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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISCELLANEOUS APPLICATION NO. 654 OF 2020
(ARISING FROM CIVIL SUIT NO. 43 OF 2020)

10 **HAM ENTERPRISES LTD**
KIGGS INTERNATIONAL (U) LTD
HAMIS KIGGUNDU **APPLICANT**

VERSUS

DIAMOND TRUST BANK (U) LTD
15 **DIAMOND TRUST BANK (K) LTD** **RESPONDENTS**

BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO
RULING

1. Application:

20 This application was brought by notice of motion under Order 9 rules
6, 8, 10 and 30 and Order 52 rules 1, 2 and 3 of the Civil Procedure
Rules SI 71-1 and section 98 of the Civil Procedure Act. It seeks
orders that;

- a) The Respondents joint written statement of defence filed in
25 HCCS No. 43 of 2020 be struck out on grounds that;
- i. It is a perpetration of illegalities committed by the
Respondents in illegally conducting financial institutions
business without a licence and / or conducting financial
institutions business in contravention of the Financial
30 Institutions Act (2004) as amended.

- 5 ii. Alternatively, but without prejudice it is frivolous, vexatious
 and evasive and fails to disclose any reasonable answer to
 the Applicants claim of illegal conduct of financial
 institutions business by the Respondents.
- iii. Judgment be entered against the Respondents upon the
10 Applicants' claim in HCCS No. 43 of 2020.
- iv. Costs of this Application be provided for.

2. Grounds for this Application:

The grounds in support of the application are contained in the affidavit of Allen Kagoya and they are;

- 15 i. That the Applicants filed HCCS No. 43 of 2020 against the
 Respondents seeking among others the recovery of monies
 unjustly and illegally obtained from the 1st Applicant's bank
 accounts and for various breaches of contractual, fiduciary and
 statutory duties.
- 20 ii. That the Applicants subsequently filed an amended plaint with
 leave of court on 10th August 2020 where they *inter alia*
 specifically raised questions of the illegality of the 2nd
 Respondent's conducting of financial institutions business in
 Uganda without a license to do so under the Financial
25 Institutions Act, 2004 (as amended).
- iii. That the Applicants further raised the question of illegal
 conduct of the 1st Respondent in facilitating and abetting the
 illegal conducting of financial institution business by the 2nd

5 Respondent which by itself amounted the contravention of the Financial Institutions Act 2004 (as amended).

iv. That the Respondents filed a joint written statement of defence pursuant to which the 2nd Respondent admitted to being a commercial bank licensed to operate in Kenya but which was
10 conducting financial business in Uganda.

v. That the 2nd Respondent was obliged by law to show that it was licensed to conduct financial institutions business in Uganda by the authority of both the Central Bank of Uganda and the Central Bank of Kenya but it did not.

15 vi. That the Respondents joint amended written statement of defence also admits that the 1st Respondent was the appointed agent of the 2nd Respondent in undertaking the impugned business in Uganda without a license.

vii. That the Respondents were again obliged by law to show that
20 the banking agency in (f) above was approved and authorized by both the Central Bank of Uganda and the Central Bank of Kenya but they did not.

viii. That the Respondents joint amended written statement of defence is a perpetration of illegalities committed by the
25 Respondents in Uganda and Kenya which defence is bad in law and ought not to be maintained or cordoned by this Honourable Court.

ix. That the 1st Respondent by facilitating acts and omissions of aiding and abetting the commission of offences under the
30 Financial Institutions Act 2004. (as amended) makes the 1st

5 Respondent both a facilitator and principal offender of the committed offences.

- x. That in the alternative, but without prejudice, the amended joint written statement of defence is frivolous and vexatious as it constitutes general denials, is evasive and it fails to disclose
10 any reasonable answer or at all, to the aforesaid applicants claim of illegality.
- xi. That for the above reason, the defence raised by the respondents is meritless as it fails to answer or give any meaningful and substantiated answer with sufficient
15 particularity to the points of substance raised by the Applicants claim of illegality and the same ought to be struck out.
- xii. That this application raises substantial questions of law which can be determined on the face of the pleadings and thus should be able to dispose of the main suit without the need for an
20 interparty hearing.
- xiii. That this application raises serious questions of law of great importance as it is essential to the proper conduct of financial institutions business in Uganda.

The Respondents on the other hand opposed this application and
25 raised several grounds as seen from the affidavit of Stephen Kodumbe, the head of Legal, head debt recovery and Company Secretary of the 2nd Respondent.

5 **xiv. Affidavits:**

Both parties filed affidavits in support and opposition to this application.

For the Applicants the affidavit in support was deposed by Ms. Kagoya Allen, who is stated to be an advocate of the High Court of Uganda working for gain with M/s Muwema and Co Advocates, one
10 of the law firms which is retained by the Applicants to handle HCCS No 43 of 2020 which is the head suit in this matter.

