IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPEAL NO.66 OF 2016

(Consolidated with Civil Appeal No.67 of 2016)

BETWEEN

KENYA DEPOSIT INSURANCE CORPORATION.....APPELLANT

AND

RICHARDSON & DAVID LIMITED.....1ST RESPONDENT

CENTRAL BANK OF KENYA LIMITED.....2ND RESPONDENT

(An appeal against the Order of the High Court of Kenya,

Nairobi (Ogola, J) delivered on 18th November, 2015

in

H.C.C.C. NO. 485 of 2015)

****

JUDGMENT OF THE COURT

INTRODUCTION

1. **Richardson and David Limited**, is a limited liability company. It was a depositor with a Bank called **Dubai Kenya Limited** (hereinafter referred to as **"DBK"**) where it held Shs.142,000,000/= in shilling account No. 81199809 (Shs.4,816,860.57) and US $1,130,264.85 in dollar account (No.81199817).

2. On 14th August 2015, the Central Bank of Kenya placed DBK Bank under receivership and appointed **Kenya Deposit Insurance Corporation** ("**KDIC")** as a receiver for a period of 12 months pursuant to Section 43(1) & (2) and 53(1) of **Kenya Deposit Insurance Corporation Act 2012**. On 25.8.2015, the CBK appointed KDIC as a liquidator of DBK.

3. The reasons that led to this action by the Central Bank of Kenya ("**CBK**") included failure by DBK Bank to meet daily cash reserve ratios; failure to honour several financial obligations as and when they fell due including Ksh.48.18 million due to the Bank of Africa Kenya Limited; failure to meet cash reserve ratio requirements from July 14th, 2015 thus attracting a total penalty of Ksh.5,395,721.03; the

likelihood of the DBK Bank to meet its financial obligations as and when due; violating banking laws and regulations including failure to maintain adequate capital and liquidity ratios as well as provisions for non-performing loans and weak corporate governance structures.

4. KDIC commenced the process of liquidation of the appellant, DBK, in September 2015. The appellant considered this wrongful and was aggrieved. In its view, the 12 month period of receivership was intended to enable the KDIC to undertake full evaluation of the affairs of the appellant as a Bank and to arrive at a reasoned decision before the process of liquidation could be commenced. In the appellant's view, this was rushed and hence the appointment of KDIC as a liquidator of the appellant on 24th August 2015 was premature and did not comply with section 53(1)(a) of the Kenya Deposit Insurance Act 2012.

5. On 24th September 2015, the Board of Directors of DBK met and passed a resolution authorizing the institution of a suit in the High Court against the CBK and the KDIC to stop them from undertaking premature liquidation of the appellant and for damages for any loss suffered as a result of the action complained of.

SUIT IN THE HIGH COURT AND INTERLOCUTORY ORDERS APPEALED AGAINST

6. On 2nd October 2015, the DBK filed a plaint in the High Court at Milimani Courts (Commercial and Admiralty Division) commencing **Civil Suit No. 482 of 2015** against the KDIC and the CBK in which it sought against KDIC and CBK judgment and orders that -

> ***(a) a declaration that Section 46(1) of The Kenya Deposit Insurance Act 2012 is inconsistent with Article 23(1) of the Constitution of Kenya 2010 and is thus null and void;***
>
> ***(b) a declaration that the CBK erred in purporting to grant the KDIC powers conferred under section 54(1)(a) of the Kenya Deposit Insurance Corporation Act 2012 before full compliance with Section 53 of the Act;***
>
> ***(c) a conservatory order to restrain KDIC from undertaking premature liquidation of the DBK, closing down its branches; dismantling its ICT systems and/or doing anything which would prejudice the rights and interest of the appellant;***
>
> ***(d) an order directing the CBK and KDIC jointly and severally to create a framework within which the willing depositors of the appellant can convert their deposits and credits into equity and for further injection of additional capital by the shareholders and any other party interested in the revival of the DBK and;***
>
> ***(e) an investigation to determine the extent of losses that may have been occasioned to the appellant as a consequence of the premature liquidation process and;***
>
> ***(f) for costs of the suit;***
>
> ***(g) Any further or other relief the Honourable Court may deem just and expedient to grant in the circumstances of this case.***

