits to equity and involvement of an unnamed strategic investor, all designed to ensure that the fraudsters keep the misappropriated money, and are not held to account for their fraudulent actions and further that deposit to equity conversion in the case of the Bank is a further burden to depositors whose deposits have been misappropriated, and no reasonable investor will invest in an institution with an admitted capital shortfall of 28 billion, resulting from fraud, without substantive shareholders capital injection.

108. The Corporation however asserted that at all material times it was CBK's intention to reopen the Bank, at the earliest opportunity, subject of course, to compliance with the CBK's requirements on recapitalization, for the stability of the institution and protection of the depositors interest as the regulator which recapitalization is meant to protect the Bank's financial stability and public interest.

109. According to the Corporation, section 2 of Cap 487C is clear that exclusion and transfer process means the process that commences when the 2<sup>nd</sup> Respondent is appointed receiver and or assumes control of a problem institution. However, the exclusion and transfer of the Bank's assets and liabilities under Cap 487C, will be subject to the outcome of the ongoing forensic investigations, and in compliance with the law.

110. It was clarified that the disbursement of deposits of up to Kshs. 1 million through the Interested Parties was informed by the knowledge that the over 40,000 of the Bank's customers who held such deposits require access to their money to sustain their daily needs and livelihoods hence the Interested Parties were simply disbursing agents, and were the only commercial banks willing to assist with the processing of the said disbursement. In any event, the disbursement of the said deposits of up to Kshs. 1 million was proposed in the recovery plan presented by the directors of the Bank, who represented the Applicants on the board of the Bank.

11. To the Corporation, the Applicants are aware that an institution being placed in receivership is a statutory process, governed by Cap 487C, and the Corporation is empowered to conduct its functions including exclusion and transfer without the approval of shareholders and directors since section 51 of Cap 487C on the autonomy of the 2<sup>nd</sup> Respondent as receiver provides that upon appointment as receiver pursuant to the Act, the 2<sup>nd</sup> Respondent shall not be subject to the direction or supervision of any other entity in the exercise of the 2<sup>nd</sup> Respondent's rights, powers, and privileges.

112. The Corporation was therefore of the view that these proceedings are misconceived since the prayers sought have the effect of stopping the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from unearthing the perpetrators of the

fraud at the Bank. Since the Applicants are mainly questioning the merits of the Respondents' decisions, the orders sought by the Applicants are therefore unavailable to them and this suit is nothing but pre-emptive, premature, and an abuse of the court process to perpetuate and cover up the manifest fraud, as investigations on the extent of fraud and perpetrators are currently ongoing. The Corporation asserted that while sitting on judicial review, this Honourable Court is concerned with whether due process has been followed and whether the Applicants were given an opportunity to be heard. According to it, the Respondents were not and are not obligated to concur with the Applicants' proposal, after giving them an opportunity to be heard, and was well within their mandate in making a meritorious decision after listening to, and due consideration of the said proposals, finding them inadequate. While the Applicants contend that they have not been accorded an opportunity to be heard, they proceed in the same breath and state at paragraphs 31, 32, 38, 40, 41, 43, 44, 45, 46, and 48 that they have on numerous dates held meetings with and have presented their proposals to the Respondents, either at the said meetings or by correspondence.

113. It was submitted by **Mr Murgor** for the 1<sup>st</sup> Respondent that the Applicants were given ample opportunity to be heard at each and every meeting, the 1<sup>st</sup> Respondent severally met with the Applicants to discuss the recapitalization of the Bank among other options, and the 1<sup>st</sup> Respondent thereafter invited the Applicants to inject a provisional sum of Kshs. 20 billion, arrived at based on the directors' own admissions of insolvency, but have failed to meet the requirement to recapitalize. To the Corporation, any other options can only be reasonably considered if the insolvency hole of 28 billion is filled and the directors were advised of the admitted capital shortfall but failed to comply. To date, the Applicants are yet to demonstrate the availability of the 10 billion they claim to be willing to deposit, or shown any good faith to enable meaningful discussion, if at all. In its view, it is important and a matter of public interest that the ongoing forensic audit and all necessary investigations be allowed to proceed to unearth the perpetrators of the fraud at the Bank, in order that they are held to account, and the orders sought by the Applicants, if granted would be detrimental to the said public interest.