Ms. Kagoya deposed that she had had the opportunity to study the pleadings in the head suit, the relevant law touching it and thus was
15 authorised and familiar with the dispute between the parties as being among others the fact that the Applicants in HCCS No 43 of 2020 seeks the recovery of monies unjustly and illegally obtained from the 1st Applicant's bank accounts and various other breaches of contractual, fiduciary and statutory duties.

20 Ms. Kagoya averred that she was knowledgeable with the law relating to the act of lending and extension of credit by a financial institution under the Financial Institution Act, 2 of 2004 (As Amended).

Ms. Kagoya Allen further averred that the Applicants filed an amended plaint in the head suit wherein are they claiming a refund
25 of more than USD 25 Million in addition to other monies which the Applicants alleged were illegally deducted from the Applicant's accounts which they alleged raised questions of illegality arising from the conduct by the 2nd Respondent of financial institutions business

5 in Uganda without a license issued under the **Financial Institutions Act 2 of 2004** (As Amended) and the illegal conduct of the 1st Respondent in facilitating and abetting the illegal conduct of financial institutions business by the 2nd Respondent in Uganda in contravention of the Financial Institutions Act, 2 of 2004 (As
10 Amended) for the said law defines the act of conducting a financial institution business to include the lending and the extension of credit by a financial institution which business were conducted by the respondents in contravention of the law and which was admitted by the Respondents in their filed joint written statement of defence in
15 which the 2nd Respondent admits being commercial bank licensed to operate in Kenya but which conducted financial institutions business in Uganda, an act which was illegal and calls for the striking of the Respondents written statement of defence by allowing this application and awarding the Applicant prayers herein and also the
20 specific prayers in the head suit of High Court Civil Suit No 43 of 2020.

The details of Ms. Kagoya Allen deposition is on record but among others alludes to the fact that the said respondents' joint amended statement of defence admits that the fact of the 1st respondent being
25 appointed as an agent of the 2nd respondent in undertaking the impugned business in Uganda without a license, contrary to the law in addition to the fact of the respondents again being obliged by law to show that the banking agency was approved by both the Central Bank of Uganda and the Central Bank Of Kenya which they did not
30 rendering their actions to offend both the Financial Institutions Act

5 2 of 2004(As Amended) of the Laws of Uganda and the Banking Act
Chapter 488 of the Laws of Kenya in addition to the Kenyan Central
Bank Prudential Guidelines on Agent Banking and Outsourcing of
Financial Services which actions were punishable under the said law
which called for the dismissal of the Respondents joint amended
10 Written Statement of Defence which is a perpetration of illegalities
committed by the Respondents both in Uganda and Kenya and thus
bad in law and ought to be striked out as this this Application raises
serious points of law which is the illegal acts of the Respondents
which if sustained dispose of the head suit without the need for any
15 interparty hearing and also renders all the credit facility agreements,
mortgages and other securities executed thereunder being declared
illegal and unenforceable *ab initio*.

The Respondents denied all the claims of the Applicants and in
rebuttal tendered in an affidavit deposed by Mr. Stephen Kodumbe,
20 the Head of Legal, Head Debt Recovery and Company Secretary of the
2nd Respondent Company, which is on record, the essence of which
is that the 2nd Respondent never carried out any financial institutions
business in Uganda and that the credit facilities alluded to by the
Applicants were offered to the 1st and 2nd Plaintiffs / Applicants in
25 Kenya after the 1st Applicant applied for credit facilities there with
the said facilities transferred to the 1st Applicant's account in Kenya
and the 2nd Respondent only instructing the 1st Respondent which is
based in Uganda to act as the collection agent for the 2nd Respondent
through an escrow account in order to enable repayments of credit

5 facilities taken out in Kenya but not acting as its agent in the conduct of financial institution business in Uganda.

Mr. Kodumbe further averred that the 2nd Respondent bank does not fall within the definition of a financial institution as envisaged under the Financial Institutions Act (as amended) 2004 and that as a result
10 it did not carry out financial institutions business in Uganda and that the credit facilities offered to the 1st and 2nd Plaintiffs were not offered in Uganda. He deponed further that the 1st Applicant applied to the 2nd Respondent for a credit facility in Kenya which was obtained in Kenya and transferred to his account from Kenya.

15 Further to Mr. Kodumbe, the burden of proving financial business was conducted by the 2nd Respondent in Uganda is upon the Applicants. On whether the 1st Respondent was an agent of the 2nd Respondent in the conduct of financial institutions business, Mr. Kodumbe averred that the 2nd Respondent instructed the 1st
20 Respondent to act as a collection agent for the payments to be made by the 1st Applicant to an escrow account of the 2nd Respondent in repayment of the credit facilities taken from the 2nd Respondent and the 1st Respondent did not act as agent of the 2nd Respondent to conduct financial institutions business in Uganda.