7. Contemporaneously with the filing of the suit, DBK filed an application by Notice of Motion dated 2nd October 2015 in HCCC No. 482 of 2015. Richardson David Limited invoked Article 23 (1)(2) & (3) of the Constitution of Kenya; Section 53(1) of The Kenya Deposit Insurance Act 2012, Order 40 rules 1 & 2 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act in seeking, *inter alia*, the following orders; "that conservatory and injunctive orders pursuant to Article 23(3) of the Constitution of Kenya 2010 and Order 40 rules 1 & 2 (of the Civil Procedure Rules) do issue to restrain the KDIC and the CBK jointly and severally from violating the provisions of Section 53 (1) of the Kenya Deposit Insurance Act 2012, by prematurely liquidating the appellant and specifically from closing branches and/or dismantling ICT systems of DBK or in any manner whatsoever upsetting the status which prevailed at the DBK as at the date of declaration of its receivership on 14th August 2015, and conserving

its assets in that state; initially pending the *inter partes* hearing and determination of the application, and subsequently pending the hearing and determination of the suit in the High Court. DBK also prayed for an order that the KDIC and the CBK be directed to suspend any attempt to liquidate DBK before fully complying with the mandatory provisions of Section 53(1) of the Kenya Deposit Insurance Corporation Act 2012 and to formulate a framework within which DBK and any other interested depositor/party and creditors of DBK can convert their credits into equity and participate without any restriction whatsoever, in all attempts aimed at reviving, and stabilizing DBK, and for an order for costs. The prayers were framed as follows:

> ***?(1) spent***
>
> ***(2) spent***
>
> ***(3) That conservatory and injunctive orders pursuant to Article 23 (3) of The Constitution of Kenya 2010, and order 40 rules 1 and 2 (CPR) do issue to retrain the 1st and 2nd Defendants jointly and severally from violating the provisions of section 53(1) of the Kenya Deposit Insurance Act 2012, by prematurely liquidating DBK and specifically from closing branches and/or dismantling ICT systems of DBK or in any manner, whatsoever, upsetting the status which prevailed at DBK as at the date of declaration of its receivership on 14th August 2015, and conserving its assets in that state;***
>
> > ***(a) initially pending the hearing and determination of this application inter-parties***
> >
> > ***(b) and subsequently, pending the hearing and determination of the suit.***
>
> ***(4) That the honourable court be pleased to direct the Defendants, jointly and severally to suspend any attempt to liquidate DBK before fully complying with the mandatory provisions of section 53(1) the Act and to formulate a frame work within which the Plaintiff and any other interested depositor/party and creditors of DBK can convert their credits into equity and participate without any restriction, whatsoever, in all attempts aimed at reviving DBK and stabilizing DBK.***
>
> ***(5) That costs of this application be provided for.?***

8. The motion was grounded on an affidavit sworn by one Valiveetil Pius Lawrence, a director of Richardson and David Limited and in the grounds set out in its paragraph 5, Richardson & David Limited (hereinafter referred to as "RD Ltd") contended that it was a depositor with DBK holding several accounts with Ksh.142 million as at 14th August 2015 when DBK was placed under receivership; that RD Ltd was opposed to liquidation of DBK as it would suffer irreparable loss and damage; that the liquidation of DBK was in violation of S.53 (1) of the Kenya Deposit Insurance Act 2012; that the "alacrity and speed" relating the process of placing DBK under liquidation "portrayed malice self-interest and desire to dismantle and completely destroy the substratum of DBK." RD Ltd therefore sought conservatory and injunctive orders to restrain KDIC and CBK from undertaking "haphazard and disorderly liquidation of DBK to pave way for RD Ltd and other parties with stake in DBK to convert their credits into equity and/or inject further capital into DBK in an effort to stabilize, sustain and ultimately revive its existence as an institution."