114. In support of the submissions the Corporation relied *inter alia* on **R vs. Permanent Secretary Ministry of Local Government and Others ex parte Immaculate Transporters Limited and Others Nairobi HC Misc. Appl. No. 133 of 2008 (Unreported) [2008] eKLR, Jacob Juma vs. the Director of public Prosecutions & 8 Others High Court JR Petition No 652 of 2009, Cargo Distributors Limited and Director of Criminal Investigations, High Court Misc. Application No 39 of 2006 and David Njane Ruiyi & Another versus Republic, High Court Revision Case number 352 of 2009.**

### **1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> interested parties' case**

115. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> interested parties, through their learned counsel **Mr Ochieng Oduol** and **Mr Ohaga**, questioned the applicants' locus standi as shareholders to bring these proceedings. They submitted that the appointment of the receivers was meant to insulate the receivership process from unwarranted interference by directors hence these proceedings were meant to defeat the legislative intent.

116. To grant the orders sought herein, it was submitted would mount to defeating the legislative intent as well as public policy. Since what is being challenged is in accordance with the statute it was contended that the orders sought herein cannot issue.

### **3<sup>rd</sup> interested Party's Case**

117. According to the 3<sup>rd</sup> interested party herein, **Josephine Awino Kogweno**, pursuant to the Advocates (Accounts) Rules, she operated a client account at Imperial Bank Limited (In Receivership) and was therefore a customer of the Bank and a depositor at the said bank. She averred that on the 13<sup>th</sup> of October 2015, she learnt through the local media that Imperial Bank Limited had been placed under receivership and on the same day saw a notice from Central Bank of Kenya confirming that indeed Imperial Bank Limited had been placed under receivership.

118. At the time the bank was placed under receivership, she had deposited at Imperial Bank Limited a

sum of approximately **Kenya Shillings Thirty Two Million (Kshs.32,000,000/-)** being various client funds which were held on stakeholder terms pending completion of various matters.

119. Pursuant to the said receivership, she has claimed and has been paid a sum of Kshs.2,500,000/- after receiving communication from Central Bank of Kenya and Kenya Deposit Insurance Corporation to lodge a claim for payment of the sums held at Imperial Bank (In Receivership) at either Diamond Trust Bank or Kenya Commercial Bank and later NIC Bank. She however still has outstanding client funds held at Imperial Bank (In Receivership) and verily believes that the orders sought in this suit will affect her as a depositor.

120. It was submitted by the 3<sup>rd</sup> interested party that the fact that the Bank is properly under receivership in law is not in dispute and has not been challenged. As a matter of fact, the applicant's herein requested the 2<sup>nd</sup> Respondent to place the Bank under receivership vide a letter dated 12<sup>th</sup> October 2015 after the applicants investigated and confirmed that there was massive fraud of approximately Kshs.38 Billion. The applicants then prepared a preliminary forensic report dated 12<sup>th</sup> October 2015, in which they proposed, *inter alia*, that;

- f. CBK place IBL under statutory management under Section 34 of the Banking Act,
- g. They enter into an agreement with CBK to permit recapitalization,
- h. They collaborate with CBK to execute a full recovery plan,
- i. They secure support from CBK to approach potential new investors,
- j. There be a joint Public Relations plan and consistent message from IBL and CBK.

121. Based on the foregoing, the 3<sup>rd</sup> interested party was surprised that the same applicants who asked for the receivership are now in court challenging the very process that they asked for and in her view, the circumstances of this case do not merit the exercise of the court's discretion in favour of the *ex parte* Applicants since to her all statutory actions carried out under the said receivership by the Respondents are valid in law and not *ultra vires*.