25 He also averred that the even if the court found that there were illegalities in the issuance of the credit facilities, the same would not be a ground to strike out the Respondents' written statement of defence.

5 Additionally, that the 2nd Respondents provided specific denials and defences and answers to the allegations raised in the amended plaint of the Applicants in their written statement of defence.

Ms. Mbabazi K. Emejeit, Head of Legal and Company Secretary of the 1st Respondent Company also swore an affidavit which is on record
10 also opposing this application deposing therein that Ms. Allen Kagoya was not competent to swear the affidavit which she did so on behalf of the Applicants since she lacked capacity to so do in addition to asserting that indeed the 2nd Respondent never conducted any financial institutions business in Uganda as alluded to by the
15 Applicants for the referred credit facilities were offered to the 1st and 2nd Applicants in Kenya after the 1st Applicant had applied to the 2nd Respondent for the same in Kenya with the same facilities obtained in Kenya and even transferred to his account in Kenya.

Therefore, according to both Mr. Stephen Kodumbe and Ms. Mbabazi
20 K. Emejeit this application was premature and thus should not be allowed such the head suit of HCCS No 43 of 2020 be allowed to proceed by this court with parties required to adduce factual evidence to support the contentions therein.

3. Submissions:

25 This application proceeded by way of submissions both is in support and in opposition of the same. The submissions which are on record are briefly summarized below.

5

a. Applicants submissions:

The Applicants through their submissions raised four issues for consideration and these are;

- i) Whether M/s Allen Kagoya, an advocate was authorized and competent swear the affidavit in support this application.
- 10 ii) Whether the written statement of defence in HCCS No 43 of 2020 is a perpetration of illegalities committed by the Respondents in illegally conducting financial institution business in Uganda without a license and / or in contravention of the Financial Institutions Act (2004) as amended.
- 15 iii) Whether the Respondents written statement of defence is frivolous, vexatious, evasive and it constitutes general denials.
- 20 iv) Whether the Applicant is entitled to judgment to be entered against the Respondents upon its claim in HCCS No. 43 of 2020.

On the first issue of whether the affidavit sworn by M/s Allen Kagoya, an advocate is authorized and competent to support this application, the submissions of the Applicants are that Ms. Kagoya is competent
25 to swear the stated affidavit on behalf of the Applicants since she is an advocate working with M/s Muwema & Co. Advocates, which a law firm retained by the Applicants and that she was well versed with the facts relating to the transactions between the parties herein.

5 On whether the written statement in HCCS No. 43 of 2020 was a
perpetration of illegalities committed by the Respondents in illegally
conducting financial institution business without a license and/ or
in contravention of the Financial Institutions Act (2004) as amended,
it was submitted for the Applicants that the financial transactions
10 that the Respondents arrived at with the Applicants were contrary to
the Financial Institutions Act 2 of 2004 (as amended) since the 2nd
Respondent did not have a license to operate in Uganda but issued
credit facilities to the Applicants who are residents of Uganda in
addition to the fact that the 1st Respondent acted as an agent of the
15 2nd Respondent in order to facilitate the said financial transactions
which was illegal and contrary to the Financial Institutions Act since
the expression financial institutions business was defined under
section 3 of the Financial Institutions Act, Act 4 of 2004 as amended
by section 3 (k) & (l) of Act No. 2 of 2016 to include the extending
20 or lending money held on deposit by way of financing of commercial
transactions, consumer and mortgage credit as well as engaging in
foreign exchange business with the 2nd Respondent being a foreign
bank engaged in the business of lending or extending money held on
deposits through mortgage credit and financing of commercial
25 projects which acts were required to be licensed by Bank of Uganda
even for a foreign bank and thus was illegal and expressly prohibited
under the Financial Institutions Act where no prior licence was
obtained.

According to counsel for the Applicants, there is sufficient evidence
30 to show that the alluded financial institutions business was

5 commenced in Uganda as the mortgage facility letter was drafted in
Uganda by Ugandan lawyers and even witnessed in Uganda and
further that the 1st and 2nd Applicants were Ugandan companies
based in Kampala, Uganda and issued securities for the loan facilities
through mortgages, debentures and other securities registered in
10 Uganda and that the 2nd Respondent never sought the permission of
the Bank of Uganda to carry out its business in Uganda as required
under sections 4 (1) and 117 of the Financial Institutions Act.

Counsel for the Applicants then concluded on this issue that since
the Respondents had not specifically denied conducting financial
15 institutions business in their written statement of defence which was
admitted then this was an incurable defect which as provided for
under Order 6 rule 8 and Order 8 rule 3 of the Civil Procedure Rules
meant that the facts in the plaint in the head suit were admitted
which this court should find so.