9. The application was resisted by the KDIC and the CBK when it came up for hearing before **E.K.O. Ogola J.** who in a Ruling dated 18th November 2015 determining the said motion, crystallized the following 5 issues which he deemed crucial for the determination of the motion on the terms that –

> ***(i) the receivership placed on the DBK would remain in force;***
>
> ***(ii) the liquidation of the DBK currently underway, would be suspended by conservatory and injunctive orders for a period of (60) days from that date; during the 60 day period;***

(iii) the KDIC and the CBK would take steps and fully consider the proposal by M/s Sovereign Financial Holdings to inject Kshs.2,214,500,000/= or thereabouts into the DBK, together with any other proposals by the depositors or other interested parties herein and report to the High Court about the viability of those proposals in an effort to revive the appellant Bank; and

(iv) by a document to be filed in the cause and served upon the respondents (KDIC & CBK) within 10 days DBK through its Chief Manager, Hassan Zubedi, would make a full, frank and total disclosure of all the properties and assets of the DBK be it land, title, money, or otherwise, and whether in Kenya or outside Kenya and in whose possession or custody; and (v) in the intervening period, either party would be at liberty to apply for any or further orders from the Court and

(v) costs to go to the applicant (DBK).

FILING OF APPEAL

10. Aggrieved by the aforesaid decision of the High Court (E. K. O. OgolaJ) dated 18th November 2015, CBK and KDIC each gave a Notice of Appeal on 24th November 2015 of its intention to appeal the decision. On 12th April 2016, KDIC lodged its record of appeal in this Court in Civil Appeal No.66 of 2016 and on 13th July 2016, CBK lodged its record of appeal in Civil Appeal No.67 of 2016. These two appeals, a shown below, have been consolidated.

MEMORANDUM OF APPEAL AND GROUNDS OF APPEAL

11. The 38 grounds proffered in the Memorandum of Appeal in Civil Appeal No.67 of 2016 by CBK against Richardson and David Limited and Kenya Deposit Insurance Corporation were in the same vein and took the same pattern as those in this appeal (No.66 of 2015) by KDIC against Richardson and David Limited and CBK. The impugned judgment was challenged, amongst other reasons, on account of the learned Judge's declaration at an interlocutory stage of the proceedings that Section 46(1) of the Kenya Deposit Insurance Act, Chapter 487 C of the Laws of Kenya was unconstitutional and invalid in light of Article 165 (4) of the Constitution of Kenya and Articles 23(1) (3) (d) of the Constitution; that the learned Judge erred in law and fact in failing to appreciate that the CBK had a statutory duty to protect the depositors, creditors, and shareholders of DBK as well as the members of the public; that strong grounds existed for placing DBK under liquidation and that the legal threshold had been satisfied by the CBK and the KDIC.

12. These two consolidated appeals came up for hearing on 15th November 2016 and we reserved our judgment for delivery on 27th January 2017, now past. Due to intervening Christmas vacation in December 2016, followed by the mishap resulting from disappearance or misplacement of the court file, the preparation of the decision suffered regrettable delay for which we apologize.

FILING OF WRITTEN SUBMISSIONS

13. Pursuant to Practice Directions of this Court, the KDIC, the appellant in Civil Appeal No.66 of 2016 filed written submissions on 12th August 2016 and a list of authorities on 13th July 2016 while Richardson & David Limited and CBK the 1st and 2nd respondents, respectively, filed their submissions on 9th September 2016. In this Appeal (No.66 of 2016) KDIC proffered a whopping 38 grounds of appeal. In a nutshell, the appellant (KDIC) contends that the learned Judge erred in law in failing to appreciate that once the process of liquidation commenced, pursuant to Sections 53(2) and 54 (1) of the Kenya Deposit Insurance Act, it could not be suspended or reversed into receivership under Section 43(2) of the Kenya Deposit Insurance Act; that the learned Judge acted in violation of Article 163(7) of the Constitution in failing to appreciate judicial precedent that was binding on him to the effect that relief could not be granted on the basis of constitutional provisions to redress a dispute arising out of a commercial transaction where Parliament had expressly provided for a law to govern such legal issues; that the learned Judge erred in failing to appreciate that DBK as a deposit-taking institution could be placed under liquidation within a period of 12 months under Section 53(1) & (2) of the Kenya Deposit