122. The 3<sup>rd</sup> interested party submitted that the orders sought herein if granted will conflict with or breach the said section 45 (3) of Cap 487. To her, the applicants are seeking orders to indirectly gain control of a bank that they never properly supervised as directors, as required in law. Since this bank was placed under receivership at their request, they ought to have known the consequences of their said request to place the bank under receivership. To the 3<sup>rd</sup> interested party, this sudden interest in the bank is very mischievous and an abuse of the court process.

#### **4<sup>th</sup> Interested Party's Case**

123. According to the 4<sup>th</sup> Interested Party, NIC Bank is duly licensed as a bank financial institution to carry on banking business under the provisions of the **Banking Act**, Chapter 488 and is regulated by the Central Bank of Kenya and has an extensive branch network throughout the country and serves numerous customers which include large businesses, SMEs, NGOs, government bodies and institutions as well as individuals from all walks of life. The said NIC Bank, it was averred has been in existence since 1959 and has grown from strength to strength and now has a regional presence and is very well respected in the financial services market.

124. It was disclosed that the NIC had followed closely the developments relating to Imperial Bank Limited-In Receivership following the unfortunate events of October 2015 after the sudden death of the Group Managing Director and the revelation of the improper banking practices culminating to it being placed under receivership by the Central Bank of Kenya in terms of the Kenya **Deposit Insurance Act** ('KDI Act'). The NIC averred that under the provisions of the **KDI Act** the Kenya Deposit Insurance

Corporation ('the Corporation') was appointed as receiver of the Bank in terms of Sections 43. Under Section 53 of the KDI Act, the appointment of the Corporation is for a period not exceeding twelve months and which may not be extended for a period exceeding six months.

125. . To NIC, the objects and purpose for which the Corporation is established is *inter alia* to provide a deposit insurance scheme for customers of member institutions; the Corporation also has power to act in such manner as may be necessary to reduce or avert risk to the financial system and like all bona fide players in the financial services industry, NIC Bank is interested in the maintenance of a stable financial market and will play its part in promoting a conducive environment towards this end.

126. Following discussions between the Central Bank, the Corporation and NIC Bank, an Agreement appointing NIC as Asset and Liability Consultant for Imperial Bank Limited-In Receivership was entered into and this was in recognition of NIC's expressed ability to undertake an assessment of the Bank's assets and liabilities in order to identify the quality of the assets and liabilities and any risks attendant thereto and on the basis of NIC's expressed willingness subject to due diligence and contract to enter into negotiations with the Corporation with a view to making an offer to acquire such assets and assume such liabilities of IBLIR as would be agreed. In addition, NIC has expressed an intention of the Bank's leases for branches that it will identify and assuming such staff of the Bank as it may require in the event that it acquires the assets and assumes the liabilities of the Bank; also NIC as able and willing to assist the Corporation to disburse payment of such amounts of deposits as may be determined by the Corporation as Receiver to the depositors of the Bank on such terms and conditions as may be agreed.

127. It was therefore NIC's position that none of the matters contemplated by the appointment of NI Casa Asset and Liability Consultant include the disposal, transfer or take-over of any of the assets of the Bank. To NIC, the agreement is *bona fide*, is for a *bona fide* purpose and there are no surreptitious or under-hand intentions and the primary purpose of the agreement is to allow the Corporation to utilize NIC's knowledge and resources to facilitate and inform a proper decision making with respect to the potential fate of the assets and liabilities of the Bank.

128. It was averred that under the provisions of the **KDI Act**, the Corporation is not required to notify or obtain the approval of shareholders (the Applicants herein), or creditors of the institution or any other person notwithstanding any rule of law, contract or anything in law or anything in the constituent documents of the Bank in respect of the manner in which its powers as Receiver are exercised and the insistence by the Applicants that they ought to have been consulted prior to the execution of the agreement has no proper foundation. However, the fear that the Bank's assets will be disposed of as the result of the appointment of NIC as the Asset and Liability Consultant is misplaced and no assets or liabilities will or can be disposed of until NIC has conducted a proper due diligence and determined the viability of the Bank. NIC clarified that the money to be paid out to depositors does not constitute any assets of the Bank but is a drawing from the Deposit Insurance Fund established under section 20 of the **KDI Act**.