20 On the issue of whether the 1st Respondent was appointed as agent
of the 2nd Respondent in contravention of the Financial Institutions
Act, counsels for the Applicants submitted that this was true since
the Respondents did not specifically deny this in their written
statement of defence and so this should be deemed to have been
25 admitted a fact which is confirmed by clause 6 of the facility letter
which was dated 23rd October 2017 in which the 2nd Respondent
domiciled in Kenya appoints the 1st Respondent domiciled in Uganda
as its collection and lending agent which action was illegal since no
proof was attached to the written statement of defence in the head

5 suit to shown that prior approval of Bank of Uganda and the Central
Bank of Kenya was sought for the 1st Respondent to act as an agent
which omission was in contravention of **Regulation 5 Of The**
Financial Institutions (Agent Banking) Regulations 2017 and
10 **Section 126 (3) of the Financial Institutions Act** as well as the
relevant laws of Kenya making the 1st Respondent 'to become a
principal offender as provided for under section 19 of the Financial
Institutions Act when it took part in and facilitated the commission
of an offence and therefore this should be found so.

On whether the Respondents written statement of defence frivolous,
15 vexatious, evasive and it constitutes general denials, it was
submitted for the Applicants it should be found so for the same
offered no specific denials, was general in character and failed to
substantiate the claims raised by Plaintiffs that the credit facilities
were illegally obtained and so this issue should be found in the
20 affirmative.

Given all the above counsels for the Applicants thus urged this court
to allow this application with the prayers made therein including the
dismissal of head suit.

b. Respondents submissions:

25 In reply to the Applicants' submissions, the Respondents adopted the
issues raised by the Applicants and answered them as follows.

On the issue of whether M/s Allen Kagoya, an advocate of the
Applicants was authorized and competent to swear support this

5 application, counsels for the Respondents argued that it was improper for an advocate with personal conduct of a matter to swear an affidavit as to contested factual matters in a case with any such deposition to be struck out since could only have knowledge of an advocate and not of the facts. In making this allusion counsel relied
10 on the holding in ***The Attorney General of the Republic of Burundi vs Secretary General of the East African Community Appeal No. 2 of 2019*** as well as Regulation 9 of the Advocates (Professional Conduct) Regulations which not only prohibits such acts by an advocate but that in addition to the bar in not swearing the affidavit
15 counsel 's affidavit was full of falsehoods which makes it irrelevant and should thus be found so.

On whether the written statement of defence of the Defendants in the head suit was a perpetration of illegalities committed by the Respondents in illegally conducting financial institution business
20 without a license and / or in contravention of the Financial Institutions Act (2004) as amended, Counsel for the Respondents insisted that the said written statement of defence contained several triable issues that require the court's investigation including the fact of whether Applicants did borrow any money from the Respondents
25 which they have failed to service in addition to the fact the issue of whether the Respondents committed any illegalities by conducting financial institution business in Uganda or that indeed the impugned credit facilities being obtained in Kenya remaining questions of fact that require the interrogation by court.

5 Furthermore, counsels maintained that the 2nd Respondent has never carried out any lending activity or extended any money held on deposit in Uganda so as to amount to conducting a financial institutions business in Uganda in contravention of sections 3 of the FIA 2004 and the Financial Institutions (Amendment) Act No. 2 of 10 2016 since the 2nd Respondent never lent to any of the Applicants money held on deposits in Uganda and as such did not conduct financial institutions business in Uganda for there was indeed evidence that the credit facility of USD 4.5 Million that was issued by the 2nd Respondent was obtained in Kenya and that since the Act 15 itself did not regulate financial institutions business or deposit taking outside of Uganda by a foreign financial institution then the fact of the 2nd Respondent carrying out a financial business transaction in Uganda would require proof through the adducing of evidence in a trial rather than at this preliminary stage in addition to 20 the fact of a Ugandan borrowing money outside Uganda not amount to deposit taking.

Lastly counsels submitted that this court should find even act of registering of mortgages in as securities for the loan facilities should be found to be a different transaction regulated by a different law and 25 further that there was no law that prohibits a Ugandan from mortgaging its property to a foreign financial institution.

Given the above counsels for the Applicants urged this court to dismiss this application with costs.

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4. Decision of Court:

I have carefully considered the submissions of both parties and the authorities that they have cited. I have likewise adopted for resolving this Application the issues framed by the Applicant and I proceed to consider them and make findings on each as below.