Insurance Act and that strong grounds existed for doing so as legal threshold had been satisfied by KDCI, i.e. Kenya Deposit Insurance Corporation, which under Section 51(1) of the said Act enjoyed autonomy; that the learned Judge erred in holding that S.51(2) of the Kenya Deposit Insurance Act allows recourse to court by an aggrieved party; that the learned Judge erred in failing to appreciate the full effect of Section 55(h) of the Kenya Deposit Insurance Act and the primary role of a liquidator to carry on the business of a problem-institution so far as may be necessary for its beneficial winding up; that the learned Judge erred in law and fact in holding that the only way to protect the interests of Richardson and David Limited was through compelling the CBK to fully consider "self-help" schemes formulated by KDIC or any other party, yet protection of the interests of the Richardson David Limited and any other depositors are vested in the KDIC by statute; that the learned Judge erred in law and fact in holding that merely because the funds that were to be injected by M/s Sovereign Financial Holdings belonged to neither the KDIC nor to the CBK, then they ought not to object to the proposal; that the orders made by the learned Judge violated the provisions of the Kenya Deposit Insurance Act and the Banking Act; that the learned Judge erred in law in holding that conservatory orders against the liquidation of DBK Ltd were well founded under Order 50 Rules 1 and 2 of the Civil Procedure Rules 2010; that the learned Judge's orders violated the Constitution and were not in favour of parties before the court and by allowing the notice of motion dated 2nd October 2015 the learned Judge erred.

HEARING OF APPEAL

14. During the hearing, **Mr. John Ohaga** appeared for the appellant in Appeal No.66 of 2016 while **Mr. Otieno Omuga** appeared for the 1st respondent and **Mr. Ochieng Oduol** appeared for the 2nd respondent and **Mr. Odhiambo M. T. Adala** appeared for the 1st interested party, Hassan Zubeidi named in the spent application No. 286/2015 (UR.244/2015).

15. The two appeals (No.66/2016 and 67/2016) were consolidated by virtue of a consent order dated 15th November 2016 showing that the record would be maintained in Appeal No.66 of 2016. Parties relied on their written submissions and highlighted the same as shown hereunder.

16. As stated above, the 38 grounds of appeal in each appeal were similar.

The main thread running through them is that the learned Judge erred in granting the impugned orders and failed to appreciate that CBK, upon receipt of the recommendation of KDIC to place DBK under liquidation, CBK was under a mandatory statutory obligation to appoint a liquidator under sections 53(2) and 54(1) of the Kenya Deposit Insurance Act; that the KDIC had a statutory duty to protect the depositors, creditors and shareholders of DBK and the public; that the learned Judge erred in law in holding that section 51(2) of the Kenya Deposit Insurance Act allows recourse to court by an aggrieved party to the extent of the orders sought by and granted to the first respondent; that the learned Judge erred in holding that CBK had statutory obligation to consider available options including voluntary liquidation before resorting to liquidation in light of sections 50(1) and 55(1) of the Kenya Deposit Insurance Act; and in holding that the only way to protect the interests of Richardson & David Ltd was to compel CBK to consider self-help schemes formulated by Richardson & David Ltd or any other party notwithstanding that KDIC was vested with the duty; that the learned Judge erred in failing to appreciate that there was no proposal by Sovereign Financial Holdings to inject the sum of Shs.2,214,500,000/= and that such proposal would be illegal under S.10 of the Banking Act; that the learned Judge's order was in violation of the provisions of the Banking Act and the Deposit Insurance Act; that the learned Judge failed to appreciate the import of section 55 (h) of the Kenya Deposit Insurance Act; that the learned Judge erred in directing one Zubeidi Hassan to provide to the court a true and full account of all assets of DBK as that was not the subject matter of any application before the court; that the learned Judge's orders violated the due and proper administration of justice and the Constitution; and that justice was perverted. The appellants (CBK in appeal 67/2016) and KDIC in appeal 67/2016)) prayed that these two consolidated appeals be allowed and the order appealed against be set aside and the notice of motion dated 2nd October 2015 in HCCC No.482 of 2015 be dismissed with costs and that the costs of the consolidated appeals be awarded to KDIC and CBK.

DETERMINATION

17. This is an interlocutory appeal against the orders of the High Court (**Ogola J**) made on 18th November 2015 in the notice of motion dated 2nd October 2015. The learned Judge ordered that -

> ***?(i) the receivership placed over DBK would remain in force;***
>
> ***(ii) the liquidation by conservatory and injunctive orders for a period of 60 days from the date of the ruling;***
>
> ***(iii) KDIC would take steps and fully consider the proposal by Sovereign Financial Holdings to inject 2,214,500,000 or thereabouts into DBK together with any other proposals by depositors or other interested parties in the suit and report to the Court within 60 days of the ruling about the availability of the proposals in an effort to revive DBK.***
>
> ***(iv) Hassan Zubeidi; the Chief Manager of DBK would disclose the entire assets and properties of DBK in and outside Kenya through an affidavit to be filled in ten days from 18th November 2015 when the ruling was delivered.?***