### **Determination**

129. I have considered the issues raised in this application.

130. Although several issues were raised by the parties before me, 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.

131. In determining this matter, this Court must be alive to the parameters of its judicial review jurisdiction. In **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR**, it was held:

“...it must be remembered that the function of this court sitting in judicial review is not

concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in *Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others*, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."

132. According to *Judicial Review Handbook*, 6<sup>th</sup> Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

133. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

134. However, it is my view that the common law and practice by the High Court of England on judicial review still recognize and apply the conventional grounds for judicial review except within enlarged categories of intervention by the Court. In Kenya such expansion on a case to case basis is permitted by the Constitution as a way of ensuring a complete remedy is availed by the Court as a Court of law. Matters of fair trial and administrative action under Article 47 and 50 of the Constitution are proper grounds for judicial review and are a codification of what is generally known as principles of natural justice.

135. Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute

personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

136. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

137. Judicial review is therefore a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

138. Judicial review, it has been cautioned, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

139. In other words the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.

140. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

141. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***,

**“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”**

142. I also associate myself with the expressions in Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR, that:

**“...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or ‘wrongness’ or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a ‘wrong’ decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...”**

143. A similar position was adopted in Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited where Majanja J. quoting with approval the decision of Githua J in Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR as follows;

**“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”**

144. However, in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR, the Court of Appeal held at paras 55-58:

55. An issue that was strenuously urged by the respondents is that the appellant’s appeal is

bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b) and (e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i) and (iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in *Section 11* of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & Another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah (*supra*) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e) and (h)* of the Fair Administrative Action Act permits the court in a judicial

**review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.**

145. This Court is guided accordingly.

146. In these proceedings, the Court is concerned with the powers given to the Respondents by the law and whether they have conducted themselves in accordance with those powers. That the Applicants themselves invited the CBK to place the Bank under statutory management cannot be denied and that the circumstances warranted the Bank being placed thereunder cannot also be seriously doubted. It is what took place thereafter that provoked these proceedings.

147. In placing the Bank under the receivership of the 2<sup>nd</sup> Respondent the 1<sup>st</sup> Respondent was no doubt carrying out its statutory obligation. Similarly the 2<sup>nd</sup> Respondent is exercising statutory powers while undertaking its functions as a receiver manager of the Bank. Article 10(1) of the Constitution provides as hereunder:

***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

148. It follows that the Respondents are bound by the provisions of Article 10(1) of the Constitution and under Article 10(2) thereof some of these national values and principles of governance include the rule of law, good governance, integrity, transparency and accountability. With respect to the rule of law, the Respondents must in carrying out their functions adhere and observe substantive provisions and procedural rules expressly laid down in a statute or legislative Instrument by which they exercise their jurisdiction to make decisions. Again their decisions must be transparent and accountable. Article 47 of the Constitution provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and proceeds to state 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.

149. In this case it cannot be gainsaid that the applicants herein, who are acknowledged to be shareholders of the Bank stand to have their rights affected either way by the actions of the respondents. In my view the applicants' rights cannot be abrogated simply because the Respondents believe rightly or wrongly that they contributed to the state of affairs bedevilling the Bank. In this country even convicted criminals have rights which are protected by the Constitution and such rights can only be limited as provided under Article 24 of the Constitution.