- 10 On the issue of whether the affidavit sworn by Allen Kagoya, an advocate is authorized and competent to support this application, I note that both parties relied on different authorities and came to differing conclusions. The fact of the matter, however is that Ms. Allen Kagoya swore an affidavit in support of the application wherein she
- 15 asserts that she was an advocate of the High Court of Uganda working with one of the law firms, M/s Muwema and Co. Advocates retained by the Applicant to handle the main suit. A detailed consideration of her affidavit shows that Ms. Kagoya mainly deposes on the fact of being legal counsel with brief to provide legal counsel
- 20 to the Applicants mainly on the questions regarding the legality or not of the 2nd Respondent's engaging with the Applicants in conduct amounting to the carrying out of a financial institutions business in Uganda as well as the fact of 1st Respondent facilitating acting as an agent of the 2nd Respondent in that respect.
- 25 I note from the Affidavit of Ms. Kagoya that that these briefs entailed the provision of legal advice to the Applicants in regard to whether the actions of the parties or any of the parties contravened any of the provisions of the Financial Institutions Act, 2004 in relation to financial institutions business in Uganda.

5 From the affidavit of Ms. Kagoya it is clear to me that she deposes
same in support of this application on behalf of her clients as a legal
practitioner being best suited to do so given her knowledge and skills
on the laws of Uganda and given the fact that the matters deposed to
in support of this application are technical in nature as they relate to
10 whether the transaction between the Applicants and Defendants met
the requirement of the Financial Institutions Act, Act 2 of 2004 As
Amended I would concur with the submissions of counsels for the
applicants that M/s Kagoya was competent to swear the affidavit in
support of this application and not acted in contravention of any
15 professional duties for her situation is very similar to that which the
court faced in the case of **Collin Kasule vs Fina Bank and Another
Civil Revision No. 5 of 2015** and after examining the nature of the
brief of counsel came to the conclusion that counsel of an applicant
was capable and acted in order by swearing an affidavit in support
20 of an application made by parties only if to restate legal issues . I
would find similarly so in this respect for the affidavit sworn here
mainly relate to the interpretation of the law and not of facts which
counsel for and applicant is by training and experience ought to be
capable of doing so. This issue is thus answered in the affirmative.

25 On the issue of whether the written statement of defence is a
perpetration of illegalities committed by the Respondents in illegally
conducting financial institution business without a license and / or
in contravention of the **Financial Institutions Act (2004)** as
amended. Reference is made to section 3 (k)) of the Financial

5 Institutions Act (2004) FIA, a financial institution which provides a definition of a company carrying a financial institution business as;

10 ***“a company licensed to carry on or conduct financial institutions business in Uganda and includes a commercial bank, merchant bank, mortgage bank, post office savings bank, credit institution, a building society, an acceptance house, a discount house, a finance house or any institution which by regulations is classified as a financial institution by the Central Bank”.***

The said Act defines, a ***“financial institution business”*** to mean “

15 ***“ ... the business of (a) acceptance of deposits; (b) issue of deposit substitutes; (c) lending or extending credit, including— (i) consumer and mortgage credit; (ii) factoring with or without recourse; (iii) the financing of commercial transactions; (iv) the recovery by foreclosure or other means of amounts so lent, advanced or extended; (v) forfeiting, namely, the medium term discounting without recourse of bills, notes and other documents evidencing an exporter’s claims on the person to whom the exports are sent; (vi) acceptance credits; (d) engaging in foreign exchange business, in particular buying and selling***
20 ***foreign currencies, including forward and option type contracts for the future sale of foreign currencies; (e) issuing and administering means of payment, including credit cards, travelers’ cheques and banker’s drafts;”***
25

5 With a **“foreign bank”** defined in the same section to mean;

“ a body corporate or entity incorporated or formed under the laws of a country other than Uganda that—

(a) is a bank according to the laws of any foreign country where it carries on business;

10 **(b) carries on a business in a country other than Uganda that if carried out in Uganda, would be wholly or to a significant extent, financial institution business;”**

15 Going by the above definitions I would find as a matter of fact that there is no doubt that the 2nd Respondent is indeed a foreign bank for the purposes of the transactions between the parties.

However, the submissions by the Applicants are that the Financial Institutions Act applies to both local and foreign banks carrying out transactions. Relying on the definition of a financial institution reproduced above find that the said definition applies equally to the
20 2nd Respondent even if the 2nd Respondent issued credit facilities in Kenya to Ugandan entities without the approval of the controlling authorities as is clearly provided for under the Act for the Act makes it illegal for any ‘money held on deposit’ whether within Uganda and or outside it as seen from section 117 of the Financial Institutions
25 Act, 2004 which requires that a foreign bank to seek authorization of Bank of Uganda before it can engage in such activities, such as lending and extending credit facilities with the only exception to this

5 section is being the taking of deposits. For clarity the said provision
of the law states;

Section 117 of the Financial Institutions Act.