18. The learned Judge also declared Section 45(1) of the Kenya Deposit Insurance Act 2012 unconstitutional and invalid under Section 23(1) and 23(3)

> (d) of the Constitution. We shall deal with this declaration of unconstitutionality of s.46(1) of the KDI Act first. The Section states:–
>
> ***?46(1) where the Corporation or the appointed person, as the case may be, has assumed control of an institution under section 44(2)(b) –***
>
> ***(a) no injunction may be brought or any other action or civil proceedings commenced against the corporation or the appointed person in respect of the assumption of control.?***
>
> ***(2) subsection (1) shall not prevent any person who sustains losses from any action of the corporation or the appointed person from instituting an action for damages for the losses suffered by such person.?***
>
> ***S.46(1)(a) bars legal challenge on receivership itself which places control of the affected bank under the control of the receiver or other person. It does not prevent legal challenge on matters other than ?assumption of control? of the bank, nor does it prohibit suit for damages.***
>
> ***Article 23 (1) of the Constitution 2010 vests the High Court with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. To start with, section 46(1)(a) does not prevent any person from accessing the court to seek justice save in the case of the assumption of control of an affected Bank. Still the manner in which the Bank is managed under receivership is open to litigation. It does not require a lot of imagination and one does not have far to seek to see that the prohibition of legal challenge after or upon assumption of control of a Bank by the receiver is in public interest.***

The learned Judge delivered himself as follows in his declaration:-

> ***?the discretionary language employed in that Section means that the applicability of that section remains in the interpretation of the court, and will depend on the circumstances of each case. In this case, however, it is my finding that to interpret that section in a manner which denies the applicant his economic or other rights, especially the right to access the court, is unconstitutional, and, limited to these proceedings, I herewith declare section 46 (1) of the KDI Act 2012 unconstitutional and invalid under Article 23(1) and 23(3) (d) of the Constitution in so far as this particular application is concerned. It is therefore the finding of this court that the Applicant has the right to come to this court, and to seek the orders sought in this application***

notwithstanding section 46(1) (a) of the KDI Act 2012.

Worth noting in the above declaration is the fact that nowhere was the learned Judge addressed by counsel on behalf of the parties with regard to the declaration, nor did the notice of motion (dated 2nd October 2015) before him contain a prayer in respect of the declaration made. We think the learned Judge went into error in making the declaration in absence of a prayer in that regard and without the benefit of any submission by any of the parties. As learned counsel for KDIC, Mr. Ochieng Oduol, correctly stated in his submission, the High Court "ignored a cardinal principle of law that a court can only determine issues raised in the pleadings" or, we may add, or where issues implicitly ensue from pleadings. Counsel's reference to the decision in **Paul Gondi versus National Bank of Kenya (Civil Appeal No.271 of 2005]** was spot on. But it is now accepted as a sound principle of the law that as an exception to this principle, a court of law may base its decision on an unpleaded issue where it appears from the course followed at the trial, that the issue has been left to the court for determination; see **Odd Jobs v. Mubia [1974] EA 476** in support of this legal proposition. We think any matter relating to the question whether a statute or a provision in a statute is in conflict with the Constitution or is unconstitutional or is invalid is a matter of such importance that public interest and public policy considerations dictate that such matter must be properly brought before the court and parties afforded opportunity to address it and where the question ensues from the pleadings, it is the duty of the court to invite the views of the parties before embarking on making a decision. Needless to add, the court must be called upon to make the determination and be properly served to do so and where the issue ensues from pleadings, or where such determination arises from unpleaded issue which is necessary for resolution of the dispute, the court must seek to be addressed by the parties.