150. In my earlier ruling in this matter I categorically stated that:

***“In this case there are the interests of the shareholders. Whereas the Respondents’ have adopted the view that the shareholders, who are the applicants herein do not deserve the Court’s indulgence due to what the Respondents perceive to have been their actions or inactions, before the Court arrives at its final determination on the matter, it must presume that the shareholders have an interest, based on their shareholding in the manner in which the Company is being run. Consequently, whatever property they have in the Company ought to be protected as far as the circumstances of the case permit.”***

151. The Respondents have however relied on section 50(8) of the *KDIC Act* which provides as follows:

***The transfer of assets and liabilities of an institution by the Corporation under this Part shall be irrevocable and shall not require the consent of debtors, creditors or any security holders.***

152. The Part to which the section applies deals with receivership, liquidation and winding up. As rightly pointed out by the applicants the section does not expressly exclude the shareholders. The Respondents have however contended that the transfer of assets and liabilities of the Bank has not been commenced and whereas it is their contention that under section 2 of the ***KDIC Act***, "exclusion and transfer process" which is described as consisting of "exclusion and transfer of part or total deposits and liabilities from a problem institution to another solvent and well-managed institution; exclusion and transfer of part or total assets to the institution receiving the liabilities; and liquidation of the residual assets and liabilities", commences when the Corporation is appointed receiver and or assume control of problem institution, this power does not render them unaccountable to the shareholders in respect of steps being undertaken in respect of the Bank where such steps are likely to adversely affect the said shareholders. This, in my view is the only way in which Regulation 15 of the ***Kenya Deposit Regulations*** can be understood. As appreciated by the respondent's, that Regulation gives discretion to CBK to issue notice to the directors to provide payments within a stated period of time, failure to which CBK shall commence an exclusion and transfer process, which culminates in liquidation. In my view where a public body is given a discretion, it is implied that in the exercise of such discretion the rules of fairness will apply and as was appreciated in Uganda HC Civil Misc. Applic. No.18 of 2010 - **Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board** as cited in **Petition 590 of 2012 Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR**:

**"...there is no difference between natural justice and "acting fairly" but that they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power and the circumstances of the case"**

153. Whereas there is no express requirement that the consent of the shareholders be sought and obtained before any such step is taken, Article 47 of the Constitution requires that where any such steps are likely to adversely affect the shareholders, the Respondents are obliged to give written reasons for the same. In other words the Corporation owes a duty of care to the shareholders in as much as it owes the same to depositors. As I held in an earlier ruling herein:

**"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."**

154. 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."**

155. I reiterate that liquidation being a policy principle must be subject to the national values and

principles of governance in Article 47 aforesaid hence must be transparent and accountable.

156. Where therefore the shareholders make proposals which are reasonable and which are geared towards the resuscitation of a problem bank, the Respondents are under an obligation to consider the same and where the same are found not viable the Respondents ought to inform the applicants of the reasons for making such findings. In other words the Respondents are not entitled to simply sit on such proposals without giving them consideration.

157. However it is for the applicants to make reasonable and tangible proposals and ought not to simply float proposals which are not viable but which are frivolous and meant to vex the respondents. As **Ogola, J** appreciated in **Richardson and David Limited vs. Kenya Deposit Insurance Corporation & Another** (supra):

**“...when an Applicant proposes what would amount to a ‘self-help’ procedure, the least the CBK should do is to consider the viability of such a proposal, and not just to sit pretty and ignore the same.”**

158. This is particularly so where the Respondents have indicated whether expressly or by their conduct, as they did in this case, that they are amenable to proposals geared towards the revival or sustainability of the business of the Bank. In the premises I associate myself with the decision in **Haoucher vs. Minister for Immigration and Ethnic Affairs Reference [1990] 169 CLR 648** in which it was stated that:

**“...in all the circumstances, the promise to follow a certain procedure having been made, or the practice of consultation having been established, fairness may require that the public authority should be held to its promise or previous practice. It adds nothing to say that there was a legitimate expectation, engendered by the promise or practice, that a certain procedure would be followed”.**

159. Similarly in **Attorney General of Hong Kong vs. Ng Yuen Shiu [1983] 2 All ER 346** the court stated that:

**“the expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.’ and ‘The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty”.**

160. In this case the applicants contend that the Respondents are driving the Bank towards liquidation. Liquidation, in my view are the “last rights” of a company and the high priest of liquidation, otherwise known in the Company Law as “the liquidator” ought only to be summoned by the doctor (the receiver) where all else have failed and the patient’s life (the Bank) is hopelessly irredeemable. Such resort ought not to be made even where the promise of healing is coming from herbalists as long as it is reasonable. In other words even where the hope of the revival of a problematic institution emanates from the shareholders who are themselves deemed as the culprits, their proposals ought to be considered if viable and serious enough and even where they are, in the Respondents’ opinion, the culprits since in my view the purpose of receivership is as much as possible to bring the company back to its feet rather than to maim it.

161. In this case, it was contended by the applicants that upon the placement of the Bank under receivership, the Respondents initially engaged the Applicants objectively, with a view to reopening the Bank and publicly avowed to engage the Applicants in doing so and as a result the Applicants became actively engaged in seeking a restructuring solution for the Bank. However, in a meeting held between the Applicants and the Respondents on 27<sup>th</sup> October 2015, the Respondents refused to consider the Applicants’ tabled proposal, because it involved the participation of a strategic investor.

162. On the part of the Respondents, it was contended that prior to and after the receivership of the Bank, CBK and the Applicants representatives held several consultative meetings but the Applicants were not in a position to raise the capital shortfall required to re-open the bank within the required timeframe as they stated that they needed to partner with unidentified investors who required to undertake due diligence and have access to the Bank's books of accounts which books were subject of forensic audit. In the meetings held and as part of the revival plan put forward by the directors of the Bank to the Respondents with a view to bridging the liquidity gap was a promise to obtain collateral security to cover part of the exposure due from W.E. Tilley (Muthaiga) Ltd who were according to the books of the Bank indebted in the sum of Kshs.34Billion. To this end the directors produced a letter addressed to the Bank dated 10<sup>th</sup> October 2015 purporting to be an undertaking from W.E. Tilley (Muthaiga) Ltd. to collateralize Kshs.10Billion of the outstanding debt. However, CBK learnt that this letter was intended to mislead CBK since in its Defence dated 15<sup>th</sup> February 2016 and filed in HCCC No 522 of 2015 - **Imperial Bank Ltd (In Receivership) -Vs- W.E. Tilley (Muthaiga) Ltd & 19 Others**, at paragraph 41, W.E. Tilley (Muthaiga) Ltd pleaded that the letter was only written upon representation of the Bank's directors to Tilley that it was intended as a "letter of comfort" to pacify the Central Bank of Kenya who were conducting in-depth investigations of the Plaintiff's operations and that the letter was not intended to have any binding effect whatsoever.

163. It was this state of affairs that led the Respondents to conclude that the proposals put forward by the Applicants to CBK were not made in good faith and were merely intended to hoodwink CBK that the shortfall was not going to result in insolvency.

164. The other proposal was the conversion of the deposits into equity a proposal which both the Respondents and the 3<sup>rd</sup> interested party opposed on the ground that it would further burden to the depositors.

165. According to the Respondents even the proposal by the Applicants to inject Kshs 10 billion which was made initially did not materialise as the applicants instead made alternative proposals which were not realistic.

166. It is therefore clear, even from the material presented by the applicants themselves that they were afforded an opportunity of presenting their proposals for consideration. The Respondents have given reasons why the same were unacceptable. This Court can only interfere with those reasons where the same are irrational. In matters of policy however, the Courts are very reluctant to interfere especially where expertise is required in arriving at a decision.

167. In **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [1985] LRC** it was held that:

**"It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."**

168. At page 105, the Court stated:

**"As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper...in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of...institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this**

nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice”.

169. Further in **R vs. Council of Legal Education [2007] eKLR** at pg. 9, it was held that

**“The other reason why this court has declined to intervene is one of principle in that... [in] matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable. I see no reason why in a democratically elected government any detected defects in such areas including defects in policy should not be corrected by the legislature”.**

170. It is my view that in the circumstances of this case, the Respondents’ decision not to accede to the proposals and/or Recovery Plan tabled by the applicants ought to be interfered with. The decision in my view cannot be termed as so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. As to whether on merits such a decision ought to have been made is a matter that ought to be left to merit investigation before a Commercial Court as opposed to a judicial review court.