10 ***“117 (1) A foreign bank may, in such form and in such
manner as shall be prescribed by the Central Bank by
statutory instrument apply to the Central Bank for
permission to establish a representative office in
Uganda to engage in such limited activities,
excluding the taking of deposits as the Central Bank
may approve.”***

15 Given the above provision, I am of the considered opinion that indeed
by their very actions the Respondents committed illegalities when
money facilities were rendered by the 2nd respondent to the 1st and
2nd Applicants without prior authorization of the Bank of Uganda
even where such funds were availed outside Uganda for the import
20 of the Financial Institutions Act is that prior authorization is required
of the Bank of Uganda was a prerequisite.

Having found as above I now turn to the question of whether the 1st
Respondent acted as an agent of the 2nd Respondent to conduct
financial institutions business in Uganda. **Regulation 5 of the**
25 **Financial Institutions (Agent Banking) Regulations 2017,**
provides that;

5

“A financial institution shall not conduct agent banking in Uganda without the prior written approval from the Central Bank.”

In respect to this issue, arguments have been made to the effect that the 2nd Respondent is a not a financial institution and it did not carry
10 out any financial institutions business in Uganda. However, given the facility letter dated 23rd October 2017 which is attached to this application and in the head suit, I would find that mortgage credit transaction was carried out illegally and that fact becomes a clear question of law and not fact as was held in the Philippine’s case of
15 **Republic Vs. Malabanan** cited with approval in the Kenyan case of **Zacharia Okoth Obado vs. Edward Akong Oyugi & 2 others Election Petition No. 4 of 2013**, Court observed that;

***“a question of law arises when there is doubt as to what the law is on certain state of facts, while there is a
20 question of fact when the doubt arises as to the truth or falsity of the alleged facts”.***

In the leading Canadian case of **Canada (Director of Investigations and Research) Vs. Southern Inc. [1997] 1 S. C.R. 748**, the Supreme Court of Canada held that,

25 ***“Questions of law are questions about what the correct legal test is, whereas questions of fact are questions about what actually took place between the parties--- and questions of mixed law and fact ae questions about whether the facts satisfy the legal tests.”***

5 Thus what would be in issue in this application is whether or not the mortgages and credit facilities rendered to the Applicants perpetrated illegalities which permeates the whole case which when brought to the notice of a court would render such transactions indefensible as was held in the case of ***Makula International vs His Eminence***
10 ***Cardinal Nsubuga and Another [1982] HCB 11*** where it was held that court cannot sanction that which is illegal and that illegality once brought to the attention of the court overrides all questions of pleadings.

From the pleadings in the head suit it is clear to me that the written
15 statement of the defence filed by the Respondents/ Defendants does allude to the fact that DTB (K), the 1st Respondent here offered credit facilities to the 1st and the 2nd Applicants outside Uganda and within the letter of offer tied the same to DTB Uganda Limited which is the 2nd Respondent to act as its agent to collect funds for the repayment
20 of the said credit facilities.

These actions, in my view, are by their very nature the carrying out of financial institution business which are regulated under section 4 (1) of the Financial Institutions Act 2 of 2004 As Amended for such actions requires valid licenses granted for that purpose by the
25 Central Bank of Uganda.

The fact of this matter shows syndicated financial institution business by the 1st and 2nd Respondents aimed at dodging the seeking of a licence from the relevant authority which actions are clearly illegal such as that I would remain with no option by the

5 authority of the holding in **Makula International Vs His Eminence Cardinal Nsubuga and Another [1982] HCB 11** would render such actions illegal once brought to the attention of the court and therefore overrides all questions of pleadings.

10 In this matter the allegation is to the effect that the written statement of defence filed in the head suit perpetuates an illegality. The Respondents denies that their actions were illegal, however my reading of the said written statement of defence actually proves the pot that an illegality was committed given the reading of paragraph 19 of the Respondents written statement which was in response to
15 the Plaintiffs allegations as contained in their paragraph 13 (k) of the Amended Plaint the contents of both are reproduced below;

Paragraph 13 (k) of the Amended Plaint:

20 ***“On the other hand, the 2nd Defendant being a financial institution licensed to carry on banking business in Kenya could not conduct financial institution business in Uganda. Therefore, the financial transactions it contracted with the Plaintiffs were entered into contrary to the Financial Institutions Act 2004 (As Amended) and as such are illegal and unenforceable.”***

25 The Applicants / Defendants response to the above is contained in paragraph 19 of the written statement of defence which is as below.

5 **Paragraph 19 of the Written Statement of Defence:**

***“Paragraph 13 (k) of the Amended Plaintiff is denied and the Plaintiff shall be put to strict proof thereof. The defendants contend that the credit facilities obtained by the Plaintiffs from the 2nd Defendant were lawfully
10 obtained in Kenya and are recoverable and enforceable”***

 The import of the defence above clearly proves to me the fact of the 2nd Defendant conceding that it is a financial institution licensed to carry on banking business in Kenya and it conducted financial institutional business in Uganda through the first defendant without
15 first seeking the authority and license from Bank of Uganda as provided for in the Financial Institutions Act, 2 of 2004 As Amended.

 That pleading is a perpetuation of an illegality which goes to the root of the dispute between the parties and thus by virtue of the holding in ***Makula International Vs His Eminence Cardinal Nsubuga and
20 Another*** (Cited above) cannot be sustained by a court of law rendering all acts carried as a result of the illegal action of the Respondents to be null and void ab initio. I would thus answer this issue in the affirmative.

 On the issue of whether the 1st Respondent was appointed as agent
25 of the 2nd Respondent in contravention of the Financial Institutions Act, 2004 As Amended it was submitted by counsels for the Applicants that this was true position since the Respondents did not specifically deny this in their written statement of defence and that this fact was confirmed by paragraph 6 of the facility letter dated 23rd

5 October 2017 by which the 2nd Respondent, a financial business
institution domiciled in Kenya appointed the 1st Respondent, a
financial business institution domiciled in Uganda as its collection
and lending agent which action was illegal since no proof was shown
that prior approval of Bank of Uganda was sought for the 1st
10 Respondent to act as an agent and that this is a violation of
Regulation 5 of the Financial Institutions (Agent Banking)
Regulations 2017 and Section 126 (3) of the Financial Institutions
Act, 2 of 2004 As Amended as well as similar the laws of Kenya. That
by doing so the 1st Respondent thus became a principal offender
15 under Section 119 of the Financial Institutions Act, 2 of 2004 As
Amended when it took part in and facilitated the commission of an
offence under the Financial Institutions Act, 2 of 2004 As Amended.

The Respondents denied this assertion insisting that the 1st
Respondent never became an agent of the 2nd Respondent in
20 contravention of the law.

The relevant communications and the laws in relations to the
allegations above are reproduced here below;

i. Paragraph 6 of the Letter of Offer dated 23rd October ,2017 titled
Establishment of a term loan for USD 4,000,000 (United States
25 of America Dollars Four Million):

***By accepting this Letter of Offer you irrevocably authorise
Diamond Trust Bank (U) Kampala who are our appointed
agents for this lending to debit your account held with
them with the said appraisal fee and taxes simultaneously***

5 **with establishment of the facility in the banks books and
on each anniversary of the term loan and remit funds to
us.**

ii. Regulation 5 (1) of the Financial Institutions (Agent Banking)
Regulations 2017 provides that:

10 **A financial institution shall not conduct agent banking in
Uganda without the prior written approval from the
Central Bank.**

iii. Section 126 (3) of the Financial Institutions Act, 2 of 2004 As
Amended provides that;

15 **A financial institution which does any act prohibited by
this Act or fails to do anything required by this Act
commits an offence and where no specific penalty is
provided the financial institution is liable on conviction to
a fine not exceeding two hundred and fifty currency points
20 and in the case of a continuing offence to an additional
fine not exceeding fifty currency points for each day on
which the offence continues.**

iv. Section 33 (4) of the banking Act of Kenya provides that;

25 **The Central Bank may issue directions to institutions
generally for the better carrying out of its functions under
this Act and in particular with respect to (a) the standards
to be e adhered to by an institution in the conduct of its
business in Kenya or in any country where a branch or**

5 **subsidiary of the institution is located and; (b) Guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system**

v. Section 117 of the Financial Institutions Act, 2 of 2004 As Amended on Representative offices for foreign banks:

10 **(1) A foreign bank may, in such form and in such manner as shall be prescribed by the Central Bank by statutory instrument apply to the Central Bank for permission to establish a representative office in Uganda to engage in such limited activities, excluding the taking of deposits as the Central Bank may approve.**

5 **(2) An application under subsection (1) shall be accompanied by the prescribed application fee.**

20 **(3) Where a foreign bank is granted permission to establish a representative office in Uganda, it shall not, without the prior permission of the Central Bank, do any of the following—**

- (a)
- (b)
- (c)
- (d).....; or

25 **(e) engage in any other activity other than such limited activity as the CENTRAL BANK may authorise the foreign bank to conduct.**

(4) Any person who—

30 **(b) contravenes any of the provisions of subsection (3) of this section, commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding two years or both.**

5 From the above, I would tend to agree with the submissions of the Applicant that indeed the 2nd Respondent not only appointed the 1st respondent to be its agent in Uganda but that the 2nd respondent carried out financial business transactions on behalf of the 1st Respondent in contravention of the law both in Uganda which acts
10 are illegal and would call for it being penalized since it pleaded and attached no licensed authorizing it to transact business on behalf of the 2nd Respondent as provided for by the Financial Institutions Act , 2004 As Amended with such acts punishable on conviction to a fine not exceeding two hundred and fifty currency points or
15 imprisonment not exceeding two years or both.

Arising from the determination as I have made above I would answer this issue in the affirmative that indeed the 1st respondent acted as an agent of the 2nd respondent when it carried out the impugned financial business transaction without first obtaining a license from
20 Bank of Uganda in contravention of the law which act is criminal and illegal.

Having found as above, I will find the remaining issues moot and so I will not delve into them further.

Therefore, arising from the illegal circumstances relating to the
25 conduct of financial institute business by both the 1st and 2nd Respondents, I would allow this application with costs.

5 In addition, I would make consequential orders as listed below.

5: Orders:

Arising from the findings above I would make the following ORDERS, CONSEQUENTIAL and other SUPPLEMENTARY ORDERS;

- i. This Application is allowed with costs to the Applicants.
- 10 ii. The joint written statement of the Respondents filed in HCCS No. 43 of 2020 which is a perpetuation of illegalities is hereby struck out.
- iii. Judgment is hereby entered for the Plaintiffs as prayed for
15 in their joint plaint by virtue of Order 9 rules 6, 8, 10 and 30 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1 and Section 98 of the Civil Procedure Act as follows;
 - a. I declare that by their illegal actions the Respondents / Defendants breached the different loan agreements terms entered into with the Applicants / Plaintiffs in the period
20 between 16th February 2011 to 16th November 2019.
 - b. I declare that Credit Facilities between the 1st and 2nd Plaintiffs and the Defendants have since been settled at law.
 - c. I do order for the recovery by the Applicants from the
25 Respondents/Defendants jointly of the Ugx. 34,295,951,553/= (Uganda Shillings Thirty-Four Billion Two Hundred Ninety-Five Million Nine Hundred Fifty -One Thousand Five Hundred and Fifty-Three Only) and USD. 23,467,670.61 (United States Dollars Twenty-Three

5 Million Four Hundred Sixty-Seven Thousand Six Hundred
and Seventy Only) being monies that were unlawfully
taken by them from the Applicants / Plaintiffs loan
accounts.

10 d. I do declare that since the 2nd Defendant did not produce
and or attached a license allowing it to conduct financial
institutions business in Uganda from Bank of Uganda in
respect of the business alluded hereto then the alleged
credit facilities that were stated to have been offered by it
15 to the first Plaintiff were illegal and thus void *ab initio* and
consequently unenforceable.

e. I do declare that the appointment of the 1st Defendant by
the 2nd Defendant as agent bank and security agent in
respect of the 2nd Defendant's loan was illegal, unethical,
unlawful, in breach of trust, in breach of fiduciary duty
20 and in breach of the Financial Institutions Act 2004 (As
Amended) as well the Bank of Uganda Consumer
Protection Guidelines 2011 and the Kenyan Banking Act.

f. I do hereby issue an order for the unconditional
release/discharge of mortgages allegedly created over the
25 Plaintiffs' properties comprised in Kyadondo Block 248
Plot 328 land at Kawuku, FRV 1533 Folio 3 Plot 36 – 38
Victoria Crescent II Kyadondo and LRV 3176 Folio 10 Plot
923 Block 9 Land at Makerere Hill Road and all Corporate
and personal guarantees issued by the Plaintiffs.

- 5 g. I do hereby vacate the order previously issued by this court
for the taking an audit and account of all the 1st and 2nd
Plaintiffs' loan accounts for the period between 16th
February 2011 to date as it is now overtaken by events.
- 10 h. I do issue a permanent injunction restraining the
Defendants from enforcing the mortgages over the
Plaintiffs' properties comprised in Kyadondo Block 248
Plot 328 land at Kawuku, FRV 1533 Folio 3 Plot 36 – 38
Victoria Crescent II, Kyadondo and LRV 3176 Folio 10 Plot
923 Block 9 Land at Makerere Hill Road.
- 15 i. I do not offer any General and punitive damages as against
the Respondents for I have found nothing to warrant such.
- j. I do declare interest on (c) above from the date of filing this
suit at the prevailing court rate of 8% per annum till
payment in full.
- 20 k. I award costs of this application and the head suit to the
Applicants/ Plaintiffs.
- vi. I do issue directives to Bank of Uganda which is the
implementing authority under the Financial Authorities Act 2 of
2004 As Amended to take such necessary actions and measures
25 to ensure that the provisions of the law is implemented in
accordance with the intention of the law such as to protect the
Ugandan economy from illegal hemorrhages and uncontrolled
flows of financial resources and to ensure that financial
institutional business in Uganda is operated within the letter of

5 the law to protect the nascent banking business industry in
Uganda.

I so order.

.....
Hon. Dr. Justice Henry Peter Adonyo

Judge

7th October 2020

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