19. It is in our jurisprudence that a Court will not at a preliminary stage determine with finality contested issues in litigation. The appellants' counsel was correct in his submissions in this regard and the decision cited by him in **Vivo Energy Kenya Ltd v. Maloba Petrol Station & 3 Others [2015] eKLR** does buttress this proposition. Excepting where there are special circumstances, it is wrong for a Judge to grant at an interlocutory stage of proceedings final orders, thus disposing of the suit before parties are heard. The right to be heard is fundamental and only in extremely rare circumstances will a court of law issue orders the effect of which is to determine the suit with finality or to render the suit superfluous. [See **Olive Mwihaki Mugenda & Another versus Okiya Omtata Okoiti & 4 Others [2016] Eklr.**

20. It is patent that Section 46(1) of the Kenya Deposit Insurance Act ousts the jurisdiction of the Court to grant injunction where KDIC or the person appointed as a receiver has assumed control of an institution under section 44(2)(b) which states:-

(2) Upon receipt of a notification under subsection (1), the Corporation may—

> ***(b) assume control as a receiver of the whole of the assets, liabilities, businesses and affairs of the institution; and***
>
> ***(i) carry on the whole of its businesses and manage the assets, liabilities and affairs; or***
>
> ***(ii) assume control of such part of its assets, liabilities, businesses and affairs including disposal of assets, and carry on such part of its business and affairs; or***
>
> ***(iii) appoint any person to carry on the whole of the businesses and manage the assets, liabilities and affairs of the institution on its behalf.***

21. There is nothing unconstitutional in an Act of Parliament taking away the jurisdiction of the Court or conferring jurisdiction on a court in consonance with the letter and spirit of the Constitution. The right of a person to access the court is not violated if he cannot get relief where the Constitution has mandated Parliament to curtail the power of the court to grant such relief. If the court has no jurisdiction to give a remedy or relief, one's fundamental right regarding access to justice cannot be said to be violated. In the instant case, the Kenya Depositors Insurance Act is mandated by the Constitution. All that it has done in Section 46(1) is to take away the power of the court to grant injunction in the context referred to. It does

not focus on or affect the right of a litigant. Under Articles 23(1) & 23(3)(d) of the Constitution, such right is left intact. The effect of S.46(1) is to limit the power of the court. The court itself is deprived the power to grant injunction. It cannot therefore be correctly argued that S.46(1) of the Kenya Deposit Insurance Act is in conflict with Article 23(1) and Article 23(3)(d) of the Constitution.

22. In our view the learned Judge went into error in declaring section46(1) of the Kenya Deposit Insurance Act to be unconstitutional. We so find.

23. We shall now deal with the other grounds of appeal together. The complaints in the two appeals against the orders made by the learned Judge on 18th November 2016 are in essence complaints against (the court) micro-managing the appellants as institutions. The learned Judge stayed the liquidation of KDK and re-instituted receivership which had lapsed and directed KDIC and CBK to take steps to fully consider the proposals by any interested party to inject capital into DBK. Did the learned Judge have powers to do so? Section 5(1) of Kenya Deposit Insurance Act ("KDI Act") states –

> ***5(1) The object and purpose for which the Corporation is established is to provide a deposit insurance scheme for customers of member institutions and to receive, liquidate and wind-up any institution in respect of which the Corporation is appointed receiver or liquidator in accordance with this Act.***

24. It is clear from the reading of Section 5(1) of KDI Act that, the power to receive, liquidate and wind up an institution is vested in KDIC only. In issuing the orders as it did, the court stepped beyond the amplitude of its powers. It substituted itself in place of CBK. It had no inherent powers to make orders that were outside the purview of its jurisdiction. The law does not give the court the power to substitute itself in place of an institution where the latter is alleged to have erred in discharge of its duty. The role of the court is to sanction what is done in the right way or invalidate what is improperly done. The court is not entitled to discharge the duties of the institution it censures or whose decisions it invalidates. Parliament has not given the court the power to step into the shoes of such institution. It was not within the purview of the judge's jurisdiction to micromanage CBK and/or KDIC as institutions. A court of law is not an expert in the management of financial institutions. The Constitution has bestowed the mandate on Parliament to enact statutes to create bodies to manage and regulate such institutions. The KDI Act and the Central Bank of Kenya Act (CBK Act) are Acts of Parliament which have vested and entrusted CBK and KDIC with powers to regulate the financial sector. Pursuant to the provisions of the said Acts, KDIC carried out its mandate and recommended liquidation of DBK. It exercised its discretion. The orders issued by the court clearly show that the court took up the role of CBK and KDIC. That is not the province of a Judge. As correctly pointed out by Odunga J in ***Republic v. KRA expert Interactive Gaming & Lotteries Ltd Misc Civil Application 251 of 2014***, *"specialized bodies created by statute ought to be given leeway to conduct their proceedings freely.... where such bodies act within their jurisdiction the court ought only step in to ensure that the proceedings are conducted fairly."*