171. It is therefore my view that the applicants’ contention that the Respondents violated the rules of natural justice in arriving at their decision cannot be sustained by this Court.

172. It was also contended by the applicants that the Respondents have discriminated against them by denying them access to the Bank’s data, information, documents and/or records but have given access to other third parties. The rule of law as one of the national values and principles governance in my view incorporates constitutionalism and in our case this entails freedom from discrimination as enshrined in Article 27 of the Constitution. The applicants’ allegations call for a determination of what constitute discrimination and under what circumstances the court can interfere where such allegations are made. 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.”

173. In **Peter K. Waweru vs. Republic [2006] eKLR** discrimination was defined in the following terms:

**“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”**

174. Similarly in **Andrews vs. Law Society of British Columbia (1989) 1 SCR 321**, Wilson J., defined discrimination as a:

**“distinction which whether intentional or not but based on grounds relating to personal characteristics of individual group (which) has an effect which imposes disadvantages not**

imposed upon others or which withholds or limits access to advantages available to other members of society.”

175. 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.”

176. In Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000 cited in Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR, the court stated:

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

177. It is therefore my view that where unfair discrimination is proved to exist the Court will be warranted to interfere. Article 35(1)(a) of the Constitution entitles every citizen access to information held by the State and dealing with this matter Mumbi Ngugi, J in Petition No. 278 of 2011 - Nairobi Law Monthly Company Ltd & Others vs. Kenya Electricity Generating Company & Others held that :

“.....the respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a constitutional obligation to provide the information.”

178. In this case, however apart from contending that the interested parties had access to information denied the applicants, the applicants have not stated with particularity the nature of the information which was sought by them but availed to the interested parties in order to enable this Court find that there was in fact discrimination. In Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others

**[2013] eKLR** the Court of Appeal expressed itself as hereunder:

**“We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent.”**

179. Based on the material before me I am unable to find that there was in fact discrimination in the manner in which the Respondents handled the information herein.

180. 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.”**

181. 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.

### **Findings**

182. Having considered the issues which in my view rightly belonged to adjudication by way of judicial review and having avoided to deal with issues which belong to and remain undetermined in other forums, I make 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.**

### **Disposition and Remedies**

183. Before I depart from this judgement I wish to express my gratitude to counsel who appeared in these proceedings for their diligence and industry in prosecuting their respective cases.

184. The applicants have sought various judicial review orders and declarations from the Court with regard to the acts of the respondents. I bear in mind the provisions of the section 11 of the *Fair Administrative Action Act, 2015* which give the Court jurisdiction to grant any order that is just and equitable, including orders:

- (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**
- (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
- (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**
- (d) prohibiting the administrator from acting in particular manner;**
- (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**
- (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**
- (g) prohibiting the administrator from acting in a particular manner;**
- (h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**
- (i) granting a temporary interdict or other temporary relief; or**
- (j) for the award of costs or other pecuniary compensation in appropriate cases.**

185. Nevertheless, the orders which commend themselves to me and which I hereby grant are as follows:

- a. 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*.**
- c. 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.**
- c. 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.

d. 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.

e. 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.

f. Save for the foregoing the rest of the prayers are disallowed.

186. As the issues raised herein were issues of great public interest not restricted to the parties herein, there will be no order as to costs.

187. Orders accordingly.

**Dated at Nairobi this 4<sup>th</sup> day of November, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Wandabwa for the Applicants and holds brief for Mr Muite and Mr Kilukumi for the Applicants***

***Mr Chege for the 1<sup>st</sup> Respondent***

***Mr Murgor with Mr Ouma for the 2<sup>nd</sup> Respondent***

***Ms Kogweno the third interested party***

***Miss Mwika for Mr Ohaga and Mr Ochieng Oduol for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> interested parties***

**CA Mwangi**