25. The jurisprudence that has developed in this area of the law shows that when decisions of public bodies are impugned, the court is only entitled to investigate the action complained of with a view to seeing whether the public body "has taken into account any matters that ought not to be taken into account or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power. "(see **Associated Provincial Picture Houses, Limited versus Wednesbury Corporation** [1948] 1 KB 223]

26. In the case of **Associated Provincial Pictures Houses Ltd** (supra), the owners and licencees of the Gaumont Cinema, Wednesbury, Staffordshire, were granted by the licensing authority of that borough under the Cinematograph Act, 1909, a licence to give performances on Sunday under S.I, sub-section I, of Entertainments Act 1932(1); but the licence was granted subject to a condition that *"no children under the age of fifteen years shall be admitted to any entertainment whether accompanied by an adult or not."* The owners and licencees brought action for a declaration that the condition was ultra vires and unreasonable. The High Court dismissed the action. The matter went to the Court of Appeal before Lord Green M.R., Lord Somervell, and Singleton. The Court of Appeal examined the amplitude of the power

of the court to interfere with executive authority. In his judgment, Lord Green MR stated -

> ***?... What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened* the law.** ***It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive direction is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case (sic). As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear tht certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.***

27. Also in his judgment, Lord Green MR went on to state –

> ***?It is true the discretion must be exercised reasonably. Now what does that mean?***
>
> ***Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word ?unreasonable? in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ? unreasonably?.***
>
> ***Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warringon L.J. in Short v. Poole Corporation [1926] Ch.66, 90, 91. Gave the example of the red haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another...?***

28. In the instant appeal, the learned judge assumed the role of the appellants to prescribe solution to the financial problem with which DBK was beleaguered. Yet nowhere in the KDI Act was the learned judge entitled to do any of the acts set out in section 44(2)(b)(i) to (iii). In construing the KDI Act, (or any other Act of Parliament) sight must not be lost of the fact that Parliament is elected by and represents the people of Kenya. The statutes it enacts constitute law by and for the benefit of the people of Kenya. If, therefore, a statute such as KDI Act gives the CBK as institution the mandate to manage the financial sector and if litigation ensues as a result of CBK's actions which are challenged in court, the role of the court is to examine whether the impugned act was done within the law and whether it was reasonable. A court of law is not entitled to do what it thinks the authority concerned should have done. In the Associated Provincial Picture Houses, LD (supra), Lord Green MR went on to state –

> "***It is clear that the local authority are entrusted by Parliament with the decision on a matter***

which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration...?

?... It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere...?

29. It is quite clear from the foregoing that the learned judge went into error and assumed a role that did not belong to him. His decision is unsupportable and is clearly wrong. If Parliament intended to confer on the court the same powers it conferred on CBK as an institution, it would have spelt this out in the KDI Act. But it did not. The decision and orders of the learned judge must be set aside.

30. This is more so because, there is no evidence that CBK or KDIC did not exercise their statutory discretion correctly. CBK and KDIC were best placed to deal with the improprieties and irregularities of DBK and the learned Judge erred in imposing his own views in place of CBK'S views. Moreover, without declaring Section 46(1) of the KDIC Act as unconstitutional, which was wrong, it was not open to the learned Judge to issue injunction. It seems clear to us that the learned Judge went too far and drifted into serious error in attempting to revive and restore receivership that was not in being after liquidation, there being complete absence of express statutory provision giving the court the power to do so.

31. We have no hesitation in allowing, which we hereby do, both appeals Nos.66/2015 and 67/2017. We set aside the Ruling and orders of the High court issued on 18th November 2015 in Suit No.HCCC No.482 of 2015 [Richardson & David Limited versus Kenya Deposit Insurance Corporation & Central Bank of Kenya Limited]. We dismiss with costs to CBK and KDIC the 1st respondent's notice of motion dated 2nd October 2015 in H.C.C.C. No.482 of 2015 [Richardson & David Limited versus Kenya Deposit Insurance Corporation & Central Bank of Kenya Limited].

32. We award the costs in these appeals and in the High Court to the appellants, CBK and KDIC.

Dated and delivered at Nairobi this *15th day of December 2017*.

E. M. GITHINJI

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR