THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO_____OF 2023

(ARISING FROM CIVIL APPEAL NO 13 of 2021)

(ALSO ARISING FROM CIVIL APPEAL NO 242 OF 2020)

(ALSO ARISING FROM HCMA NO 064 OF 2020)

(ALSO ARISING FROM HCCS NO 43 OF 2020)

1. **HAM ENTERPRISES (U) LTD**
2. **KIGGS INTERNATIONAL (U) LTD**
3. **HAMIS KIGGUNDU.....] APPLICANTS**

VERSUS

1. **DIAMOND TRUST BANK (U) LTD**
2. **DIAMOND TRUST BANK (K) LTD.....] RESPONDENTS**

NOTICE OF MOTION

(Brought under Articles 28 (1), 44 (c), 126 (1), (2) (a), (b) & (e) of the Constitution, Section 98 of the Civil Procedure Act Cap 71, Rules 2 (2), 42 (1) & (2) and 43 of the Judicature (Supreme Court Rules) Directions S.I 13-1)

TAKE NOTICE that this Honourable Court shall be moved on the____day of_____2023 at_____ O'clock in the fore/afternoon or soon thereafter as Counsel for the Applicants can be heard in an application for orders that;

a) **Civil Application No 051/2021 Ham Enterprises Ltd & 2 Ors vs Diamond Trust Bank (U) Ltd & Diamond Trust Bank (K) Ltd** which was filed by the Applicants seeking orders for judgment on admission, be heard and finally determined by the court.

b) The Applicants be granted leave to adduce additional evidence from the Central Bank of Kenya to elucidate and substantiate the illegality committed by the 2nd Respondent in respect of the disputed credit transactions between the Applicant and the 2nd Respondent, the subject of this Appeal.

c) This Honourable Court be pleased to arrest it's Judgment in **Supreme Court Civil Appeal No 13/2021** which is scheduled to be delivered on the **13th** of **June 2023** at **10:30 a.m** pending the hearing and determination of Civil Application No 051/2021 and the application for leave to adduce additional evidence.

d) This Honourable Court be pleased to issue further and better orders as shall meet the ends of justice.

e) Costs of the Application be provided for.

TAKE FURTHER NOTICE that the grounds in support of this application herein are contained in the supporting affidavit of **Hamis Kiggundu**, the 3rd Applicant and a director of the 1st and 2nd Applicants respectively and a further affidavit of **Edwin Lubanga**, which shall be read and relied upon at hearing but briefly are that;

1. The Applicants filed a memorandum of appeal in Supreme Court Civil Appeal No13/2021 in which they raised 7 grounds of appeal to wit;

    i. *The learned Justices of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondents Appeal before them.*

    ii. *The learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of*

appeal that were not implicitly set out in the memorandum of appeal and thereby erroneously ordered;

a) *the striking out of the Appellants Amended Plaint in HCCS No 43/2020 and further ordered a retrial on the basis of the original pleadings,*

b) *the saving of the order for appointment of auditors which order has been vacated and was never resurrected in the suit.*

iii. *The learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in MA No 654/2020 before their joint Written Statement of Defense was struck out and judgment entered for the Appellants.*

iv. *The learned Justices of Appeal erred in law and in fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favour of the Appellant under* ***Order 6 Rule 30*** *of the* ***Civil Procedure Rules S.I 71-1****.*

v. *The learned Justices of Appeal erred in law and fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter parties by the trial court.*

vi. *The learned Justices of Appeal erred in law and fact in condemning the Appellants to costs in an Appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.*

vii. *The learned Justices of Appeal erred in law and in fact in rewarding the Respondents with costs for committing an illegality.*

2. The Appeal was heard on the 11th day of November 2021 and the parties were directed to file written submissions and judgment was reserved on notice.

3. On realizing that the Respondents had admitted the grounds of appeal, the Applicants filed **Civil Application No 051/2021 Ham Enterprises Ltd & 2 Ors vs Diamond Trust Bank (U) Ltd & Diamond Trust Bank (K) Ltd** on the 23rd of November 2021 seeking orders for Judgment on admission.

4. Despite numerous requests to be heard, this Honourable Court did not list the application for hearing until the **28th** of **April 2023** when the Court invited the Applicants to attend a session for re-constitution of the panel on the **5th** of **May 2023**.

5. Upon receipt of the above invitation, the Applicant through it's lawyers wrote a letter on the 2nd of May 2023 requesting for the fixing and hearing of the **Civil Application No 051/2021** but the court advised that the hearing of the said Civil Application will be communicated at a later date.

6. The Court went ahead to introduce a new panel to sit in the judgement of Civil Appeal No 13/2021 after the demise of Hon. Justice Apio Aweri JSC (RIP) and it's now constituted as follows;

   i. **Hon. Alfonse C Owiny Dollo CJ-(Head of panel),**
   ii. **Hon. Lady Faith Mwondha JSC,**
   iii. **Hon. Lady Percy Tuhaise JSC,**
   iv. **Hon. John Mike Chibita JSC,**
   v. **Hon. Stephen Musota JSC.**

7. That on the 29th of May 2023, the court invited the Applicant for a pre-hearing conference of **Civil Application No 051/2021** to be held on the **8th** of **June 2023** at **9:30 a.m.**

8. That on the 8th June 2023, the Applicants together with the Respondents attended the scheduled pre-hearing conference which was presided over by **Hon. Lady Justice Elizabeth Musoke JSC** who declined to conduct the pre-hearing session which had been called.

9. The **Hon. Lady Justice Elizabeth Musoke JSC** informed the parties that she had been directed by the head of the panel to inform them that Judgement in Civil Appeal No 13/2021 was ready and that it would be delivered on the **13th** of **June 2023**.

10. That by reason of the above developments, **Civil Application No 051/2021** was not heard by the above mentioned re-constituted panel with the result that the said Civil Application neither stands heard, allowed or dismissed.

11. That consequently, the Applicants have been denied access to the Supreme Court to seek adjudication of the dispute upon the aforesaid Civil Application which has occasioned a gross violation of the Applicants' non-derogable right to be heard as protected under **Article 28** of the Constitution.

12. That it is a grave injustice for the Supreme Court which is the highest court in Uganda to permanently lock the Applicants out of an opportunity to be heard on such a novel and complex commercial dispute well knowing that it's decisions are final, binding and not appealable.

13. That in the meantime, the Applicants recently discovered through Edwin Lubanga, that the Central Bank of Kenya did not grant the requisite approval under the law to the 2nd Respondent

to enter into the disputed credit transaction which is the subject of this appeal.

14. That the above information or evidence was not known or available to the Applicants by the time of the filing and hearing of Civil Appeal No 13/2021.

15. That the above information/evidence is very relevant to the substantial question of the illegal conduct of cross border financial institution business by the Respondents which is the subject of this appeal.

16. That the said information/evidence is not only credible but it is also capable of having an influence on the decision or result of the Appeal.

17. That it is therefore crucial that this Honourable Court be pleased to admit the abovementioned additional information or evidence as it may deem fit.

18. That there is no inordinate delay in filing this application which is very urgent in light of the impending judgement to be delivered in Civil Appeal No 13/2021.

19. That it is in the interests of substantive justice, fairness and equity that this application be granted as sought.

Dated at Kampala this 9th day of June 2023.

MUWEMA & CO. ADVOCATES
KIMARA ADVOCATES & CONSULTANTS
(COUNSEL FOR THE APPLICANTS)

GIVEN under my hand and seal of this Honourable Court this ___ day of _____2023.

DEPUTY REGISTRAR

Drawn & Filed by:

1. *M/s Muwema & Co. Advocates and Solicitors,*
   Plot 50 Windsor Crescent Road, Kololo,
   P.O. Box 6074, Kampala,
   Tel: +256 414 257 661
   Email: info@madvocates.com
   : madvocates@madvocates.com
   Website: www.madvocates.com.

2. *M/s Kimara Advocates & Consultants,*
   Plot 67B, Spring Road, Bugolobi,
   4th Floor Kisakye Complex,
   P.O Box 11916, Kampala.
   Tel: +256200944412
   Email: info@kimara-advocates.com
   Website: www.kimara-advocates.com.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO_____OF 2023

(ARISING FROM CIVIL APPEAL NO 13 of 2021)

(ALSO ARISING FROM CIVIL APPEAL NO 242 OF 2020)

(ALSO ARISING FROM HCMA NO 064 OF 2020)

(ALSO ARISING FROM HCCS NO 43 OF 2020)

1. **HAM ENTERPRISES LTD**
2. **KIGGS INTERNATIONAL (U) LTD**
3. **HAMIS KIGGUNDU.....] APPLICANTS**

VERSUS

1. **DIAMOND TRUST BANK (U) LTD**
2. **DIAMOND TRUST BANK (K) LTD.....] RESPONDENTS**

AFFIDAVIT IN SUPPORT

I **HAMIS KIGGUNDU** of c/o **M/s Muwema & Co. Advocates,** P.O Box 6074, Plot 50 Windsor Crescent Road - Kololo, Kampala and **M/s Kimara Advocates & Consultants,** P.O Box 11916, Plot 67B Spring Road, Bugolobi, 4th Floor Kisakye Complex, Kampala do solemnly make oath and state as follows;

1. THAT I am a male adult Ugandan of sound mind, the 3rd Applicant herein, and a director and attorney of the 1st and 2nd Applicants respectively and I am well conversant with the facts pertaining this matter in which capacity I affirm this Affidavit.

2. THAT I am also a lawyer by training and I bear a fair understanding of the basic principles of law attendant to this matter before court.

3. THAT the Applicants filed a Memorandum of Appeal before this Court in Civil Appeal No13/2021 in which they raised 7 grounds of appeal to wit that;

i. ***The learned Justices of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondents Appeal before them.***

ii. ***The learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of appeal that were not implicitly set out in the memorandum of appeal and thereby erroneously ordered;***

c) the striking out of the Appellants Amended Plaint in HCCS No 43/2020 and further ordered a retrial on the basis of the original pleadings,

d) the saving of the order for appointment of auditors which order has been vacated and was never resurrected in the suit.

iii. ***The learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in MA No 654/2020 before their joint Written Statement of Defense was struck out and judgment entered for the Appellants.***

iv. ***The learned Justices of Appeal erred in law and in fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favour of the Appellant under Order 6 Rule 30 of the Civil Procedure Rules S.I 71-1.***

v. ***The learned Justices of Appeal erred in law and fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter parties by the trial court.***

vi. ***The learned Justices of Appeal erred in law and fact in condemning the Appellants to costs in an Appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.***

vii. ***The learned Justices of Appeal erred in law and in fact in rewarding the Respondents with costs for committing an illegality.***

(A copy of the memorandum of appeal is attached hereto as annexure "AE1")

4. THAT the Appeal was heard on the 11th day of November 2021 and the parties were directed to file written submissions and judgment was reserved on notice.

5. THAT on realizing that the Respondents had admitted the grounds of appeal, the Applicants filed **Civil Application No 051/2021 Ham Enterprises Ltd & 2 Ors vs Diamond Trust Bank (U) Ltd & Diamond Trust Bank (K) Ltd** on the 23rd of November 2021 seeking Judgment on admission. ***(A copy of the said application is attached hereto as annexure "AE2")***

6. THAT despite numerous requests to be heard, this Honourable Court did not list the application for hearing until the 28th of April 2023, when the Court invited the Applicants to attend a session for re-constitution of the panel on the 5th of May 2023. ***(Copies of the reminder letters are attached hereto as group annexure "AE3")***

7. THAT upon receipt of the above invitation, the Applicants through their lawyers M/s Muwema & Co. Advocates, wrote a letter on the

2nd of May 2023 requesting for the fixing and hearing of the **Civil Application No 051/2021** but the court advised that the hearing of the said Civil Application will be communicated at a later date. ***(Copies of the said letters are attached hereto as group annexure "AE4 (a) and (b) respectively")***

8. THAT the Court went ahead to introduce a new panel after the demise of Hon. Justice Apio Aweri JSC (RIP) and a new panel to sit in Judgment of **Civil Appeal No 13/2021** is now constituted as follows;

    i. **Hon. Alfonse C Owiny Dollo CJ-(Head of panel),**
    ii. **Hon. Lady Faith Mwondha JSC,**
    iii. **Hon. Lady Percy Tuhaise JSC,**
    iv. **Hon. John Mike Chibita JSC,**
    v. **Hon. Stephen Musota JSC.**

9. THAT on the 29th of May 2023, the court invited the Applicant for a pre-hearing conference of **Civil Application No 051/2021** to be held on the **8th** of **June 2023** at **9:30 a.m.** (***A copy of the said invite is attached hereto as annexure "AE5"***)

10. THAT on the 8th June 2023, the Applicants together with the Respondents attended the scheduled pre-hearing conference which was presided over by **Hon. Lady Justice Elizabeth Musoke JSC** who declined to conduct the pre-hearing session which had been called.

11. THAT the **Hon. Lady Justice Elizabeth Musoke JSC** informed the parties that she had been directed by the head of the panel to inform them that Judgement in Civil Appeal No 13/2021 was ready and that it would be delivered on the **13th** of **June 2023**. (***A copy of the Judgment notice is attached as annexure "AE6"***)

12. THAT by reason of the above developments, **Civil Application No 051/2021** was not heard by the above mentioned re-constituted panel with the result that the said Civil Application neither stands heard, allowed or dismissed.

13. THAT consequently, the Applicants have been denied access to the Supreme Court to seek adjudication of the dispute upon the aforesaid Civil Application and this has occasioned a gross violation of the Applicants' non-derogable right to be heard as protected under **Article 28** of the Constitution.

14. THAT it is a grave injustice for the Supreme Court which is the highest court in Uganda to permanently lock the Applicants out of an opportunity to be heard on such a novel and complex commercial dispute well knowing that it's decisions are final, binding and not appealable.

15. THAT this conduct by the Court is very strange because the doors of the Supreme Court are usually open to litigants irrespective of the strength or weakness of their cases and irrespective of their political social or economic standing.

16. THAT the Applicants do not understand why the Supreme Court has treated the Respondents favourably by always entertaining and allowing their oral applications while refusing to hear the Applicants written applications in the same appeal. (***A copy of the record of proceedings of the 11th November 2021 is attached hereto as annexure "AE7"***)

17. THAT the Applicants do not feel that Justice has been served and/or will be served in the circumstances where they are not being treated equally with the Respondents, before and under the law.

18. THAT in the meantime, I recently discovered through Edwin Lubanga, that the Central Bank of Kenya did not grant the requisite

approval under the law for the 2nd Respondent to enter into the disputed credit transaction which is the subject of this appeal. (***Copies of the application for access to information and the response from the Central Bank of Kenya are attached as group annexure "AE8 (a) and (b) respectively"***)

19. THAT the above information or evidence was not known or available to the Applicants by the time of the filing and hearing of Civil Appeal No 13/2021 as I obtained it from the said Edwin Lubanga on the 8th June 2023.

20. THAT the above information/evidence is very relevant to the substantial question of the illegal conduct of cross border financial institution business by the Respondents which is the subject of this appeal.

21. THAT the said information/evidence is not only credible but it is also capable of having an influence on the decision or result of the Appeal which will guide the proper legal and prudential regulations of Commercial banks in Uganda and beyond.

22. THAT the failure by the 2nd Respondent to obtain regulatory approval from the Central Bank of Kenya to contract the disputed credit transaction with the assistance of the 1st Respondent affects the legality of the whole transaction which was carried out jointly by the Respondents, as one transaction.

23. THAT the abovementioned information or evidence from the Central Bank of Kenya is material additional evidence which is necessary to aid the court in determining the substantive question of illegality pending before it.

24. THAT the Applicant shall suffer manifest and immeasurable injustice, irreparable harm and injury, if this Honourable Court refuses to

exercise it's judicial function to hear and determine Civil Application No 051/2021 and the present application.

25. THAT the Applicants are concerned that this Honourable Court may follow precedent and decline to hear this application as well, but they have filed it all the same in the hope that Court may finally observe it's greatest commandment, which is to administer substantive justice to all without fear or favour.

26. THAT it is therefore crucial that this Honourable Court be pleased to admit the abovementioned additional information or evidence as it may deem fit and also arrest it's judgement due to be delivered on the 13th June 2023.

27. THAT there is no inordinate delay in filing this application which is very urgent in light of the impending judgement to be delivered in Civil Appeal No 13/2021.

28. THAT it is in the interests of substantive justice, fairness and equity that this application be granted as sought.

29. THAT whatever is stated herein is true and correct to the best of my knowledge and belief save where the source of information is disclosed.

AFFIRMED at Kampala this 8th day of]
June 2023 by the said]
HAMIS KIGGUNDU]

DEPONENT

BEFORE ME:

A COMMISSIONER FOR OATH

MUMPENJE ANDREW
COMMISSIONER OF OATHS / ADVOCATE
P.O. BOX 27827, KAMPALA

Drawn & Filed by:

1. *M/s Muwema & Co. Advocates and Solicitors,*
   Plot 50 Windsor Crescent Road, Kololo,
   P.O. Box 6074, Kampala,
   Tel: +256 414 257 661
   Email: info@madvocates.com
   : madvocates@madvocates.com
   Website: www.madvocates.com.

2. *M/s Kimara Advocates & Consultants,*
   Plot 67B, Spring Road, Bugolobi,
   4th Floor Kisakye Complex,
   P.O Box 11916, Kampala.
   Tel: +256200944412
   Email: info@kimara-advocates.com
   Website: www.kimara-advocates.com

AE1

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL No. 13 OF 2021
(ARISING FROM CIVIL APPEAL NO 242 OF 2020)
[ARISING FROM MISC. APPLTN NO 654 OF 2020 AND HCCS NO 43 OF 2020]

1. HAM ENTERPRISES LTD
2. KIGGS INTERNATIONAL (U) LTD
3. HAMIS KIGGUNDU] APPELLANTS

VERSUS

1. DIAMOND TRUST BANK (U) LIMITED
2. DIAMOND TRUST BANK (K) LIMITED] RESPONDENTS

MEMORANDUM OF APPEAL

[An appeal against the Judgment, Decree and Orders of the Learned Justices of Appeal, delivered at the Court of Appeal of Uganda, Kampala, by their lordships, Hon. Mr. Justice RICHARD BUTEERA, DCJ, Hon. Mr. Justice KENNETH KAKURU, JA, and Hon. Mr. Justice CHRISTOPHER MADRAMA, JA, on 05th May, 2021, sitting in Civil Appeal No. 242/2020 (arising from HCMA No. 654/2020 and HCCS No. 43/2020]

The above-named Appellants appeal to The Supreme Court of Uganda, at Kampala, against the above-mentioned decision on the following grounds set-out hereunder, **THAT: -**

1. The learned Justices of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondents Appeal before them.

THIS IS THE EXHIBIT MARKED AE1
REFERRED TO IN THE ANNEXED AFFIDAVIT OF
Hamis Kiggundu SWORN/DECLARED
BEFORE ME THIS 8th DAY OF June
20 23 AT
COMMISSIONER FOR OATHS

4

2. The learned Justices of Appeal erred in law and fact when they abandoned the grounds of Appeal raised by the Respondents and irregularly introduced new grounds of Appeal that were not implicitly set out in the memorandum of Appeal and thereby erroneously ordered;

   i) the striking out of the Appellants Amended Plaint in HCCS No 43 of 2020 and further ordered a retrial on the basis of the original pleadings,

   ii) the saving of the order for appointment of auditors which order had been vacated and was never resurrected in the suit.

3. The learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in Misc. Application No.654 of 2020 before their joint written statement of Defense was struck out and judgment entered for the Appellants.

4. The learned Justices of Appeal erred in law and in fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favor of the Appellants under **Order 6 Rule 30** of the **Civil Procedure Rules S.I 71-1.**

5. The learned justices of Appeal erred in law and in fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter partes by the trial court.

6. The learned justices of Appeal erred in law and in fact in condemning the Appellants to costs in an appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.

7. The learned justices of Appeal erred in law and in fact in rewarding the Respondents with costs for committing an illegality.

IT IS proposed to seek of the Honorable Supreme Court, Orders THAT: -

(a) **the Judgement, Orders and Decree of the Court of Appeal in Civil Appeal No. 242/2020, be set-aside;**

(b) **the Judgment, Orders and Decree of the Trial Judge in the High Court in HCMA No. 654/2020 and HCCS No. 43/2020 be reinstated;**

(c) **costs of this appeal and the Courts below be provided for, with a certificate to 2 (two) Counsel;**

DATED at Kampala this 1st day of June, 2021.

COUNSEL FOR THE APPELLANTS

TO: The Honorable Justices of the SUPREME COURT of Uganda at Kampala.

COPIES TO BE SERVED UPON:

M/s K&K Advocates,
2nd Floor, K&K House,

6

LODGED in the registry of the Supreme Court of Uganda at Kampala this 10 day of June, 2021.

REGISTRAR, Supreme Court.

JOINTLY DRAWN & FILED BY:

M/s Muwema & Co. Advocates & Solicitors,
Plot 50 Windsor Crescent Road, Kololo,
P.O. Box 6074, Kampala,
Tel: +256-414-257661,
Email:info@madvocates.com
:madvocates@madvocates.com
Website: www.madvocates.com

AND

M/s **Kimara Advocates & Consultants,**
Plot 67B, Spring Road, Bugolobi
4th floor, Kisakye complex,
P.O. Box 11916, Kampala – Uganda.
Email: info@kimara-advocates.com

7

AE_2

AE2 FILE

SUPREME COURT OF UGANDA RECEIVED TIME: 12:13 pm 23 NOV 2021 P. O. BOX 6074, KAMPALA SIGN:

A

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLTN NO. 51 ..... OF 2021
[ARISING FROM SCCA NO. 13 OF 2021]
[ARISING FROM CIVIL APPEAL NO. 242 OF 2020]
[ARISING FROM HCMA NO 654 OF 2020]
[ARISING FROM HCCS NO. 43 OF 2020]

1.	**HAM ENTERPRISES LTD**	]		
2.	**KIGGS INTERNATIONAL (U) LTD**	]		
3.	**HAMIS KIGGUNDU**	]	.....	**APPLICANTS**

VERSUS

1.	**DIAMOND TRUST BANK (U) LTD**	]		
2.	**DIAMOND TRUST BANK (K) LTD**	]	.....	**RESPONDENTS**

NOTICE OF MOTION

[Under Rules 2 (2), 42 (1) and (2) and 43 Judicature (Supreme Court Rules) Directions S. I 13 – 11) and Order 13 r. 6 Civil Procedure Rules]

TAKE NOTICE that this Honorable Court shall be moved on the _____ day of _____ 2021 at _____ O'clock in the forenoon/afternoon or soon thereafter as the Applicants or their Counsel can be heard on an Application for Orders that;

(a) **Judgement on admission be entered against the Respondents upon grounds 1, 2 and 3 of the Applicants Memorandum of Appeal filed in Civil Appeal No. 13/2021.**

(b) **Hearing of the appeal on grounds 4,5,6 and 7 in the Memorandum of appeals abides court's decision on the Respondents' admissions.**

(c) **Costs of the Application be provided for.**

TAKE FURTHER NOTICE that the grounds in support of this Application herein are contained in the supporting affidavit of **HAMIS KIGGUNDU**, the 3rd Applicant, Director and Attorney of the 1st and 2nd Applicants respectively, which shall be relied upon at the hearing of this Application but which briefly are that;

THIS IS THE EXHIBIT MARKED AE2 REFERRED TO IN THE ANNEXED AFFIDAVIT OF Hamis Kiggundu SWORN/DECLARED BEFORE ME THIS 8th DAY OF June 20 22 AT ..... COMMISSIONER FOR OATHS

Muwema & Co. Advocates and Solicitors P. O BOX 6074 KAMPALA, UGANDA
★ 23 NOV 2021 ★
RECEIVED
SIGN: ..... at 3.26 pm

1. The Applicants filed a Memorandum of Appeal in Supreme Court Civil Appeal No. 13/2021 in which they raised 7 grounds of appeal *to wit;*

   (i) *The learned Justice of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondents Appeal before them.*

   (ii) The learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of appeal that were not implicitly set out in the memorandum of appeal and thereby erroneously ordered;

      (a) the striking out of the Appellants Amended Plaint in HCCS No. 43 of 2020 and further ordered a retrial on the basis of the original pleadings,

      (b) the saving of the order for appointment of auditors which order had been vacated and was never resurrected in the suit.

   (iii) The learned Justice of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in Misc. Application No. 654 of 2020 before their joint written statement of Defense was struck out and judgment entered for the Appellants.

   (iv) The learned Justices of Appeal erred in law and in fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favour of the Appellants under ***Order 6 Rule 30*** *of the* ***Civil Procedure Rules S. 171 – 1****.*

   (v) The learned Justices of Appeal erred in law and in fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter parties by the trial court.

   (vi) The learned Justices of Appeal erred in law and in fact in condemning the Appellants to costs in an Appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.

   (vii) The learned Justices of Appeal erred in law and in fact in rewarding the Respondents with costs for committing an illegality.

2. On the 27th day of October, 2021, the Court directed that the said appeal be heard by way of written submissions filed by the Parties.

3. Pursuant to the Court directions, the Applicants filed their Conferencing Notes and Written Submissions in support of the aforesaid grounds of appeal and served copies thereof on the Respondents Counsel on the 3rd of November 2021.

4. The Respondents filed and served their reply to Applicants Conferencing Notes and Written Submissions on the 5th of November 2021.

5. The Respondents' reply to the Applicants conferencing notes and written submissions conceded and admitted to grounds 1, 2 and 3 of the Memorandum of Appeal in SCCA No. 13/2021.

6. The same admissions are repeated in the Respondents Supplementary submissions which were filed in Court on the 17th November 2021.

7. On the whole, the thrust of the Respondents arguments and submissions in this appeal, amounts to a clear, unequivocal and positive admission to grounds 1,2 and 3 of the memorandum of appeal.

8. Consequently, there is no dispute for this honorable court to determine in respect of the admitted grounds indicated above and the remainder of the Appeal ought to stand settled in favor of the Applicant.

9. In the circumstances, the admissions entitle the Applicants to judgement upon the said admitted grounds and or a settlement of the remainder of the appeal as sought.

10. That it is expedient, just and equitable that this Application be granted as sought.

DATED at Kampala this 22 day of November 2021.

MUWEMA & CO. ADVOCATES
KIMARA ADVOCATES & CONSULTANTS
(COUNSEL FOR THE APPLICANTS)

GIVEN under my hand and the seal of this Honorable Court the _____ day of _____ 2021.

_____

REGISTRAR

Drawn and Filed By;

1. M/s **Muwema & Co. Advocates and Solicitors,**
   Plot 50 Windsor Crescent Road, Kololo,
   P.O. Box 6074, Kampala.
   Tel: +256-414-257661
   Email: info@madvocates.com
   madvocates@madvocates.com
   Website: www.madvocates.com

2. M/s **Kimara Advocates & Consultants,**
   Plot 67B, Spring Road, Bugolobi,
   4th Floor Kisakye Complex,
   P. O. Box 11916, Kampala
   Tel: +256 200 944412
   Email: info@kimara-advocates.com
   Website: www.Kimara-advocates.com

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLTN NO. 51 ... OF 2021
[ARISING FROM SCCA NO. 13 OF 2021]
[ARISING FROM CIVIL APPEAL NO. 242 OF 2020]
[ARISING FROM HCMA NO 654 OF 2020]
[ARISING FROM HCCS NO. 43 OF 2020]

1.	HAM ENTERPRISES LTD	]		
2.	KIGGS INTERNATIONAL (U) LTD	]		
3.	HAMIS KIGGUNDU	]	.....	APPLICANTS

VERSUS

1.	DIAMOND TRUST BANK (U) LTD	]		
2.	DIAMOND TRUST BANK (K) LTD	]	.....	RESPONDENTS

AFFIDAVIT IN SUPPORT OF MOTION

I, **Hajji HAMIS KIGGUNDU** of C/o **M/s Muwema & Co. Advocates & Solicitors,** Plot 50 Windsor Crescent Kololo, P.O. Box 6074 Kampala Uganda and **M/s Kimara Advocates & Consultants,** Plot 67B, Spring Road, Bugolobi, 4th Floor, Kisakye Complex, P. O. Box 11916 Kampala – Uganda, do solemnly Affirm and State as follows;

1. **THAT** I am a male adult Ugandan of sound mind, the 3rd Applicant herein, and a Director and Attorney of the 1st and 2nd Applicants respectively, and I am conversant with the facts of this case, in which capacity I depone / affirm to this Supporting Affidavit;

2. **THAT** I am also a lawyer by training, and I bear a fair understanding of the basic principles of law attendant to this matter before Court;

3. **THAT** the Applicants filed a memorandum of Appeal before this Court in Civil Appeal No. 13 of 2021 in which they raised 7 (Seven) grounds of appeal *to wit,* THAT;

(i) The learned Justice of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondents Appeal before them.

(ii) The learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of appeal that were not implicitly set out in the memorandum of appeal and thereby erroneously ordered;

(a) the striking out of the Appellants Amended Plaint in HCCS No. 43 of 2020 and further ordered a retrial on the basis of the original pleadings,

(b) the saving of the order for appointment of auditors which order had been vacated and was never resurrected in the suit.

(iii) The learned Justice of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in Misc. Application No. 654/2020 before their joint written statement of Defense was struck out and judgment entered for the Appellants.

(iv) The learned Justices of Appeal erred in law and in fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favor of the Appellants under Order 6 Rule 30 of the Civil Procedure Rules S. I 71 – 1.

(v) The learned Justices of Appeal erred in law and in fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter parties by the trial court.

(vi) The learned Justices of Appeal erred in law and fact in condemning the Appellants to costs in an Appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.

(vii) **The learned Justices of Appeal erred in law and fact in rewarding the Respondents with costs for committing an illegality.**

(A copy of the Applicants memorandum of appeal is attached and marked as "Annexure HK.1");

4. **THAT** there is an apparent interconnectedness between the above grounds of appeal, on the substantial question of illegality.

5. **THAT** on the 27th day of November, 2021, at the pre-hearing session, the Court directed that the appeal be heard by way of written submissions filed by the Parties;

6. **THAT** pursuant to the Court directions, the Applicants filed their Conferencing Notes and Written Submissions in support of the aforesaid grounds of appeal, and served a copy thereof, on the Respondents' Counsel on 3rd November 2021. **(A copy of the Applicant's Conferencing Notes and Written Submissions are attached hereto and marked as "Annexure HK.2");**

7. **THAT** subsequently, the Respondents filed and served their Respondents' Reply to the Appellants' Conferencing Notes and Written Submissions on the 5th day of November 2021. **(A copy of the Respondents' said Reply to the Appellants' Conferencing Notes and Written Submissions are attached hereto and marked as "Annexure HK.3");**

8. **THAT** the Respondents' submissions in reply to the Applicants' Conferencing Notes and Written Submissions conceded to and materially admitted **grounds 1, 2 and 3** of the Appellants' Memorandum of Appeal in SCCA No. 13/2021;

9. **THAT** the issue of the failure by the Learned Justices of Appeal to adjudicate the substantial question of illegality which was the basis of the Respondents appeal in the Court of Appeal, is the anchor of grounds 1, 2 and 3 and the rest of the appeal. **(A copy of the Respondents Memorandum of Appeal in Civil Appeal No. 242/2020 is attached hereto as "Annexure HK.4");**

10. **THAT** in response to the said grounds of appeal (1, 2 and 3), the Respondents clearly conceded that the Learned Justices of Appeal did not adjudicate the substantial question of illegality when they stated at page 5 of their written submissions that;

> ***"The learned Justices were entitled to first deal with the grounds regarding the procedure adopted by the trial Judge in striking out the defendants' pleadings and granting the impugned orders before dealing with the other grounds".***

11. **THAT** the Respondents continue to concede at the same page by stating that ***"where the procedural grounds disposed of the appeal, the learned Justices of appeal were not required by law to consider the other grounds raised"***.

12. **THAT** in their Written Submissions, the Respondents conclude their arguments by directly admitting that the substantial question of illegality was not dealt with by stating that;

> ***"Having dealt with procedural grounds which disposed of the appeal, the learned justices of appeal had no duty to delve into the rest of the grounds which were at that point moot".***

13. **THAT** the above indicated admissions, are wholly repeated in the Respondents Supplementary Submissions which were filed in this Honorable Court on the 17th November 2021. **(A copy of the Respondents Supplementary Submissions are attached hereto and marked as "Annexure HK.5");**

14. **THAT** as further proof of their glaring admission, that the Justices of Appeal did not adjudicate the substantial question of illegality, the Respondents prayed at page 9 of their Supplementary Submissions that this honorable court,

> ***"finds it appropriate to provide clarity on this matter of utmost importance to the economy of the country".***

15. **THAT** the Respondents in their Supplementary Submissions then proceed to seek fresh orders of this Honorable Court in respect of foreign and syndicated lending in addition to orders regarding the conduct of agency banking;

16. **THAT** according to information received from the Applicants lawyers, which information I verily believe to be true;

(i) the request for 'clarity' and the seeking of fresh orders in (16) above, is a belatedly irregular and disguised application for a certificate that a question of great public importance arises,

(ii) alternatively, it is an improper and disguised cross appeal and or affirmation of the decision of the court of appeal by the Respondents, all without following due process.

17. **THAT** on the whole, the thrust of the Respondents arguments and submissions in the appeal before this Court, amounts to a clear, unequivocal and positive admission to grounds 1, 2 and 3 of the Memorandum of Appeal;

18. **THAT** there is no dispute for this honorable court to determine in respect of the admitted grounds indicated in this application.

19. **THAT** by extension, the admissions to grounds 1, 2 and 3 of the Memorandum of Appeal, settles the remainder of the appeal in favor of the Applicants;

20. **THAT** in the circumstances, the admissions entitle the Applicants to judgement upon the admitted grounds and or settlement of the remainder of the appeal as sought;

21. **THAT** there is no dispute for this Honorable Court to determine in respect of the admitted grounds indicated in this application;

22. **THAT** it is expedient, just and equitable that this Application be granted as sought;

23. **THAT** I affirm this affidavit in support of the Applicants' application for judgment on admission in SCCA No. No. 13/2021, against the Respondents

24. **THAT** whatever is stated hereinabove is true and correct to the best of my knowledge and belief save where the source of information is disclosed;

AFFIRMED at Kampala this
22 day of ...Nov..., 2021 by
the said **HAMIS KIGGUNDU**

.....
AFFIRMANT

BEFORE ME:

.....
A COMMISSIONER FOR OATHS

KENNETH PAUL OMODING
Advocate & Commissioner for Oaths
P.O. Box 4109 Kampala - Uganda

Drawn and Filed By:

1. M/s **Muwema & Co. Advocates and Solicitors,**
   Plot 50 Windsor Crescent Road, Kololo,
   P.O. Box 6074, Kampala.
   Tel: +256-414-257661
   Email: info@madvocates.com
   madvocates@madvocates.com
   Website: www.madvocates.com

2. M/s **Kimara Advocates & Consultants,**
   Plot 67B, Spring Road, Bugolobi,
   4th Floor Kisakye Complex,
   P. O. Box 11916, Kampala
   Tel: +256 200 944412
   Email: info@kimara-advocates.com
   Website: www.Kimara-advocates.com

HK1

SUPREME COURT OF UGANDA
RECEIVED
TIME: 2:35 pm
15 JUN 2021
P.O. BOX 0010, KAMPALA
SIGN:

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL No. 13 OF 2021
(ARISING FROM CIVIL APPEAL NO 242 OF 2020)
[ARISING FROM MISC. APPLTN NO 654 OF 2020 AND HCCS NO 43 OF 2020]

1. HAM ENTERPRISES LTD
2. KIGGS INTERNATIONAL (U) LTD
3. HAMIS KIGGUNDU] APPELLANTS

I Certify that this is Annexture HH Referred to in the Affidavit of Hamis Kiggundu for Ohita Dated 22/6/2021

VERSUS

1. DIAMOND TRUST BANK (U) LIMITED
2. DIAMOND TRUST BANK (K) LIMITED] RESPONDENTS

MEMORANDUM OF APPEAL

[An appeal against the Judgment, Decree and Orders of the Learned Justices of Appeal, delivered at the Court of Appeal of Uganda, Kampala, by their lordships, Hon. Mr. Justice RICHARD BUTEERA, DCJ, Hon. Mr. Justice KENNETH KAKURU, JA, and Hon. Mr. Justice CHRISTOPHER MADRAMA, JA, on 05th May, 2021, sitting in Civil Appeal No. 242/2020 (arising from HCMA No. 654/2020 and HCCS No. 43/2020]

The above-named Appellants appeal to The Supreme Court of Uganda, at Kampala, against the above-mentioned decision on the following grounds set-out hereunder, **THAT:** -

1. The learned Justices of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondents Appeal before them.

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2. The learned Justices of Appeal erred in law and fact when they abandoned the grounds of Appeal raised by the Respondents and irregularly introduced new grounds of Appeal that were not implicitly set out in the memorandum of Appeal and thereby erroneously ordered;

   i) the striking out of the Appellants Amended Plaint in HCCS No 43 of 2020 and further ordered a retrial on the basis of the original pleadings,

   ii) the saving of the order for appointment of auditors which order had been vacated and was never resurrected in the suit.

3. The learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in Misc. Application No.654 of 2020 before their joint written statement of Defense was struck out and judgment entered for the Appellants.

4. The learned Justices of Appeal erred in law and in fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favor of the Appellants under **Order 6 Rule 30** of the **Civil Procedure Rules S.I 71-1.**

5. The learned justices of Appeal erred in law and in fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter partes by the trial court.

6. The learned justices of Appeal erred in law and in fact in condemning the Appellants to costs in an appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.

7. The learned justices of Appeal erred in law and in fact in rewarding the Respondents with costs for committing an illegality.

IT IS proposed to seek of the Honorable Supreme Court, Orders THAT: -

(a) **the Judgement, Orders and Decree of the Court of Appeal in Civil Appeal No. 242/2020, be set-aside;**

(b) **the Judgment, Orders and Decree of the Trial Judge in the High Court in HCMA No. 654/2020 and HCCS No. 43/2020 be reinstated;**

(c) **costs of this appeal and the Courts below be provided for, with a certificate to 2 (two) Counsel;**

DATED at Kampala this 1st day of June, 2021.

COUNSEL FOR THE APPELLANTS

TO: The Honorable Justices of the SUPREME COURT of Uganda at Kampala.

COPIES TO BE SERVED UPON:

M/s K&K Advocates,
2nd Floor, K&K House,

6

LODGED in the registry of the Supreme Court of Uganda at Kampala this 10 day of June, 2021..

REGISTRAR, Supreme Court.

JOINTLY DRAWN & FILED BY:

M/s Muwema & Co. Advocates & Solicitors,
Plot 50 Windsor Crescent Road, Kololo,
P.O. Box 6074, Kampala,
Tel: +256-414-257661,
Email:info@madvocates.com
:madvocates@madvocates.com
Website: www.madvocates.com

AND

M/s **Kimara Advocates & Consultants,**
Plot 67B, Spring Road, Bugolobi
4th floor, Kisakye complex,
P.O. Box 11916, Kampala – Uganda.
Email: info@kimara-advocates.com

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In protest for late filing and service

HK2

SUPREME COURT OF UGANDA RECEIVED TIME: 5:36 03 NOV 2021 P. O. BOX 6074, KAMPALA SIGN:

KAMPALA ESTATES
Date Received 3/11/21
Time 9:47AM
File No. —
Received by: HK
Action by: RK

I Certify that this is Annexture HK2 referred to in the Affidavit of Hamis Kiggundu Commissioner for Oaths Dated 22.11.2021

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 13 OF 2021
[ARISING FROM CIVIL APPEAL NO. 242 OF 2020]
[ARISING FROM HCMA NO 654 OF 2020]
[ARISING FROM HCCS NO. 43 OF 2020]

1.	HAM ENTERPRISES LTD	]		
2.	KIGGS INTERNATIONAL (U) LTD	]		
3.	HAMIS KIGGUNDU	]	.....	APPELLANTS

VERSUS

1.	DIAMOND TRUST BANK (U) LTD	]		
2.	DIAMOND TRUST BANK (K) LTD	]	.....	RESPONDENTS

APPELLANTS' CONFERENCING NOTES AND WRITTEN SUBMISSIONS

1. APPELLANTS' FACTS

This is an appeal from the judgement and orders of the learned Justices of the Court of Appeal which was delivered in Civil Appeal No. 242 of 2020 on the 5th day of May 2021 by their lordships **Hon. Justice Richard Buteera, DCJ, Hon. Mr. Justice Kenneth Kakuru, JA,** and **Hon. Mr. Justice Christopher Madrama, JA.**

2. The brief facts giving rise to the appeal arose as follows;

2.1. The Appellants filed a suit against the Respondents vide HCCS No. 43/2020 for breach of contract and other duties. By the said suit, the Appellant also sought for recovery of money that had been unlawfully debited from the Appellants' accounts.

2.2. The sum sought to be recovered by the Appellant from the Respondents is **UGX 34,295,951,553**(Uganda Shillings Thirty-Four Billion Two Hundred Ninety-Five Million Five Hundred Fifty-Three Only) and **USD 23,467,670.61**(United States Dollars Twenty-Three

Muwema & Co. Advocates and Solicitors P. O. BOX 6074 KAMPALA, UGANDA
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Million Four Hundred Sixty-Seven Thousand Six Hundred Seventy Only)

2.3. The above Appellants claims were supported and substantiated by a comprehensive 643 page Audit Report from the Appellants Accountants.

2.4. By consent of the parties and endorsement by the trial court, both parties filed amended pleadings in the main suit. The Appellants filed an Amended Plaint by which they raised serious issues of illegality.

2.5. The illegality in question related to the illegal conduct of financial institutions business by the 2nd Respondent which was facilitated by the 1st Respondent contrary to the **Financial Institutions Act, 2004 (as amended)**

2.6. In their joint Written Statement of Defence (hereinafter referred to as WSD) the Respondents rendered a general denial to the Appellants claims in the amended Plaint without substantially answering to the money and claims of illegality in the suit.

2.7. On 28th August 2020 the Appellants filed **M.A. No. 654 of 2020 under O.6 r 28, 29 and 30** of the **Civil Procedure Rules S.S 71-1.**

2.8. In that Application, the Appellants sought to strike out the Respondents' joint WSD as it was a perpetration of illegalities jointly committed by the Respondents in conducting financial institutions business in contravention of the Financial Institutions Act 2004 (as amended).

2.9. In the alternative, that the Respondent's Joint WSD be struck out for being frivolous, vexatious, evasive and failing to disclose any reasonable answer to the Appellant's claim of illegal conduct of financial institutions business.

2.10. The Appellants also prayed for judgment to be entered against the Respondents upon their claim in the suit in the event the joint WSD was struck out.

2.11. On **31st August 2020**, the parties attended court for a scheduling conference where, at the insistence of the Respondents, court agreed to frame the issue of appointment of an Auditor as one of the agreed pre-trial issues.

2.12. The Appellants on the other hand reasoned that an Auditor could not be appointed before the pending question of illegality had been determined vide; **M. A. No 654/2020.** The Appellants argument was that an illegality if found by the court could not be audited.

2.13. Despite the Appellants' protestations, the learned trial Judge **Hon. Justice Dr. Henry Peter Adonyo** issued the Audit Order anyway and reserved the ruling in **M.A. No 654** of **2020** for **5th October 2020**.

2.14. On **16th September 2020** the Appellants filed **M.A. No 729** of **2020** seeking to stay implementation of the Audit order until a ruling in **M. A. No 654** of **2020** had been delivered.

2.15. The Appellants contended that the audit exercise if allowed to proceed would negate and/or contradict the court's then ongoing investigation into the legality of the very credit facilities whose amounts were sought to be audited.

2.16. On **30th September 2020**, the trial Judge issued an order staying implementation of the Audit order pending determination of **M. A. No 654** of **2020**.

2.17. The court conducted a hearing of M. A. No 654/2020 through the respective written submissions of the parties.

2.18. On **7th October, 2020** the court delivered its ruling in **M.A No 654** of **2020** wherein the Respondent's joint WSD was struck out for being a perpetuation of illegalities.

2.19. Consequently, the trial court entered judgment against the Respondents upon the full monetary claim of the Appellants in HCCS No 43/2020 against which the Respondents had failed to establish a defence.

2.20. Being dissatisfied with the court ruling, judgment and orders, the Respondents filed **Civil Appeal No 242 of 2020** on the following grounds;

i) **That the learned trial judge erred in law in finding that the Financial Institutions Act 2004 applied to the 2nd Appellant in respect of credit facilities issued in Kenya to Ugandan entities.**

ii) **That the Learned Trial Judge erred in law and in fact in finding that the 2nd Appellant required approval from the Bank of Uganda (BOU) to issue credit facilities in Kenya to a Ugandan entity.**

iii) **That the learned trial judge erred in law in finding that it is illegal for a foreign bank using money held on deposit whether within Uganda and or outside Uganda to engage in activities such as lending and extending credit facilities to Ugandan entities without authorisation from Bank of Uganda.**

iv) **That the learned trial judge erred in law in finding that the 1st Appellant carried out agent banking in contravention of the Financial Institutions (Agent banking) Regulations 2017**

v) **That the learned trial Judge erred in law and in fact in finding that the 1st Appellant acted as agent of the 2nd Appellant contrary to Regulation 5 of the Financial Institutions (Agent banking) Regulations 2017 and Sec 126(3) of the Financial Institutions Act 2004 as well as similar laws in Kenya without receiving evidence.**

vi) **That the learned trial Judge erred in law in holding that the 2nd Appellant committed illegalities by violating Sec. 117 Financial Institutions Act 2004 in so far as it did open up a representative office in Uganda**

vii) That the learned trial Judge erred in law and in fact in finding that the Appellants breached the different loan agreement terms entered into with the Respondents between 16th Feb 2011 to 16th Nov 2019, without evidence.

viii) That the learned trial Judge erred in law and in fact in declaring that the credit facilities between the Appellants and Respondents were settled at law.

ix) That the learned trial Judge erred in law and in fact in striking out the Written Statement of Defence of the 1st Defendant whereas there was no challenge to it.

x) That the learned trial Judge erred in law and in fact in finding that Ushs 34,295,951,553/= and USD 23,467,670.61 were unlawfully taken from the Respondents loan account without evidence.

xi) That the learned trial Judge erred in law in entering judgment for the Plaintiffs as prayed for in their joint plaint by virtue of 0.9 r 6,8,10 and 30 of the Civil Procedure Rules S.I 71-1

xii) That the learned trial Judge erred in law and in fact in finding that the affidavit sworn by Allen Kagoya was competent to support the Application

2.21. On 5th May 2021 the Court of Appeal delivered its judgment in favour of the Respondents. However the Court of Appeal only considered two grounds to wit; grounds 9 and 11 from the Respondents Memorandum of Appeal.

2.22. In its judgment found at Pages 715 – 761 of the Record of Appeal, the Court of Appeal found inter alia that the trial court erred in law to strike out the WSD, that the Respondents were not heard in HCMA No 654/2020 and remitted the suit to the High court for a retrial.

2.23. The Appellants have now filed this second Appeal against the Judgment and orders of the Court of Appeal which were delivered on **5th May 2021**.

2.24. The Appellants have also filed a Memorandum of Appeal with the grounds of Appeal listed below which we propose to discuss as the issues arising out of this Appeal.

GROUNDS OF APPEAL:

3. The appeal is premised on the grounds set-out in the Memorandum of Appeal filed in this Honourable Court on 15th June, 2021, as follows;

(1) The learned Justices of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondents Appeal before them;

(2) The learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of appeal which were not implicitly set-out in the Respondents Memorandum of Appeal and thereby erroneously ordered;

i. The striking out of the Appellants Amended Plaint in HCCS No. 43 of 2020 and further ordered a retrial on the basis of the original pleadings;

ii. The saving of the order for appointment of auditors which order had been vacated and was never resurrected in the suit.

(3) The learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in HCMA No. 654/2020 before their joint Written Statement of Defense was struck out and judgment entered for the Appellants;

(4) The learned Justices of Appeal erred in law and fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favour of the Appellants under Order 6 Rule 30 of the Civil Procedure Rules S.I 71-1;

(5) The learned Justices of Appeal erred in law and fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter-parties by the trial court;

(6) The learned Justices erred in law and in fact in condemning the Appellants to costs in an appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court;

(7) The learned Justices of Appeal erred in law and fact in rewarding the Respondents with costs for committing an illegality;

RESOLUTION OF GROUNDS:

We will submit on Grounds 1 and 4 concurrently;

4. Ground 1 - The Learned Justices of Appeal erred in law and fact when they avoided adjudicating on the substantial question of illegality which was the basis of the Respondents Appeal before them;

Ground 4 - The Learned Justices of Appeal erred in law and fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favour of the Appellants under Order 6 Rule 30 of the Civil Procedure Rules S.I 71-1;

5. My lords, the role of the Supreme Court on Second Appeals has been well established in a plethora of cases. In SUPREME COURT CIVIL APPEAL No. 08 OF 2003: GOUSTAR ENTERPRISES LTD vs JOHN KOKAS OUMO, it was held inter alia that

> "On second appeal, the Supreme Court is not required to re-evaluate evidence in the same manner as a first appellate Court would as doing so create unnecessary uncertainty. It is sufficient to decide whether the first appellate Court on approaching its task has applied the relevant principles properly."

6. In **BANCO ARABE ESPANOL VS BANK OF UGANDA SCCA NO. 8 of 1998,** the Supreme Court held that as a 2nd Appellate court, except in the clearest of cases, it is not required to re-evaluate the evidence like the 1st Appellate court.

7. However, the same Supreme court stated in **KIFAMUNTE HENRY VS UGANDA, SUPREME COURT CRIMINAL APPEAL NO 10/1997** that;

> **"the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but instead carefully weighing and considering it."**

8. The above decision was followed by the Supreme Court again in **HABRE INTERNATIONAL CO. LTD vs. ABRAHAM ALAYAKHA & ORS CIVIL APPEAL No. 4/98;** where it was held that;

> *"where it is apparent that the evidence on record has not be subjected to adequate scrutiny by the trial Judge, or the 1st Appellate court, as the case may be, the Appellate court has an obligation to do so."*

9. It is our contention that whereas the learned trial Judge in the High Court adequately scrutinised the evidence and properly disposed of the suit, the 1st Appellate court failed to evaluate the same evidence and the Appeal as presented by the Respondents.

10. In the circumstances of this Appeal therefore, we seek the indulgence of the Supreme Court to subject the evidence in this Appeal to a comprehensive scrutiny and re-evaluation.

11. We respectfully submit that the Justices of the Court of Appeal failed to exercise their appellate jurisdiction when handling Civil Appeal No. 242/2020 and thereby arrived at a wrong decision.

12. Out of the 12 grounds of Appeal that had been raised by the Respondents at the Court of Appeal, 8 of the grounds were premised on the question of illegal conduct of financial institutions business which had been adjudged by the High Court **(See Pages 571 – 602 of the Record of Appeal)**

13. It was therefore the solemn duty of the Court of Appeal to hear and determine the substantive question of illegality which the Respondents had raised before it. The Court of Appeal did not enjoy the liberty to abandon the Respondents' Appeal at the altar.

14. Interestingly, in the lead judgment of **Christopher Madrama JA**, he stated that most of the Appellants (now Respondents) grounds of Appeal dealt with points of law as to whether the transactions in issue by the Appellants were illegal transactions.**(see Page 726 of the Record of Appeal)**

15. By abandoning the Respondent's Appeal, the Court of Appeal went against its own rules. **Rule 102** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10** forbids the court from allowing an appeal on any ground not set forth or implicit in the memorandum of Appeal.

16. The Supreme Court confirmed the above position in **Civil Appeal No 6/2013 Ms Fang min Vs Belex Tours & Travel Ltd** when the **Hon. Chief Justice Bart Katureebe** (as he then was) held that;

17. ''it is a cardinal principle in our judicial process that when adjudicating a suit, the trial court must base its decision and orders on the pleadings and issues contested before it. Founding a court decision or relief on unpleaded matter or issue not properly before it for determination is an error of law''

18. In the same case of Fung Min (ibid) the Supreme Court also held that issues cannot properly arise at the stage of submissions because such a procedure would allow a party to succeed on a case not set up by them.

19. As we shall show in the subsequent pages of these submissions, the learned Justices of Appeal introduced issues at the stage of submissions which had the overall effect of voiding their decision.

20. Therefore, our contention is that the determination of the Appeal was based on an error in law because it was founded on unpleaded matters of amendment of the pleadings, the right to be heard, the challenge to the audit etc **(See Pages 744 – 755 of the Record of Appeal)**

21. It is trite that when an illegality is brought to the attention of the court of law, the court has no discretion in standing with the illegality as it supersedes all questions of pleadings including any admissions made.

See: **MAKULA INTERNATIONAL LTD vs. HIS EMINENCE CARDINAL NSUBUGA & ANOR (Civil Appeal 4/1981) [1982] UGSC 2 (08 April 1982)**

22. Contrary to the above binding decision, the Court of Appeal decided to tolerate and stand with the Respondents illegality which was a substantive question and proceeded to determine the appeal on unpleaded procedural grounds.

23. In making the above decision, the Court of Appeal aided the Respondents in perpetuating the illegality of conducting financial institutions business contrary to the law. This kind of conduct has been rebuked several times by the courts of law.

24. Before we take leave of this issue, we need to point out that whereas the learned Justices delved into scrutinizing the Appellants cause of action in the Pleadings, they shied away from expressly determining the illegality question raised therein.

25. At page 742 of the Appellant's Record of Appeal, the Judgment **of Hon. Justice Christopher Madrama, J.A, (page 28 Paragraph 4)** the learned Justice of Appeal cites the position of the law as follows;

> ***"The general proposition of the law is that what is done in contravention of the provisions of an act of parliament can- not be made the subject of an action....***
>
> ***its settled law that any contract prohibited by statute, either expressly or by implication is illegal and void"***

26. At Page 760 - 761 of Appellants Record of Appeal, judgment of **Hon. Justice Richard Buteera, DCJ, at Page 5 and 6** thereof, the learned Justice of Appeal in agreeing with the above holding of his learned brother added as follows;

> ***"I also agree that in law, it is not possible for a plaintiff to recover by a claim based on the medium of and by aid of an illegal transaction to which he was himself a party. See Mistry Amarsingh vs Serwano Wofunira Kulubya [1963] 1 EA 408;***
>
> ***"The legal point I find relevant to clarify is that I know of no law that makes it illegal for a Ugandan citizen or a foreigner resident in Uganda to borrow or pay back money borrowed from a foreigner or a foreign institution, a Bank of any other organization, unless the transaction involves the perpetration of a criminal***

offence such as terrorism, money laundering, human trafficking or any other offence. The loan agreement tainted with perpetuation of an offence wouldn't be enforced by a Ugandan court"

27. Notwithstanding the above observations, the learned Justices went ahead to wrongly overturn the decision of the trial Judge without making a specific and contrary finding on the illegality of the impugned credit facility agreements.

28. Furthermore, the learned Justices of Appeal erroneously made an assumption and alleged that the Appellants claim for recovery of the sum of UGX. 34,295,951,553 and USD 23,467,670.61, being money lost in unjust enrichment was allegedly arising from illegal contracts, whereas not.

29. For the avoidance of any doubt, the Respondents did not advance any defence at the trial which pleaded that the Appellants money claim arose from illegal contracts. This was a creation of the Court of Appeal which it had not right to introduce in the case.

30. Finally, the learned Justices took it upon themselves to attack the propriety of the amendment to the Plaint whereas the same was not in issue on Appeal. They then ordered a retrial of the suit in the High court upon the original Pleadings without any legal justification or at all.

31. On the strength of the above submissions, it is our humble prayer therefore that this Honourable court be pleased to determine ground 1 in favour of the Appellants.

32. With regard to ground 4, we contend that the court of Appeal erred in law and fact in setting aside the Judgment entered in favour of the Appellants under **Order 6 r 30 CPR**

33. In the Appellants submissions before the Court of Appeal **(see Pages 688 – 710 of the ROA)** we maintained that the trial Judge rightly entered Judgment in favour of the Appellants. We argued then and we still argue now that the import of **O.6 r 30 CPR** read together with **O.6 r 28** is that the trial Judge was clothed with both the jurisdiction and discretion to strike out the WSD as he rightly did.

See: Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696

34. The above compelling submissions were not considered or evaluated anywhere in the Court of Appeal decision. The court of Appeal failed to adjudicate on this fundamental question and instead delved into issues of procedural irregularity thus abdicating its role of re-evaluating/ reappraising all evidence on record and drawing inferences of fact.

35. For ease of reference, my lords we have restated **O.6 r. 30(1) CPR** which provides that;

> ***" The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just"***

36. It is clear from the above provision that the trial Judge enjoyed both the jurisdiction and discretion to stay, dismiss or enter Judgment and strike out the Defence if it did not disclose any reasonable grounds of Defence.

37. Since the trial Judge properly exercised his discretion by applying the correct principles of law, there was no reason for the Court of Appeal to interfere with the exercise of discretion and the decision made therefrom.

38. The Supreme has ably guided and held in previous decisions that the discretion of a trial judge may be interfered with sparingly. In **BANCO ARABE ESPANOL v. BANK OF UGANDA** the Supreme Court stated as follows;

> *"In **Uganda Development Bank v. National Insurance and Anor. (SCU) Civil No. 28-95** (unreported) this court said this on page 7 of its judgment.*
>
> *"... the principles which this court applies when deciding whether to interfere with the exercise of discretion by a trial Judge are well known and are set out in such decisions such as **Mbogo v. Shah (1968) E.A 93.**where Newbold, at page 96 stated that the principle to be that:*

"... a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion that as a result there has been a misjustice.

There, principles are referred to in various terms. In ***Famous Cycle Agencies (Supra), Civil Appeal No. 16 of 1994 and Yahaya Kiriisa v. Attorney General Civil Appeal No.7/1994 (SCW 9 (unreported)*** *Judicial discretion must he exercised on fixed principles:* ***Jetha v. Sinsh (1931) LRK-*** *where there has been no improper exercise of discretion, the Judge's decision cannot normally be upset:* ***Devji v. Jinabhai (1934) 1 EACA 89.***

A mere difference of opinion between the appellate court and the lower court as to the proper order to make is no sufficient ground for interfering with a discretion which has been exercised in the court below. *There must be shown to be an unjudicial exercise of discretion at which no judge could reasonably arrive whereby injustice has been done to the party complaining:* ***Shah v. Allu (supra)***

39. My lords, in the judgment of Hon. Justice Christopher Madrama, JA, at page 18 thereof, Court in interfering with the discretion of the learned trial Judge opined that the learned trial Judge could have perhaps stayed proceedings in the main suit, to allow the Respondents time to appeal against the decision of the court in HCMA No. 654/2020, striking out their WSD;

40. He stated as follows;

"Had the learned trial judge struck out the pleadings of the defendant the defendant was entitled as of right under Order 6 Rule 30(2) to appeal the striking out of the defence order to this suit. Because the rule allowed the court to order the suit to be stayed if the defendants desired to appeal the decision striking out the defence, further proceedings could have been stayed pending appeal and this court would be handling the issue whether it was lawful or proper to strike out the written statement

of defence on the ground that the plaintiff alleged that it was a perpetration of illegalities".

See: Page 732 of the Appellants Record of Appeal;

41. We humbly submit, that the above position was only a difference in opinion, between the appellate court and the lower court. We submit that going by the decision cited above, **a mere difference of opinion between the appellate court and the lower court as to the proper order to make is no sufficient ground for interfering with a discretion which has been exercised in the court below;**

See: BANCO ARABE ESPANOL v. BANK OF UGANDA (Supra);

42. In its lead judgment at **Page 732** of the Record of Appeal, the court while discussing the provisions of **O.6 Rule 30(2)** of the CPR stated that;

''Because the rule allowed the court to order that the suit be stayed if the Defendants desired to appeal the decision striking out the defence, further proceedings could have been stayed pending appeal and this court would be handling the issue of whether it was lawful or proper to strike out the WSD on the ground that the plaintiff alleged it was a perpetuation of illegalities.''

43. We submit that the above provision gives the trial judge discretion as to whether or not to stay proceedings pending appeal. The Court of Appeal had no reason to interfere with the discretion of the learned trial Judge not to stay the proceedings in HCCS 43/2020 and to strike out the Respondents WSD.

44. The trial judge cannot be faulted for finding it fitting to dispose of the preliminary objection the way that he did in his ruling. The record of appeal indicates that the Respondents filed an affidavit in reply to the objection raised in HCMA. No 645/2020 and made written arguments which unfortunately failed to address the specific question of illegality that had been raised by the Appellants.

45. A preliminary objection is by its very nature based on points of law. In making a determination on a preliminary objection, court is supposed to look at the pleadings (defence in this instance), and assume that the averments therein are true. If in the opinion of the court the preliminary objection cannot be disposed of without calling additional evidence, the court cannot determine the preliminary point of law but should set down the suit for hearing and call for additional evidence

See: **Crane Bank Ltd. (in Receivership) vs. Sudhir Ruparelia & Meera Investments Ltd, Civil Appeal No 252 of 2019,**
Express Electrical Engineers & Contractors vs Uganda Post and Telecommunications Corporation, Civil Appeal No 8 of 1980).

46. We are of the view that where the point of law is based on pleadings and there is no need for calling additional evidence, the court can, and in this instance, did proceed under the provisions of **Order 6 rule 29** of the **CPR**.

47. In this instance, the trial Judge reasoned that the preliminary objections raised in **M.A No 654/2020** would, if upheld, dispose of the suit without the need for trial. That this being a matter of exercise of discretion, and without reason to show that the Judge acted outside the confines of the rules or applied the wrong principles, he cannot be faulted for striking out the WSD.

48. The above is the basis upon which the Respondents filed **Civil Appeal No 242/2020** challenging the trial court's finding on illegality. However, the court of appeal did not specifically pronounce itself on this issue or at all and opted to determine the appeal on alleged procedural irregularities.

49. It is our humble submission therefore, that the appellate court erred in law when it failed in its judicial function to effectually and requisitely determine the question of illegality on its merits as brought before it in Civil Appeal No. 242/2020. By so doing, the honourable court erred in the discharge of its appellate function and rendered a decision outside of the appellate duty asked of it by the said Respondents under their Memorandum of Appeal, and thereby occasioned a miscarriage.

54. Ground 2 - <u>The learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of appeal which were not implicitly set-out in the Respondents Memorandum of Appeal and thereby made erroneous orders;</u>

i. **Striking out the Appellants Amended Plaint in HCCS No. 43/2020 and further ordered a retrial on the basis of the original pleadings;**

ii. **Saving the order for appointment of an auditor which order had been vacated.**

55. We humbly submit, that the learned Justices of Appeal erred in law and in fact when they abandoned the grounds of appeal as raised by the Respondents in the Memorandum of Appeal and then introduced new grounds not implicitly set-out thereunder and determined Civil Appeal No. 242/2020, on the said alien grounds;

55.1. The Respondents presented 12 grounds of appeal in Civil Appeal No. 242/2020. These grounds were laid out in their Memorandum of Appeal filed in the appellate court on 17th October, 2020.

55.2. The Respondents never ever applied for leave to amend any of their grounds of appeal, nor did they seek withdrawal of any of the grounds.

55.3. At the pre-trial scheduling and the hearing of the appeal, the Respondents only presented 12 grounds for seeking to overturn the decision of the trial court. By their listed grounds of appeal, the Respondents clearly and elaborately outlined the appellate burden required of the Court of Appeal in so far as the decision of the trial court they sought to challenge refers;

55.4. The Appeal was called up for hearing on 27th January, 2021. As at that time, the parties had filed their respective Conferencing Notes and Written Submissions on grounds of appeal raised by the Respondents and adopted at Scheduling Conference;

55.5. However, when the appeal was called up for hearing, on the 27th of January, 2021, Hon. Mr. Justice Kenneth Kakuru sitting in Civil Appeal No. 242/2020 raised grounds and points for consideration outside of the grounds raised in the appeal, and directed that the parties address court by written submissions on those grounds.

55.6. It is these grounds that had been raised by the learned Justice of Appeal that then formed the basis of the judgments of their lordships Hon. Justice Richard Buteera, DCJ, and Hon. Justice Kenneth Kakuru, JA, in deciding Civil Appeal No. 242/2020;

56. We humbly submit that the departure from the listed grounds of appeal under the Memorandum of Appeal, grounds not implicit to grounds set-out in the Memorandum of appeal, only at the level of submissions, was irregular and erroneous, and the same occasioned a total miscarriage of justice as it formed the decision of 2 (two) of the Honourable Justices sitting in the appeal;

57. The Supreme Court has affirmed its position in several previous decisions that **it is now settled law that issues cannot properly arise at the stage of submissions because such procedure would allow a party to succeed on a case not set up by them;**

<u>See</u>: **INTERFREIGHT FORWARDERS LTD vs EADB, SCCA No 33/1992. FANG MIN vs BELEX TOURS & TRAVEL LTD, SCCA No 6/2013.**

58. With the greatest of respect, we further submit that it was a fundamental error of law for the appellate Court to require the parties to address court on grounds that were not implicitly set out in the memorandum of appeal in Civil Appeal No. 242/2020;

58.1. Under **Rule 86(1) Judicature (Court of Appeal Rules) Directions S.I 13 – 10**, the law prescribes that

> ***"a memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of order which it is proposed to ask the court to make"***

58.2. Under **Rule 102(a) Judicature (Court of Appeal Rules) Directions S.I 13 – 10**, the law bars parties from raising arguments on grounds not implicit or raised in a Memorandum of Appeal. Under the said provision, the Respondents herein (who were Appellants in Civil Appeal No. 242/2020) were legally precluded from submitting on any grounds alien to the grounds raised in their Memorandum of Appeal;

58.3. In the same breath, the Appellants herein should not have been required to submit on the impugned questions and the same shouldn't have formed the basis of the decision in Civil Appeal No. 242/2020. The Rule provides as follows;

"102. Arguments at hearing.

At the hearing of an appeal in the court—

(a) no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these Rules;"

58.4. The above provision provides for the making of such arguments in instances where the Appellant first obtains leave of the Court. As the Record of Proceedings in Civil Appeal No. 242/2020 shows, the Respondents herein never applied or sought leave before the appellate court to address the Court of Appeal on any grounds or issues not set-out in their Memorandum of Appeal.

58.5. It is also important to highlight the grounds upon which the court of appeal entered judgment against the Appellants. Ground 9 of the Respondents Memorandum of appeal stated that the trial court erred in law and in fact in striking out the WSD of the 1st Defendant whereas there was no challenge to it.

58.6. This issue had been addressed by the Appellants in their written submissions in Civil Appeal No.242/2020 which the court of appeal unfortunately did not make reference to.

58.7. For brevity's sake, paragraph 9 of the amended Plaint states that the subject matter of the suit and cause of action is against the Defendants jointly and severally.

58.8. Among the prayers sought in the amendment was/is a determination as to the legality of the credit facilities executed by the Defendants with the Plaintiffs.

58.9. What is evident is that the Appellants in M.A No 654/2020 sought to strike out the joint WSD on account of illegalities which were jointly committed by the Defendants. It cannot therefore be said that there was no challenge to the 1st Respondent's Defence.

59. We therefore submit, that **the learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of appeal which were not implicitly set-out in the Respondents Memorandum of Appeal and made erroneous orders;**

60. We further submit that it was an error for the Honourable Court to order a re-trial of the suit without resolving the question of illegality that had been brought before it on appeal.

60.1. Suffice to note that the question on illegality had hitherto arisen before the trial court under the amended pleadings and the same was investigated through a hearing inter-partes and finally determined vide; HCMA No. 654/2020.

60.2. However when the decision of the trial court on the issue of illegality was subjected to appeal before the Court of Appeal, the Court did not resolve or settle the questions on illegality that had been raised in the Respondents' memorandum of appeal.

60.3. When setting aside the decision of the learned trial Judge on his findings on illegality, the Court neither addressed its mind, nor did

it point out any incorrectness in the said findings of the learned Judge with material particularity;

60.4. We therefore submit, that it was erroneous for the appellate court to leave the overriding question of illegality brought before it on appeal hanging, and at the same time remit the suit to the trial court for retrial on its original pleadings absent of the issue on illegality.

60.5. This position was outside the spirit of the law, the policy of court and jurisprudence established on the duty of court to investigate illegalities brought to the attention of Courts. See **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor;**

61. Additionally, we submit that the orders of the appellate court striking out the amended pleadings was erroneous and/or irregular taking into account the circumstances under which the amendment was allowed;

61.1. As is evident on the Record of Court, the amendment was with the consent of both parties and duly endorsed by the trial court. **When the Court endorsed the consent to amendment by both parties and issued directions/timelines for filing amended pleadings, the consent became an order of the trial court;**

61.2. The amendment of pleadings by mutual consent was not subject of appeal and was not implicit in any ground of appeal raised in the Respondents' Memorandum of Appeal in Civil Appeal No. 242/2020.

61.3. Similarly, the original pleadings in the suit were never listed documents in the Respondents' Record of Appeal in the Appeal, for determination of any ground before the Court of Appeal as would have been required under **Rule 87(1)(c) and (f) Judicature (Court of Appeal Rules) Directions S.I 13 -10;**

61.4. We submit that the appellate court erred in law and in fact when it struck out the amended pleadings of the parties in HCCS No. 43 of 2020, when determining Civil Appeal, on premises or grounds which were not set-out, or implicit, to the grounds of appeal in Civil Appeal No. 242/2020;

61.5. The legal principles governing setting aside of consent orders and consent judgments or decrees are established in several cases. In **Supreme Court Civil Appeal No. 4/2004: THE ATTORNEY GENERAL and COMMISSIONER LANDS vs. JAMES KAMOGA & ANOTHER**, this Honourable Court guided as follows;

> "The principle upon which the court may interfere with a consent judgment was outlined by the Court of Appeal for East Africa in ***Hirani vs. Kassam*** (supra) in which it approved and adopted the following passage from ***Seton on Judgments and Orders,*** 7th Ed., Vol. 1 p. 124:
>
> ***"Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and can't be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of court or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement."***
>
> Subsequently, that same Court reiterated the principle in ***Brooke Bond Liebig (T) Ltd. vs. Mallya*** (supra) and the Supreme Court of Uganda followed it in ***Mohamed Allibhai vs. W.E. Bukenya and Another*** Civil Appeal No.56 of 1996 (unreported). It is a well settled principle therefore, **that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy."**

61.6. For a court to invoke the above conditions or set-aside a consent order, it would require an aggrieved party to seek the remedy and move court by its pleadings. Evidence must be adduced and demonstrated to court as a basis for setting aside a consent order.

61.7. In the instant matter, during the proceedings in Civil Appeal No. 242/2020, the Respondents neither expressed any grievances over the amended pleadings nor did they move court to have the amended pleadings struck out.

61.8. It is our submission that the learned Justices of Appeal erred in law when they abandoned the grounds of appeal in Civil Appeal No. 242 of 2020, and arrived at an erroneous decision to strike out the Appellants amended pleadings which was never a subject of appeal.

61.9. As stated in the decision in **Civil Appeal No. 23/2013 PETER GICHUKI KING'ARA vs INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS (Kenya);**

> **"It is trite law that a court cannot pronounce itself on an issue that is not in the pleadings of the parties. As it was stated in the case of *Galaxy Paints Co. vs Falcon Guards Ltd. EALR (2000)2 EA 385* the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties frame for the court's determination."**

62. We also submit that the learned Justices of Appeal erred in law and fact when they issued judgment on appeal in Civil Appeal No. 242/2020 reinstating an order for the appointment of auditors, whereas the same was never subject of or ground of appeal in Civil Appeal No. 242/2020;

62.1. As has been well submitted upon above, the learned Justices of Appeal erred in law and fact by abandoned grounds of appeal set-out in the Memorandum of Appeal and issued orders absent any grounds implicit thereto.

62.2. In the amended plaint in HCCS No. 43/2020 the Appellants made a prayer for the taking of an audit and an account reconciliation under **Prayer (viii)** of the plaint. **Refer to Page 20 of the Record of Appeal;**

62.3. However, the factual context within which the prayer was made, and the purpose for which the Appellants would seek an audit or account reconciliation was contained under Paragraph 17 of the Amended Plaint. The Paragraph provided as follows;

17. **The Plaintiffs aver and content, that an audit and account reconciliation of all the financial transactions between the 1st and 2nd Plaintiffs and the Defendant .... shall demonstrate the Defendants' breaches, and unjust enrichment schemes, to the prejudice of the Plaintiffs;**

62.4. As can be deduced from the foregoing averment, the sole purpose for an audit and account reconciliation, was only to demonstrate matters of fact about the Respondents' breach of contract and unjust enrichment. The Appellants carried out an independent audit and account reconciliation and submitted their Report in Court which was exhibited and adopted on Court record without reservation by the Respondents. **See Pages 1700 – 2342 of the Supplementary Record of Appeal;**

62.5. HCMA No. 654/2020 and HCCS No. 43/2020 were all heard and determined. Civil Appeal No. 242/2020, did not contain any ground of appeal questioning the decision of the trial court over an audit. The learned Justices of Appeal therefore erred in law and fact, in entering a judgment on appeal on a matter not expressly or implicitly raised in the Memorandum of Appeal.

62.6. We are fortified by the guidance in the decision in **Civil Appeal No. 23/2013 PETER GICHUKI KING'ARA vs INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS (Supra)** that,

> **"It is trite law that a court cannot pronounce itself on an issue that is not in the pleadings of the parties. As it was stated in the case of *Galaxy Paints Co. vs Falcon Guards Ltd. EALR (2000)2 EA 385* the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties frame for the court's determination."**

63. **We will submit on Grounds 3 and 5 Concurrently:**

Ground 3 - **The Learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in MA No. 654/2020 before their joint Written Statement of Defense was struck out and judgment entered for the Appellants;**

Ground 5 - **The learned Justices of Appeal erred in law and fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter-party by the trial court;**

64. We humbly submit that the learned Justices of Appeal erred in law and fact when they set-aside the decision in HCMA No. 654/2020 and HCCS No. 43/2020 on an erroneous finding that the Respondents were never heard on the question of illegality before the lower court and ordered a retrial;

65. My lords, the Respondents in their Memorandum of Appeal vide; Civil Appeal No. 242/2020 did not raise any ground of being denied a hearing on the question of illegality. The learned Justices of Appeal therefore erred in law and fact in determining Civil Appeal No. 242/2020 on a ground alien to grounds presented before the court on appeal;

65.1. In **Civil Appeal No. 23/13 PETER GICHUKI KING'ARA vs INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS (Kenya)** the court stated that;

> **"it is trite law that a court cannot pronounce itself on an issue that isn't in the pleadings of the parties... issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties frame for the court's determination."**

65.2. The above decision would apply to appeals which are a form of suit. **Sec 2 Civil Procedure Act Cap. 71** defines a **"suit" to mean all civil proceedings commenced in any manner prescribed at law.**

65.3. This definition encompasses appeals which are civil proceedings commenced by lodging a Memorandum and Record of Appeal The above decision is guiding / instructive as relates to appeals.;

66. **Secondly**, we contend that there was a hearing interparty that was carried out before the trial court on the question of illegality and the Respondent heard;

66.1. At the proceedings before the trial court, the Appellants raised preliminary points of law, challenging the competence of the Respondents' Amended Joint Written Statement of Defence in **HCMA No. 654/2020** brought under **Order6 Rules 28, 29, & 30 Civil Procedure Rules S.I 71-1;**

66.2. The objection was to the effect that the Respondents' amended Joint Written Statement of Defence is a perpetuation of illegalities committed by the Respondents in illegally conducting financial institutions business in Uganda, in a manner contrary to provisions of the **Financial Institutions Act, 2004 (as amended)**, and it was sought of court to strike out the impugned WSD;

66.3. The Respondents filed their Affidavits in Reply to the application. The Appellants filed Affidavits in Rejoinder and the matter proceeded by way of Written Submissions filed by both parties. For all intents and purposes, the trial court carried out a formal hearing on the question on illegality and determined the same. **See: Pages 312 – 602 of the Record of Appeal herein;**

66.4. **Sec. 39(1) and (2) Judicature Act Cap. 13** permits the High Court to adopt a procedure prescribed at law, or a practise to enable it exercise its jurisdiction vested in the High Court under the laws of Uganda;

> **(1) The jurisdiction vested in the High Court by the Constitution, this Act or by any other enactment shall be exercised in accordance with the practice and procedure provided by this or any other enactment or by such rules and orders of the court as may be made or existing under this Act or any other enactment;**

(2) Where in any case no procedure is laid down for the High Court by any written law or by practice, the court may, in its discretion, adopt a procedure justifiable by the circumstances of the case."

66.5. We therefore submit that the Record of Appeal demonstrates that indeed the Respondents were heard on the issue of illegality by a procedure prescribed at law, and a practise adopted by the High Court through submissions. The Court then determined the issue of illegality on its merits at law;

66.6. The learned Justices of Appeal therefore erred in law and fact, and failed to properly evaluate the evidence on record of court demonstrating that a hearing was carried out on the issue of an illegality, and it arrived at an erroneous decision and occasioned a miscarriage of justice upon the Appellants;

67. We propose to submit on grounds 6 and 7 concurrently.

Ground 6 - <u>The Learned Justices of Appeal erred in law and in fact in condemning the Appellants to costs in an appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.</u>

Ground 7 - <u>The Learned Justices of Appeal erred in law and in fact in rewarding the Respondents with costs for committing an illegality.</u>

68. My lords, the above issues are raised from an equity and fairness perspective. It is our humble and respectful submission that the learned Justices of Appeal sitting in Civil Appeal No. 242/2020, were unfair in ordering costs of the Appeal against the Appellants in an appeal where the Honourable Court of Appeal determined the appeal on grounds outside of the Memorandum of Appeal;

69. We are awake to the principle of law that under **Sec. 27 Civil Procedure Act Cap 71**, costs are awarded at the discretion of the Court. However, in the same breath the principles of law are to the effect that judicial discretion has to be exercised reasonably and judiciously, depending on the circumstances of a case;

70. This Honourable has previously guided that discretionary powers have to be exercised judiciously. In **SUPREME COURT CONSTITUTIONAL APPEAL NO. 02/2016: The ATTORNEY GENERAL vs. GLADYS NAKIBUULE KISEKKA** the Court guided as follows;

> *"Discretion refers to the power or right given to an individual to make decisions or act according to her/his own judgment. Judicial discretion is therefore the power of a judicial officer to make legal decisions based on her opinion - but I hasten to add - but within general legal guidelines. In Black's Law Dictionary 5nd Edition, "judicial and legal discretion" is defined as "discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained." (My emphasis). Judicial discretion does not therefore provide a license for a judge to merely act as he or she chooses.*
>
> *Therefore, judicial officers must make many discretionary decisions within each case that influence the outcome of the case or the legal recourse of the parties. [See: Natayi vs. Barclays Bank of Uganda Ltd (MA No. 263 of 2013) UGHCLD 60 (14 June 2013); Kaweesa vs. Mugisha (CIVIL APPEAL NO. 28 OF 2013) [2014] UGHCLD 21 (22 April 2014)]. Nevertheless, while a judicial officer may have the discretion to decide the issues and outcomes within a case, this does not mean he or she will always make the right decision. Sometimes, judges misunderstand the law or pertinent facts and make an unfair decision. Therefore, while much deference is given to the judge's decision, an erroneous judicial decision may be overturned through the appeals process in order to maintain the integrity of the legal system."*

71. We have submitted extensively above, that the Court erred in law and fact in not resolving the appeal on the very questions as raised in the grounds of appeal. The appellate court left the key issue on illegality undetermined and unresolved.

72. The awarding of costs to the Respondents in this instance would be construed as unfair and inappropriate seeing as the Court did not adjudge the Respondent of any illegality.

73. In the premises, we humbly pray Your Lordships allow this Appeal with costs and set aside the Judgment and Orders issued in Civil Appeal No 242 of 2020.

We so pray

DATED at Kampala this 02nd day of November 2021.

MUWEMA & CO. ADVOCATES
KIMARA ADVOCATES & CONSULTANTS
COUNSEL FOR THE APPELLANTS

JOINTLY DRAWN & FILED BY:

M/s **Muwema & Co. Advocates and Solicitors,**
Plot 50 Windsor Crescent Road, Kololo,
Opposite Metropole Hotel Main Gate,
P.O. Box 6074, Kampala,
Tel: +256-414-257661

AND

M/s **Kimara Advocates & Consultants,**
Plot 67B, Spring Road, Bugolobi,
4th Floor Kisakye Complex,
P. O. Box 11916, Kampala
Tel: +256 200 944412
Email: info@kimara-advocates.com

KIMARA ADVOCATES
& CONSULTANTS
P.O.Box 11916 Kampala (U)

Date	05/11/2021
Time	04:26PM
File No.	

RECEIVED
Name: Claire
Sign:

HK3

SUPREME COURT OF UGANDA
TIME: R.E.C.E.I.V.E.D 3:33 P.M.
05 NOV 2021
P. O. BOX 6679, KAMPALA
SIGN

I Certify that this is Annexture HK3 Referred to in the Affidavit of Hamis Kiggundu Sworn before me this 5th day of 11 2021

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 13 OF 2021

1. HAM ENTERPRISES LTD
2. KIGGS INTERNATIONAL (U) LTD
3. HAMIS KIGGUNDU]:: APPELLANTS

VERSUS

1. DIAMOND TRUST BANK (U) LTD
2. DIAMOND TRUST BANK (K) LTD]:::::::::::::::::::::::::::::::: RESPONDENTS

1st AND 2nd RESPONDENTS' REPLY TO APPELLANT'S CONFERENCING NOTES AND WRITTEN SUBMISSIONS

Introduction:

1. The Appellants variously borrowed money from the Respondents which they failed to pay back, as a result of which, the Respondents commenced recovery proceedings.
2. In response the Appellants filed Civil Suit No 43 of 2020 against the Respondents. The Appellants cause of action was for breach of contract, misrepresentation, negligence, undue influence, unfair and unconscionable contractual terms, recovery of sums unjustly charged to and obtained from the Appellants.
3. The Appellants sought declarations that the Respondents acted in breach of contractual, fiduciary and statutory duties, that the defendant's acts of negligence complicated performance of the contract, and an order directing a full Account Reconciliation of all financial transactions between the parties among others.
4. On 10th August 2020, the Appellants amended their Plaint introducing an entirely new cause of action based on alleged Illegalities. The amended Plaint was largely premised on claims that the loan agreements were illegal and unenforceable. The Appellants also by amendment now sought inter alia:
    a. a declaration that the credit facilities offered to the Appellants were irregular, illegal, null, void and unenforceable.
    b. a declaration that the Respondent's demand for repayment of USD $4,014,444 and USD $6,974,600 is illegal and unenforceable;

c. an order for recovery of UGX. 34,295,951,553/= and USD $23,467,670.61 from the Respondents being money unlawfully appropriated from the Appellant's accounts;

d. an unconditional discharge of the Appellant's properties and all corporate and personal guarantees issued to secure their borrowings.

5. The Respondents filed a Joint Written Statement of Defence, denying the allegations and contending that the Appellants was indebted to both Respondents for various credit facilities lawfully obtained.

6. On 28th August 2020, the Appellants filed Miscellaneous Application No 654 of 2020, seeking to strike out the joint Written Statement of Defence of the Respondents on the grounds that:

   a. it is perpetuating illegalities as the Respondents illegally conducted financial institutions business in contravention of the Financial Institutions Act (2004) as amended (Hereinafter referred to as the "FIA");

   b. alternatively, it is frivolous, vexatious and evasive and fails to disclose a reasonable answer to the Appellant's claim.

7. The parties filed a Joint Scheduling Memorandum in the main suit on 31st August 2020 and appeared before Hon Justice Henry Peter Adonyo for conferencing. Under clause 6 of the Joint Scheduling Memorandum (JSM), it was agreed that a court-appointed auditor would be required to carry out an account, audit and reconciliation of the 1st Appellant's loan amounts to determine issues 3 and 6 as raised by the parties – [page 185, of the Record of Appeal]

8. The Trial Judge upon completion of conferencing, ordered that an independent auditor be appointed by the Institute of Certified Public Accountants of Uganda and that the parties file witness statements by 5th October 2020.

9. On 17th September 2020, the Appellants filed Miscellaneous Application No 729 of 2020 by which they sought to stay the implementation of the court order appointing an auditor pending hearing and determination of the application to strike out the joint WSD. Court granted the stay order on 30th September 2020.

10. On 7th October 2020, the Court delivered its ruling in Miscellaneous Application No 654 of 2020 (Application to strike out WSD), allowing the application and striking out the joint WSD on the ground that it was a perpetuation of an illegality and proceeded in the same ruling proceeded to determine the main suit and order *inter alia* that:

a. by their illegal actions, the Respondents breached the loan agreements with the Appellants.the credit facilities offered to the Appellants have since been settled at law;

b. credit facilities offered to the Appellants are illegal and void *ab initio* and unenforceable;

c. an order for Respondents to pay the Appellans the sums of UGX. 34,295,951,553/= and USD $23,467,670.61 being money unlawfully appropriated from the Appellant's accounts;

d. an unconditional discharge of the Appellant's properties and all corporate and personal guarantees issued to secure their borrowings. [page 599 – 601 ROA]

11. The Respondents being dissatisfied, filed **Civil Appeal No 242 of 2021** in the Court of Appeal against the decision of the Trial Judge in **Miscellaneous Application No. 654 of 2020** (Application to strike out WSD) and **HCCS No. 43 of 2020** delivered on 7th October 2020. The Respondents raised twelve grounds of appeal for determination by the Court of Appeal. [page 659 and 660 ROA].

12. The parties were directed to file their conferencing notes and written arguments and on 30th October 2020.

13. When the Appeal was called for hearing on 27th January 2021, the Court of Appeal had questions that it wanted the parties to address in the Appeal and requested the parties to address the same in their written submissions..

14. Respondents filed written submissions on 25th January 2021 and a rejoinder on 3rd February 2021 to address the additional questions from court. The Appellants filed their written submissions on 1st February 2021 addressing both the grounds of appeal and the additional questions of the court.

15. On 5th May 2021, the Court of Appeal delivered its judgment, setting aside the orders of the Trial Judge and ordering striking out of the amended pleadings of the parties and for the remitting of the matter to the trial court for hearing based on the original pleadings.

16. The Appellants have filed this appeal challenging the decision of the Court of Appeal.

The Appellants have submitted on grounds 1 and 4, 3 and 5, 6 and 7 jointly and ground 2 separately. We shall respond to the grounds as in the same order.

LEGAL ARGUMENTS

Issue 1: The learned Justices of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondent's Appeal before them

Issue 4: The learned Justices of Appeal erred in law and fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favour of the Appellants under Order 6 Rule 30 of the Civil Procedure Rules S.I 71-1.

Duty of Court on Second Appeal: In the case of Boutique Shazim Ltd v Norattan Bhatia and Another (Civil Appeal 4 of 2020) (Authority No. 1), the Supreme Court restated the duty of the Court on a second appeal as follows:

> *This is a second appeal. The duty of this court as a second appellate court has for long been stated in various decisions of this Court. In Milly Masembe vs Sugar Corporation (U) Ltd and another, Supreme Court of Uganda Civil Appeal No. 1 of 2000, it was held inter alia "On second appeal, the Supreme Court was not required to re-evaluate the evidence in the same manner as a first appellate Court would as doing so would create unnecessary uncertainty. It was sufficient to decide whether the first appellate Court on approaching its task has applied the relevant principles properly." See also Francis Sembatya Vs Alport Services Ltd, SCCA No.6 of 1999 and Banco Arahe Espanol v Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998.*

We submit that the learned Justices of Appeal did not avoid adjudication of the question of illegality and did evaluate the evidence before setting aside the judgement entered under Order 6 rule 30 CPR for the reasons below:

1. The Learned justices of appeal were legally entitled to deal first with the procedural grounds of the appeal:

The learned justices in their judgment first considered the grounds dealing with the procedural aspects of the appeal [page 720 ROA] and stated thus:

> *"Preliminary grounds;*
>
> *Having carefully considered the grounds of appeal, it should be noted that grounds 9 and 11 dealt with matters of procedure that affect the rest of the grounds and I will consider them first. Ground 9 deal with the propriety of striking*

out the written statement of defence of the appellants and ground 11 deals with the entering of judgment for liquidated sums and issuing declarations on points of law on the basis of illegality of the loan facilities between the parties that are the subject of grounds 1,2,3,4,5,6,7,8 and 10. Ground 12 deals with the propriety of using the affidavit of Allen Kagoya in support of the application and is partially covered in considering whether a defence can be struck out on the basis of pleadings alone and without considering the evidence or not, under ground 9 of the appeal."

The learned justices go on further at page 726 ROA to state;

"On the other hand, ground 9 of the appeal raises a fundamental issue of procedure as to whether the learned trial judge erred in law in striking out the written statement of defence of the first defendant. Secondly in ground 11 the issue is whether the learned trial judge erred in law in entering judgement for the plaintiffs as prayed for in the joint plaint by virtue of Order 9 rules 6, 8, 10 and 30 of the Civil Procedure rules."

The learned justices were entitled to first deal with the grounds regarding the procedure adopted by the trial judge in striking out the defendants' pleadings and granting the impugned orders before dealing with other grounds.

2. Where the said procedural grounds disposed of the appeal, the learned justices of appeal were not required by law to consider the other grounds raised:

Having dealt with the procedural grounds which disposed of the appeal, the learned justices of appeal had no duty to delve into the rest of the grounds which were at that point moot. The court has a primary duty to determine the dispute and contributing to jurisprudence is incidental and not by design.

In the case of Jaspal Singh Sandhu v Noble builders (U) Ltd and Anor (Civil Appeal-2002/13) (Authority No.2), the Supreme Court while dealing with a ground of appeal raised to the effect that the lower court had not addressed all the grounds of appeal held:

"I note that ground 8 of the appeal complains that the Justices of Appeal grossly erred and misdirected themselves when they held that the whole appeal case revolved on one issue only and thereby ignored other grounds of appeal which

raised important questions for the jurisprudence of this country. Important as the jurisprudence of this country may be, the basis of the court's consideration in any case is the application of law and principles of justice founded on the actual facts and circumstances of the case. The primary function of the court in determining a case involving disputes amongst citizens and organizations is to resolve those disputes judicially and not to seek and declare jurisprudential wisdom. Such wisdom evolves incidentally and not by design in any one given case.

In my opinion, the notion that because in its deliberations, a given court did not enhance the knowledge of jurisprudence in Uganda, should constitute a ground of appeal is very far fetched in any legal system. For these reasons I would dismiss ground 8 of the appeal.

... If the pleadings and submissions prove that the appellant ceased to be both a member and a contributory of the company, the case ends there because all the other listed grounds would only be considered on the presumption that the appellant is still a member and contributory of the company.

In this case once the procedure adopted to make the findings and orders of the trial judge was found to have been illegal, the case ended there as the other grounds on the substance of his findings could only be an issue if the trial judge had proceeded legally.

3. The court was could not adjudicate the grounds on illegality as the Appellants had founded their action and sought remedy on credit agreements, they were party to, which they claimed were illegal:

While the Respondents have at all times contended and still maintain that the credit agreements are legal, it is clear that the grounds on illegality arose from an amendment to the plaint which the court found could not be made subject of the Appellant's action [see Justice Madrama at page 742 ROA, Justice Kakuru Page 753 ROA and Deputy Chief Justice Buteera at page 760-761]

The judgment of Justice Kakuru at page 747 to page 751 ROA clearly illustrates how the cause of action in breach of contract and fiduciary duty was substantially substituted for a cause of action based on illegality of the transaction. The plaint on page 8 to 21 ROA was amended to delete paragraphs on the original cause of action and to reframe the cause of action as follows:

5. The 1st Defendant is being sued for among others facilitating and providing an illegal cover for the 2nd Defendant to engage in financial institution business in Uganda and various unethical acts of breach of trust, breach of fiduciary duty and breach of contract.

6. The 2nd Defendant is being sued as a foreign banking institution for engaging in unlicensed financial institutions business in Uganda by granting several loan facilities to the 1st Plaintiff which is the subject of the suit.

7. .....

8. The Plaintiffs bring this suit against the Defendants jointly and severally so that the question as to which of the Defendants is liable for illegally carrying out financial institutions business in Uganda and for breach of contract among others, can be determined.

The Appellants then set out their cause of action to include the following paragraphs:

k) On the other hand, the 2nd Defendant being a financial institution licensed to carry out banking business in Kenya could not conduct financial institutions 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.

j) The Plaintiffs have since realized that even the appointment of the 1st defendant as security agent for the 2nd Defendant in order to facilitate its financial transactions was unethical, illegal and a breach of trus/ fiduciary duty under the Financial Institutions Act 2004 (As Amended), the Bank of Uganda Consumer Protection Guidelines 2011.

The Appellants then supply particulars of breach of fiduciary duty on page 17 ROA and particulars of illegality and unethical conduct on page 19 ROA as follows:

Actively facilitating the procurement of the Plaintiff and the 2nd Defendant to enter into a trans-national transaction in breach of the duty to act with care, fairness, reliability and transparency as required by the Financial Institutions Act 2004 (As Amended), the Bank of Uganda Consumer Protection Guidelines 2011

The 2nd Defendant entered into loan agreements with the Plaintiffs under the cover of the 1st Defendant to transact financial institutions business with the full understanding the 2nd Defendant is not licensed to transact such business in Uganda and with Knowledge and means of knowing that it was illegal and prohibited by the Financial Institutions Act 2004 (as Amended)

The Appellants then proceeded on page 19 to 20 of the ROA to amend the remedies by seeking declarations that the credit facilities offered to the Appellants by the Respondents were irregular, illegal, null, void and unenforceable; a declaration that the Respondent's demand for repayment of USD $4,014,444 and USD $6,974,600 is illegal and unenforceable; an order for Respondents to pay the Appellants the sums of UGX. 34,295,951,553/= and USD $23,467,670.61 being money unlawfully appropriated from the Appellant's accounts and an unconditional discharge of the Appellant's properties and all corporate and personal guarantees issued to secure their borrowings.

It is clear that the Appellants cause of action after amendment was founded on the alleged illegality of the transaction which was the basis for the remedies claimed. If the Appellants participate in doing an act that they claim is not permitted by statute, they cannot found their action on the alleged illegality.

It is our submission that if a plaintiff's cause of action is based on his participation in an illegal act, then the court will not assist him. In Patel v Mirza [2016] UKSC 42 Lord Justice Toulson made reference to the long-standing dictum of Lord Mansfield in Holman v Johnson (1775) 1 Cowp 341, 343 wherein his Lordship held as follows;

> *"If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."*

The true test for determining whether or not the plaintiff and the defendant were in *pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium of the illegal transaction. [See: Active Automobile Spares Ltd v Crane Bank Ltd and Anor Civil Appeal No. 21 of 2001 (Authority No.4)]. The Appellants case in the trial court hinged on allegations of illegality. The illegality alleged by the Appellants was that the 2nd Respondent conducted the lending or

extending money held on deposit to the Appellants in Uganda and the 1st Respondent provided the cover. They seek indulgence of Court to find that the transaction was illegal and at the same time seek to recover from the said transaction they claim is illegal. It is apparent that the Appellants cause of action is founded on an illegality and as such their claim cannot stand.

To allow recovery in this case would put court in position of saying that the same conduct/transaction is both legal, in the sense of being capable of rectification by the court, and illegal. In Les Labaratories Servier and another V Apotex Inc and Os (2014) UKSC 55 (Authority No.5), the Supreme Court of the UK cited Hall v Herbert (1993) 101 DLR for the proposition that;

> *"For the courts to punish conduct with one hand while rewarding it with the other, would be to create an intolerable fissure in the law's conceptually seamless web."*

The Court of Appeal upon establishing that the Appellants founded their cause of action on an illegality as claimed in Amended Plaint, had no option but to strike it out. It matters not that the amendment was by consent of the parties or that the objection was not raised by any of the parties.

In Asuman Mugyenyi V Buwule Civil Appeal No. 14 of 2016 (Authority No. 6), the Supreme Court held:

> *"With due respect to the first appellate Judge, I find that he errored in law to go ahead and determine an incompetent appeal just because counsel for the appellant did not raise a preliminary objection. The Court had a duty to make sure Rules of procedure and Act are not flouted, because the Courts are eyes of justice and the Court is under the duty at all times to uphold the law and its procedure*
>
> *... even if it would be the case as the Court of Appeal wanted it to seem like, a consent order cannot override illegality, parties cannot consent to oust the law and procedures set under the Civil Procedures Act and Rules."*

4. The judgment of the Court of Appeal clearly illustrates how the evidence was evaluated in resolution of the grounds dealt with:

The matter before the trial court was an application to strike out a WSD. It is important to note that the trial judge's only consideration in the High Court when dealing with the application to strike out the WSD for the Respondents should have been the pleadings of the parties as the Court of Appeal rightly held. This was the position of this Supreme Court in the case of Ismail Serugo vs Kampala City Council & the Attorney General, Constitutional Appeal No 2 of 1998 (Authority No.7).

The learned Justices of Appeal properly evaluated the evidence that was before the trial court and rightfully determined that the orders made by the trial judge in the High Could not be given under Order 6 Rule 30 of the Civil procedure Rules. The court extensively evaluates the application to strike out, the Amended Plaint, WSD and the averments made therein.

Order 6 Rule 30(1) of the Civil Procedure Rules S.I 71-1 provides:

> *(1) The Court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.*

Upon evaluation, court framed the question thus at page 739 ROA:

> *The question before the court is whether the defendants pleading did not disclose a reasonable answer or whether it was shown to be frivolous or vexatious. As noted earlier, the learned trial judge did not strike out the written statement of defence on the ground that it was frivolous or vexatious but that there was no reasonable answer to the allegation that the defendants were conducting unlawful business forbidden by statute.*

At page 741 ROA, the court found that the matter in contention was both one of fact and law and could not be determined under O. 6 Rule 30:

> *"The learned trial judge proceeded under paragraph 19 of the written statement of defence as the answer to the alleged illegalities made against the defendants by the Plaintiff. However, the issue of whether the plaintiffs were lawfully carrying out the business alleged in the plaint, is partly a question of fact and partly a question of law that ought not to be concluded by striking out the written statement of defence. For instance, it is alleged that the defendants did not have*

a licence to do so or breached the terms of regulations. The defendants averred that they were doing business lawfully and the issue was triable as the factual basis had to be established. For instance, it is alleged that the first Plaintiff went to Kenya to obtain credit facilities. What are the facts before even dealing with the law? In the very least, the matter ought to have been tried as a point of law under order 6 rule 29 of the Civil Procedure Rules and only where facts are not in dispute or have been established without the need for more. In the very best of circumstances, the point of law required to be determined after taking evidence and after address of counsel on all relevant matters of law and fact. What was being alleged involves an important point of law affecting colossal sums of money. In N.A.S Airport Services Ltd v the Attorney General of Kenya [1959] EA 53 order 6 rule 29 was interpreted by the then East African Court of Appeal when Windham JA who read the judgment of court stated at page 58 that:

Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the shortcut, as is so often the way with shortcuts, would prove longer in the end.

At pages 738-741 of the ROA, the court summarized the claim as disclosed by the amended plaint of the Appellants and the response thereto as disclosed by the amended WSD for the Respondents and concluded at page 741 of the ROA:

The learned trial judge proceeded under paragraph 19 of the written statement of defence as the answer to the alleged illegalities made against the defendants by the Plaintiffs. However, the issue of whether the plaintiffs were lawfully carrying out the business alleged in the plaint, is partly a question of fact and partly a question of law that ought not to be concluded by striking out the written statement of defence. For instance, it is alleged that the defendants did not have a licence to do so or breached the terms of regulations. The defendants averred that they were doing business lawfully and the issue was triable as the factual basis had to be established. For instance, it is alleged that the first Plaintiff went to Kenya to obtain credit facilities. What are the facts before even dealing with the law? In the very least, the matter ought to have been tried as a point of law under order 6 rule 29 of the Civil Procedure Rules and only where facts are not in dispute or have been established without the need for more. In the very best of

circumstances, the point of law required to be determined after taking evidence and after address of counsel on all relevant matters of law and fact.

The conclusion of Justice Madrama above is supported in Wycliff Kiggundu v. Attorney General, Supreme Court Civil Appeal No. 27 of 1992, which was restated in the case of Nyeko Smith & Anor V Attorney General Civil Appeal No 01 of 2016 (Authority No.8) where the Supreme Court held that *'once questions of fact arise, then the issue must surely go to trial.'* Therefore, it is a well-established principle of law that Court is precluded from determining a point law as a preliminary issue once questions of fact arise which require taking of evidence and the holding of a trial.

In N.A.S Airport Services Ltd v the Attorney General of Kenya [1959] EA 53 (Authority No.9) the East African Court of Appeal interpreted Order 6 Rule 29 and held that;

Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the shortcut, as is so often the way with shortcuts, would prove longer in the end.

We submit that the learned Justices of Appeal properly evaluated the evidence before them to come to the conclusion that the Respondents' joint WSD could not have been stuck out based on the alleged claim of illegality when only the pleadings of the parties were considered. It was a matter that required evidence of fact to be adduced and considered by court.

In re-evaluation of evidence by a first appellate court, there is no set format to which the court should conform. In Uganda Breweries Limited vs. Uganda Railways Corporation (Civil Appeal No.6 of 2001) [2002] UGSC 1 (Authority No.10) this court held:-

"There is no set format to which a re-evaluation of evidence by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court."

We therefore pray that Grounds 1 and 4 be rejected.

GROUND 2: The learned Justices of Appeal erred in law and fact when they abandoned the grounds of Appeal raised by the Respondents and irregularly introduced new grounds of appeal that were not implicitly set out in the memorandum of appeal and thereby erroneously ordered:

i) The striking out of the Appellants Amended Plaint in HCCS No 43 of 2020 and further ordered a retrial on the basis of the original pleadings.
ii) The saving of the order for appointment of auditors which order had been vacated and was never resurrected in the suit.

It is our submission that the learned Justices of Appeal did not abandon the grounds of appeal as raised in the Memorandum of Appeal or introduce new grounds. During the hearing of the matter, the Court requested the parties to address it on a number of issues [page 770 of the ROA]. We submit that it is the duty of court to frame issues as would be necessary for determining the matters in controversy as between the parties.

The Court of Appeal however, based its decision on the grounds that were contained in the memorandum of appeal. In the lead judgement at page 720 ROA, Justice Madrama considered grounds 9 and 11 of the memorandum of appeal, whose resolution, had the effect of determining the entire appeal. The other members of the panel agreed with his findings. It is therefore not true that the Justices of Appeal based their decision on entirely new grounds of appeal as alleged by the Appellants. The questions that were raised by the Court of Appeal were related to the grounds of appeal raised by the Respondents. This was conceded by the Appellants in their written submissions [page 2383 in Vol. 5 of the supplementary ROA] where they state:

> *We take the view that most if not all the issues raised by this Honourable Court are covered under the grounds of appeal framed by the Appellant. We therefore propose to address the above issues within our submissions in relation to the grounds of appeal*

It thus unfathomable that they now fault the Court of Appeal for raising entirely new issues and grounds of Appeal yet they admit that they are related to the grounds of appeal raised by the Respondents in the Court of Appeal. In Restetuta Twinomugisha V Uganda Aluminum Ltd SCCA 19/2001(Authority No.11) Justice Karokora held;

"In my experience, it is not uncommon for an appellate judge or any appellate court to rephrase any grounds of appeal so as to make the subject of appeal clearer and bring into focus the issues canvassed before the appellate Court."

We submit that the Court of Appeal was well within its rights to ask any questions related to the matter before it so as to gain clarity or bring into focus the most important issues.

That notwithstanding, Rule 102(c) of the Judicature (Court of Appeal) Rules provides:

102. At the hearing of an appeal in the court-

(c) the court shall not allow an appeal or cross appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal, without affording the respondent, or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground;

Clearly the court can hear an appeal on a ground not set forth or implicit in the memorandum of appeal where the parties have been afforded an opportunity to be heard on that ground. In the case of Crane Bank Ltd v Nipun Narottam Bhatia (Civil Appeal No. 02 of 2014), (Authority No.12) the Supreme Court on a similar issue stated:

"The Court held that the requirement in Rule 102 is mandatory. That the sub rule is a reproduction of Rule 101 (c) of the former Court of Appeal Rules, 1972 which was operating when the former Uganda Court of Appeal decided the Makula case. That the Court must have borne this in mind when it allowed parties to address it before it made its decision on the basis of an illegality brought to the attention of the Court.....In this case, as earlier on stated, the issue of illegality was neither pleaded nor canvassed before both courts; it was discovered at the late stage of drafting the judgment. Being an appellate court, the Learned Justices of Appeal had to be very cautious and had to consider whether the illegality was sufficiently proved. It was in my view, obligatory upon the Learned Justices of Appeal, upon detecting an illegality during the course of drafting their judgment on the basis of the available evidence, to summon both parties to address them on the issue before taking a decision. This would have satisfied the requirement of Rule 102 (c) of the Court of Appeal Rules as well as Article 28(1) of the Constitution."

The Appellants were afforded an opportunity to be heard on the questions raised by court and the Appellants in their written submissions [page 2416 to 2419 in Vol. 5 of

the supplementary ROA] specifically submitted on all the questions that were raised by the Court of Appeal in compliance with Rule 102(c) of the Judicature (Court of Appeal) Rules.

As regards striking out of the Appellants Amended Plaint

We reiterate our submissions on ground 1 above and state that the amendment of the plaint was illegal as the Appellants' amended plaint introduced an entirely new cause of action based on illegality which they sought to found their claim for remedy.

The Appellants contend that the amendment was with consent of both parties and duly endorsed by the trial court. It matters not that the amendment was by consent of the parties or that the objection was not raised by any of the parties. In **Asuman Mugyenyi V Buwule (Supra) (Authority No.6)** the Supreme Court held that a consent order cannot override illegality and parties cannot consent to oust the law and procedures set by law. We concur with the above holding and submit that the fact the amendment was illegal overrides any consent between the parties. The Court of Appeal upon establishing that the Appellants founded their cause of action on an illegality as claimed in Amended Plaint, had no option but to strike it out.

Further still, the Appellants were given an opportunity by Court to address it on the issue of amendment of pleadings. At **page 2417 of the supplementary ROA**, the Appellants addressed the question as to amendment of the pleadings. They were thus given an opportunity before the Court made it's order.

Saving the Order for appointment of Auditors

The court at page 755 of the **ROA** saved the order of the learned trial judge appointing auditors. In his ruling dated 30th September 2020 [**on page 311 ROA**], the learned trial judge made an order staying the implementation of the Court order issued on 31st August 2020 directing Institute of Certified Public Accountants of Uganda (ICPAU) to appoint an independent auditor to carry out a full account reconciliation of the financial transactions which are based on the credit facilities between the Appellants and the Respondents to determine the amounts due inter parties pending the hearing and determination of Misc Application No 654 of 2020.

Misc Application No 654 of 2020 was determined by the learned trial judge on 7th October 2020. [**Page 602 ROA**]. In his orders at page 601 of the record of appeal, the learned trial judge ordered:

I do hereby vacate the order previously issued by this court for taking an audit and account of all the 1st and 2nd Plaintiff's loan accounts for the period between 16th February 2011 to date as it is now overtaken by events.

The Respondents appealed against all entire decision of the learned Trail Judge and filed a Notice of Appeal on 15th October 2020 [Page 653 of the ROA]. The Respondents further filed a Memorandum of Appeal on 19th October 2020 requesting orders that the ruling and orders of the learned trial Judge in Miscellaneous Application No 654 of 2020 and HCCS no 43 OF 2020 be reversed and/or set aside [Page 661 of the ROA].

The Court of Appeal, in deciding Civil Appeal No. 242 of 2020, set aside the judgment and orders of the learned trial Judge [Page 744 of the ROA]. Having reversed the ruling of the court in Misc Application No 654 of 2020 the order vacating the order for an audit was set aside.

Rule 32(1) of the Judicature Court of Appeal Rules) Directions provides:

On any appeal, the court may so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial and make necessary, incidental or consequential orders, including orders as to costs.

The order of the Court of Appeal to save the order of the learned trial judge appointing auditors was clearly an incidental order of Court considering the setting aside of the orders of the Trial Judge that included the vacating of the order to appoint auditors.

The Appellants erroneously argue that an independent audit and reconciliation had been carried out which was exhibited and adopted on Court record without reservation of the Respondents. A reading of Page 182 of the Record of Appeal reveals that exhibit P9 and P12 (the Appellants own report) were never agreed to by the Respondents and remained contested. The documents were not adopted on Court's record at any point in time and the Appellant's submissions on this point are misleading.

In Okwonga v Uganda SCCA No.20 of 2000 (Authority No13), the Supreme Court held that;

"there is a distinction between exhibits and articles marked for identification, the term "exhibit' should be confined to articles which have been formally proved and admitted in evidence"

Therefore, as the audit and reconciliation remained contested, the same document could not have been admitted by Court and we therefore pray that this ground of appeal be rejected by this Court.

GROUND 3: The learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of the illegality in Misc Application No 654 of 2020 before their joint written statement of Defense was struck out and judgment entered for the Appellants.

GROUND 5: The learned justices of Appeal erred in law and in fact in ordering for a retrial of the suit in which the overriding question of illegality has been fully heard and determined inter parties by the trial court.

It was the finding of the court, which we concur, with that the Respondents were not heard on the basis of the awards that were made and that the the issue of illegality as framed required the production of evidence and could not be determined in a summary manner. As rightly held by the Court of Appeal, there were triable issues that were raised by the Respondents that necessitated that they be heard. This was never done. Justice Madrama in his judgment at page 732 of the ROA states;

> "…. Secondly, could the matter be handled as a point of law without considering the evidence? Was it not proper procedure to hear the parties before determining the issue as a point of law under order 6 rule 29 of the CPR? In any case, had there been the envisaged order under order 6 rule 30 of the CPR, that is the only matter which we would have to handle on this appeal. It would be procedural matter on the assumptions that it was an order made on the basis of pleadings only. Thirdly, subsequent orders of entering judgment, though permissible after striking out a defence, needed to proceed on the basis of a claim for a liquidated amount in default of a defence but not on a basis of a conclusion that the plaintiff was entitled to money in a contentious matter."

He further states at page 742 ROA that;

> *Further could the plaintiffs recover money on the basis of an illegal transaction/ The learned judge went ahead to enter judgement allowing colossal sums of money against the appellants after striking out their defence on the ground of illegality and without giving them a hearing on the basis of the awards.*

And at page 744 ROA:

> *There were questions of fact that needed to be established after taking the necessary evidence in considering the issues..... I find that because the defendants were not heard, the rest of the orders issued by the learned trial judge cannot stand and there is no need to consider grounds 1,2,3,4,5,6,7,10 and 12 of the appeal.*

The Court's finding was that Respondents raised issues relating to the alleged illegal credit facilities that needed the analysis of Court of the facts in the case by taking necessary evidence. The finding that the Respondents were not heard was in respect of the Learned Trial Judge in the High Court making default judgment orders yet he had erred in striking out of the Respondents) written statement of defence and therefore left the Defendants/Respondents unheard.

Deputy Chief Justice Buteera in his judgement at page 759 ROA correctly states that in the circumstances, Order 6 rule 30 was inapplicable as all the facts were clearly contested.

The Learned Justices of Appeal rightly found that the question of illegality was one mixed of law and fact and required a full hearing [See page 741 ROA]. We further submit that the allegation of commission of any illegal acts by the Respondents required the production of evidence by the Appellants on whom the burden of proof lay. The Appellants could not try to avoid this legal obligation by attempting to deal with this as a preliminary point of law.

We therefore pray that this ground of appeal also be rejected by this Honourable Court.

As regards ground 5, we reiterate our submissions in ground 1 above. The Learned Justices of Appeal correctly ordered the remitting of the suit to the High Court for trial after finding that it was an illegality to amend the plaint and introduce an entirely new cause of action. They also rightly held that the Appellants cause of action could not be founded on an illegality. There was thus no basis for upholding the findings of the trial court based on illegality when a fundamental steps in the procedure has been flouted.

Rule 32(1) of the Judicature (Court of Appeal Rules) Directions provides:

> *On any appeal, the court may so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial and make necessary, incidental or consequential orders, including orders as to costs.*

It is an unsustainable argument to contend that the issue of illegality had been concluded by the High Court so the Court of Appeal was not entitled to remit the matter for retrial.

Furthermore, the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See Kifamunte Henry V Uganda (Supra). The Supreme Court in Sebanakita Godfrey V Fuelex(U) Ltd Civil Appeal No. 4 of 2016 (Authority No.14) quoted the case of Francis Sembatya Vs Alport Services Ltd SCCA No.6 of 1999 where it was held among others that

> *"..... A first appellate court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the trial court."*

It is thus untenable for the Appellants to fault the appellate court for departing from the finding of the lower court after all the evidence and facts were taken into consideration before arriving at its own decision.

It follows therefore that the Court correctly ordered for a retrial of the suit. Rule 32(1) of the Judicature Court of Appeal Rules) Directions. The Court of Appeal therefore acted within the ambits of its powers in remitting the suit to the High Court to be tried.

GROUND 6: The learned justices of Appeal erred in law and in fact in condemning the Appellants to costs in an appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.

GROUND 7: The Learned justices of appeal erred in law and in fact in rewarding the Respondents with costs for committing an illegality.

We shall argue issues 6 and 7 concurrently. It is our submission that the learned Justices of Appeal firstly did not find that the Respondents has committed any acts of illegality.

It is clear from the above holdings that the judgment of the High Court relating to the alleged illegalities was set aside by the Court of Appeal. There was therefore no illegality to purge.

The argument that the Learned Justices of Appeal awarded the Respondents costs for committing an illegality is baseless and not backed by any of the judgments of the Court.

Rule 32 (1) of the Judicature (Court of Appeal Rules) Directions empowers the Court of Appeal to award various incidental orders including costs.

In the case of Stanbic Bank Uganda Ltd v Atabya Agencies Ltd (CIVIL APPEAL NO. 03 OF 2012) (Authority No.15), the Supreme Court held that it is trite that once a judgment is given the successful party is entitled to enjoy the fruits of the judgment. In the case of Makula International Ltd Vs His Eminence Cardinal Nsubuga & Anor (CIVIL APPEAL NO. 4 OF 1981), the court relied on the case of Sturrock v Littlejohn (1898) 68 L.J. Q.B. 165)' which held;

> *"A plaintiff who successfully sues to act aside a judgment wrongfully detained against him in a former action is entitled to the costs of the former action as well as those of the action of review Sturrock v Littlejohn (1898) 68 L.J. Q.B. 165)'.*

We submit that the Appellants dragged the Respondents to Court in Civil Suit No 43 of 2020 before the High Court wherein the Court made various orders in their favour including costs. The Respondents were forced to appeal against the decision of the High Court in the Court of Appeal. We submit that in the circumstances the Respondents are entitled to the fruits of their judgment in having their appeal allowed and ground 6 and 7 should fail.

<u>Foreign lending to Ugandan Borrowers:</u>

My lords, before you take leave of this matter, we note that the Appellants have not, in their submissions, addressed the issue of the legality of the foreign lending to Ugandan borrowers. Ground 1 accuses the Court of Appeal of avoiding adjudicating on the matter. We contend that the Court of Appeal had no choice but to strike out the amended plaint that raised the issue of illegality of the foreign lending since the Appellants founded their cause of action on an illegal act they allegedly participated in. The Court of Appeal also found that the procedural grounds were enough to determine the matter and they were legally entitled to do so.

The learned trial judge however made some far reaching findings on foreign lending, syndicated loans and agent banking with directives to the Bank of Uganda to take the necessary measures arising from his findings. At page 589 ROA:

> *"Relying on the definition of a financial institution reproduced above (I) find that the said definition applies equally to the 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 in Uganda or outside it as seen from section 117 of the Financial Institutions Act 2004 which required that a foreign bank to seek authorization of Bank of Uganda ..."

at page 591 ROA:

"The fact of this matter shows syndicated financial institution business by the 1st and 2nd Respondents aimed at dodging the seeking of a license from the relevant authority which actions are clearly illegal and I would remain with no option by the authority of the holding in Makula Internationsl vs His Eminence Cardinal Nsubuga and Another (1982) HCB 11 would render such actions illegal once brought to the attention of court."

at page 594 to 598 ROA:

"It was submitted by counsel for the Applicants that ... the 2nd Respondent a financial 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 Respondent to act as an agent and that is a violation of Regulation 5 of the Financial Institutions (Agent Banking) Regulations 2017 ...

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 ..."

While the ruling was set aside, this was on procedural grounds. The Deputy Chief Justice in his remarks on page 761 of ROA states in regard to this matter that he knows of no law that makes it illegal for a Ugandan citizen or a foreigner resident in Uganda to borrow and pay back money borrowed from a foreigner or a foreign financial institution and such loan agreement would be enforceable.

Given the obvious far-reaching consequences of this matter on the financial sector and the economy with regard to Foreign Direct Investment, multi lateral and institutional lending to government, existing and future syndicated loans as well as private project finance, we seek the leave of court to address this matter briefly under Rule 98(a) of the Judicature (Supreme Court Rules) Directions. This matter was submitted on at length in

the lower courts and our submissions appear in Volume 5 of the Supplementary rRecord of Appeal. We summarise our position as follows:

Whether foreign lending to a Ugandan borrower requires a license under the FIA

Section 4(1) of the Financial Institutions Act 2004 as amended provides:

> *(1) A person shall not transact any deposit-taking or other financial institution business in Uganda without a valid licence granted for that purpose under this Act.*

The Financial Institutions Act 2004 as amended by the Financial Institutions (Amendment) Act No 2 of 2016 further defines "Financial Institution Business" to mean

> *the business of—*
>
> *(a) acceptance of deposits;*
>
> *(b) issue of deposit substitutes;*
>
> *(c) lending or extending money held on deposit or any part of that money including by way of—*
>
> *(i) consumer and mortgage credit;*
>
> *(ii) factoring with or without recourse; ...*

Clearly the regulatory thrust is to supervise the receiving of deposits and how deposits so received are lent out. The conclusion by the trial judge, with due respect, that the Act governs lending or extending of money held on deposit whether in Uganda or abroad is without basis. It is inconceivable that the legislators were exercising their constitutional remit to protect Kenyan depositors. Their role is clearly to protect Ugandan depositors whom they are accountable to. This is obvious when one looks at the long title to the Act and the definition of a Financial Institution under the Act. The long title reads thus:

> *An Act to revise and consolidate the law relating to financial institutions; to provide for the regulation, control and discipline of financial institutions by the Central Bank; to repeal the Financial Institutions Act, Cap. 54 and to provide for other related matters.*

Section 3 defines a Financial Institution to mean:

> *"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; "

Reference to a financial institution under the Act therefore means one licensed to conduct financial institution business in Uganda and not any other country. The law was not intended to have extra territorial application to conduct of financial business outside Uganda.

Therefore, a lending transaction for funds which originate from foreign sources is not a transaction that requires a license under the FIA as it is not a transaction made from deposits taken in Uganda. See: KOH KIM CHAI VERSUS ASIA COMMERCIAL BANKING CORPORATION LIMITED (1981) 1 MLJ196 PC (Authority No.17)

Section 117 of the FIA further provides as follows:

'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.'

The above provision is only permissive as its simply provides that a foreign bank may apply to Bank of Uganda for permission to establish a representative office in Uganda and engage in limited activities that do not include taking of deposits. The law is not couched in mandatory terms and it is therefore not a mandatory requirement. Also the law doesn't say that a foreign bank may not lend to a Ugandan citizen or resident without a license.

Whether a license is required for syndicated banking

A syndicated loan defined in Banking and Capital Markets Companion, 6th Edition, Bloomsbury (Authority No.18) as *"a loan provided by two or more lenders acting together to lend a portion of the loan on identical terms"*. A syndicated loan is also defined in Ellinger's Modern Banking Law 5th Edition, Oxford University Press, (Authority No.19) as a loan that *"involves two or more banks each making separate loans to a borrower on common terms governed by a single loan agreement."*

The learned authors continue to set out the nature of the relationship of parties in a syndicate differentiating between the *'arranging bank'* and the *'agent bank.'* They note

that to obtain a syndicated loan, *'the borrower grants a mandate to a single bank or a group of banks (the 'arranging bank') to arrange the syndicated loan. The arranging bank's main function is to put together the loan, although it may also agree to underwrite the loan.'*

The learned authors then observe that *'the loan agreement will, however, provide for the appointment of a bank that will act as the agent of the syndicate (the 'agent bank') in dealing with the borrower and administering the loan facility".*

Clearly the learned trial judge misconstrued the meaning of syndicated banking while handling the matter before him as the loans in issue were separate and documented separately. That notwithstanding, where two banks come together to offer a loan, the bank that is lending from deposits taken and held in Uganda, will require a license under S. 4 of the FIA while the bank which provides funds externally from foreign sources requires no such license.

Whether an agent of a foreign lender requires a license under the Financial Institutions (Agent Banking) Regulations 2017

It is our contention that the learned trial judge misconstrued the concept of Agent Banking under the Financial Institutions (Agent Banking) Regulations 2017 and 'a Banking Agent under a contractual relationship.

In Kelly v Cooper [1993] AC 205 quoted with approval in Torre Asset Funding Limited v RBS [2013] EWHC 2670 (Authority No.20), a case dealing with a syndicated lending relationship, Lord Browne Wilkinson set out two critical propositions in relation to agency. His Lordship noted that; "*first, agency is a contract made between principal and agent; second, like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied. It is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract.*"

Under section 4 of the Financial Institutions (Agent Banking) Regulations 2017

> *"Agent" means a person contracted by a financial institution to provide financial institutions business on behalf of a financial institution in accordance with the Act and these Regulations.*

"Agent banking" means the conduct by a person of financial institutions business on behalf of a financial institution as may be approved by the Central Bank. A financial institution is clearly defined in the FIA as one licensed by the BOU to conduct financial institutions business in Uganda.

We contend that the above did not amount to appointment to carry out agency banking within the meaning of the Financial Institutions (Agent Banking) Regulations 2017 made pursuant to s. 4(2)(b) and 131(1)(b) of the FIA which the trial judge relied upon.

Under section 4 of the Financial Institutions (Agent Banking) Regulations 2017

"Agent" means a person contracted by a financial institution to provide financial institutions business on behalf of a financial institution in accordance with the Act and these Regulations.

"Agent banking" means the conduct by a person of financial institutions business on behalf of a financial institution as may be approved by the Central Bank.

A financial institution is clearly defined in the FIA as one licensed by the BOU to conduct financial institutions business in Uganda.

The objects of the Regulations set out under section 3 of the Financial Institutions (Agent Banking) Regulations 2017 are which provides:

3. Objectives

The objectives of these Regulations are—
(a) to provide for agent banking as a delivery channel for offering banking services in a cost-effective manner to foster financial inclusion;

We have had occasion to establish the intention of Parliament as expressed in the Hansard of 6th January 2016, when the Committee on Finance, Planning and Economic Development tabled the Financial Institutions (Amendment) Bill, 2015 at (https://www.parliament.go.ug/documents/1118/hansards-2016-january) (Authority No.21) attached to our list of authorities. The relevant page is at Page 42 where the Chairperson, Committee on Finance, Planning and Economic Development (Mr Robert Kasule) clearly explains the reasoning behind the introduction of agent banking as follows:

1. *Introduction of Agent Banking*

The Bill seeks to introduce agent banking in Uganda. Agent banking is commonly referred to as branchless banking. This literally means the delivery of limited scale banking and financial services outside the conventional branches to the underserved population through engaged agents under a valid agency agreement rather than a teller or a cashier. It is the owner of the outlet who conducts banking transactions on behalf of a bank. A banking agent is a retail or postal outlet contracted by a licensed deposit-taking financial institution or a mobile money operator to provide a range of financial services to customers.

The committee observes that:

a) With proper guidelines, agency banking will offer a viable solution to increasing and expanding the outreach of financial services in Uganda, particularly in rural areas.
b) There is need for clear definitions on who an agent under this Act should be.

It is inconceivable that lending $10 Million to the Appellants was an exercise in financial inclusion of an underserved rural citizen. Clearly the regulations apply to extending banking to the unbanked in rural areas. Also, the 2nd Respondent is not a Financial Institution within the meaning of the FIA capable of appointing an agent under the Regulations.

We therefore pray this ground of appeal be rejected.

We pray that the Appellant's appeal be dismissed with costs to the Respondents in this court and in the courts below.

Dated at Kampala this 05 day of NOV 2021.

COUNSEL FOR THE RESPONDENTS

Drawn & Filed by:
K&K ADVOCATES,
K&K CHAMBERS
PLOT 5A2, ACACIA AVENUE
P.O.BOX 6061 KAMPALA-UGANDA

HK4

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.242 OF 2020

(ARISING FROM MISCELLANEOUS APPLICATION NO.654 OF 2020)
(ARISING FROM HIGH COURT CIVIL SUIT NO. 43 OF 2020)

COURT OF APPEAL OF UGANDA
RECEIVED
SIGN

1. DIAMOND TRUST BANK (U) LTD
2. DIAMOND TRUST BANK (K) LTD ::: APPELLANTS

this is HK4 Annexure referred to in the Affidavit of Hamis Kiggundu sworn

VERSUS

1. HAM ENTERPRISES LTD
2. KIGGS INTERNATIONAL (U) LTD
3. HAMIS KIGGUNDU ::: RESPONDENTS

MEMORANDUM OF APPEAL

WE, DIAMOND TRUST BANK (U) LTD and DIAMOND TRUST BANK (K) LTD the above named Appellants, being dissatisfied with the Ruling, Orders and Judgement of The Honourable Dr. Justice Henry Peter Adonyo delivered on the 7th October 2020 intends to appeal against the decision to the Court of Appeal on the following grounds;

1. The learned trial judge erred in law in finding that the Financial Institutions Act 2004 applied to the 2nd Appellant in respect of credit facilities issued in Kenya to Ugandan entities.

2. The learned trial judge erred in law and in fact in finding that the 2nd Appellant required approval from the Bank of Uganda to issue credit facilities in Kenya to Ugandan entities.

3. The learned trial judge erred in law in finding that it is illegal for a foreign bank using 'money held on deposit' whether within Uganda and or outside it to engage in activities, such as lending and extending credit facilities to Ugandan entities without authorization of Bank of Uganda.

4. The learned trial judge erred in law in finding that the 1st Appellant carried out agency banking in contravention of the Financial Institutions (Agent Banking) Regulations 2017.

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(5)

ii) The Ruling and orders of the learned trial Judge in Miscellaneous Application No. 654 of 2020 and HCCS No. 43 of 2020 be reversed and/or set aside.

iii) HCCS no. 43 of 2020 be sent back to the High Court for trial.

Dated at Kampala this 15th day of October 2020.

COUNSEL FOR THE APPELLANT

TO BE SERVED UPON:

Muwema & Co. Advocates & Solicitors,
Plot 50 Windsor Crescent,
P. O. Box 6074,
Kampala

Kimara Advocates and Consultants,
4th Floor Kisakye Complex, Plot 67B Spring Road – Bugolobi,
P, O, Box 11916,
Kampala

Lodged in the Court of Appeal Registry this 20th day of October, 2020.

DEPUTY REGISTRAR

Drawn and Filed by:
K&K Advocates, (Formerly Kiwanuka & Karugire Advocates)
K&K Chambers,
Plot 5A2 Acacia Avenue,
P. O. Box 6061,
Kampala
Email: advocates@kandk.co.ug

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KIMARA ADVOCATES
& CONSULTANTS
P.O.Box 11916 Kampala (U)

Date	17/11/2021
Time	01:11 PM
File No.	

RECEIVED
Name: Claire
Sign:

HK5

17 NOV 2021

I Certify that this is Annexture HK5 referred to in the Affidavit of Hamis Kiggundu Sworn on 22 Nov 2021

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 13 OF 2021

1. HAM ENTERPRISES LTD
2. KIGGS INTERNATIONAL (U) LTD
3. HAMIS KIGGUNDU]:: APPELLANTS

VERSUS

1. DIAMOND TRUST BANK (U) LTD
2. DIAMOND TRUST BANK (K) LTD]:::::::::::: RESPONDENTS

1st AND 2nd RESPONDENTS' SUPPLEMENTARY SUBMISSIONS

Introduction:

My lords, in our submissions filed on 5th November 2021, we pointed out that the Appellants had not, in their submissions, addressed the issue of the legality of the foreign lending to Ugandan borrowers even though Ground 1 accuses the Court of Appeal of avoiding adjudicating on the same issue. The above notwithstanding, the Appellants at page 8 of their submissions in rejoinder note that this is the real question in issue and invite this court to at page 16 to reevaluate the evidence and determine this issue.

We contend that the Court of Appeal had no choice but to strike out the amended plaint that raised the issue of illegality of foreign lending since the Appellants founded their cause of action on an illegal act they allegedly participated in. The Court of Appeal also found that the procedural grounds were enough to determine the matter and they were legally entitled to do so.

The learned trial judge however made some far-reaching findings on foreign lending, syndicated loans and agent banking with directives to the Bank of Uganda to take the necessary measures arising from his findings. At page 589 ROA:

> *"Relying on the definition of a financial institution reproduced above (I) find that the said definition applies equally to the 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 in Uganda or outside it as seen from section 117 of the Financial Institutions Act 2004 which required that a foreign bank to seek authorization of Bank of Uganda ..."

at page 591 ROA:

"The fact of this matter shows syndicated financial institution business by the 1st and 2nd Respondents aimed at dodging the seeking of a license from the relevant authority which actions are clearly illegal and I would remain with no option by the authority of the holding in ***Makula Internationsl vs His Eminence Cardinal Nsubuga and Another (1982) HCB 11*** *would render such actions illegal once brought to the attention of court."*

at page 594 to 598 ROA:

"It was submitted by counsel for the Applicants that ... the 2nd Respondent a financial 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 Respondent to act as an agent and that is a violation of Regulation 5 of the Financial Institutions (Agent Banking) Regulations 2017 ...

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 ..."

While the ruling was set aside, this was on procedural grounds. The Deputy Chief Justice in his remarks on page 761 of ROA states in regard to this matter that he knows of no law that makes it illegal for a Ugandan citizen or a foreigner resident

in Uganda to borrow and pay back money borrowed from a foreigner or a foreign financial institution and such loan agreement would be enforceable.

There are obvious far-reaching consequences of this matter on the financial sector and the economy that transcend the dispute between the parties and that are likely to recur given the finding in the High Court that was set aside procedurally. There is therefore need for certainty. The consequences of the decision impact areas including:

a) Lending to government: *Are the World Bank, IMF, ADB etc. required to get licenses from BOU in order to lend to GoU?*);
b) Foreign Direct Investment: *Are foreign financiers of foreign investments in Ugandan subsidiaries required to get licenses from BOU?*;
c) Syndicated loans as well as private project finance: (*Are foreign banks that are lending to Ugandan registered companies in association with Ugandan banks required to get licenses from BOU?*) and most importantly:
d) Enforcement of existing obligations: *are all such loans including the national debt null, void and irrecoverable? What does this mean for the credit worthiness of the country as a whole?*

The decision of the High Court was clearly as absurd as it is unsupported by the law. We sought and were granted the leave of court to address this matter under **Rule 98(a) of the Judicature (Supreme Court Rules) Directions.** This matter was submitted on at length in the lower courts and our submissions appear in Volume 5 of the Supplementary Record of Appeal. We summarize our position as follows:

1) WHETHER FOREIGN LENDING TO A UGANDAN BORROWER REQUIRES A LICENSE UNDER THE FIA

Section 4 of the Financial Institutions Act 2004 as amended provides:

> *(1) A person shall not transact any deposit-taking or other financial institution business in Uganda without a valid licence granted for that purpose under this Act.*

The Financial Institutions Act 2004 as amended by the Financial Institutions (Amendment) Act No 2 of 2016 further defines "*Financial Institution Business*" in Section 3 to mean

the business of—

(a) acceptance of deposits;

(b) issue of deposit substitutes;

(c) lending or extending money held on deposit or any part of that money including by way of—

(i) consumer and mortgage credit;

(ii) factoring with or without recourse; …

Clearly the regulatory thrust is to supervise the receiving of deposits and how deposits so received are lent out. The conclusion by the trial judge, with due respect, that the Act governs lending or extending of money held on deposit whether in Uganda or abroad is without basis. It is inconceivable that the legislators were exercising their constitutional remit to protect Kenyan depositors. Their role is clearly to protect Ugandan depositors by making *laws on any matter for the peace, order, development and good governance of Uganda* [Article 79(1) of the Constitution].

This is obvious when one looks at the long title to the Act and the definition of a Financial Institution under the Act. The long title reads thus:

An Act to revise and consolidate the law relating to financial institutions; to provide for the regulation, control and discipline of financial institutions by the Central Bank; to repeal the Financial Institutions Act, Cap. 54 and to provide for other related matters.

Section 3 defines a Financial Institution to mean:

"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; "

Reference to a financial institution under the Act therefore means one licensed to conduct financial institution business in Uganda and not any other country. The law was not intended to have extra territorial application to conduct of financial business outside Uganda.

Under **Section 3 FIA**, the prohibition on carrying out financial institutions business without a license is a prohibition on taking deposits or issuing deposit substitutes or lending money held on deposits. Where the money lent is not derived from deposits, it falls outside the ambit of 4 of the FIA. Also, a lending transaction for funds which originate from foreign sources is not a transaction that requires a license under the FIA as it is not a transaction made from deposits taken in Uganda. See: **KOH KIM CHAI VERSUS ASIA COMMERCIAL BANKING CORPORATION LIMITED (1981) 1 MLJ196 PC (Authority No.17)**

The learned High Court judge also made a finding that a **Section 117 of the FIA** requires foreign banks to get authorization from BOU to lend to Ugandan entities.

Section 117 of the FIA provides as follows:

'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.'

The above provision is clearly permissive as its simply provides an avenue that a foreign bank may use to apply to Bank of Uganda for permission to establish a representative office in Uganda. The law is not couched in mandatory terms and

it is therefore not a mandatory requirement. Also, the law doesn't say explicitly or even implicitly, that a foreign bank may not lend to a Ugandan citizen or resident without a license, as the learned trial judge concluded.

The literal rule of statutory interpretation requires that words which have a clear meaning say what they mean. The words must be applied with nothing added or nothing removed.

The literal rule was explained by Lord Diplock in the case of **Duport Steels and Ors V Sirs and Ors (1980) 1 All ER 529** where he held as follows; "*When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.*"

2) WHETHER A LICENSE IS REQUIRED FOR SYNDICATED BANKING

A syndicated loan defined in **Banking and Capital Markets Companion, 6th Edition, Bloomsbury (Authority No.18)** as "*a loan provided by two or more lenders acting together to lend a portion of the loan on identical terms*". A syndicated loan is also defined in **Ellinger's Modern Banking Law 5th Edition, Oxford University Press, (Authority No.19)** as a loan that "*involves two or more banks each making separate loans to a borrower on common terms governed by a single loan agreement.*"

The learned authors then observe that *'the loan agreement will, however, provide for the appointment of a bank that will act as the agent of the syndicate (the 'agent bank') in dealing with the borrower and administering the loan facility".*

Clearly the learned trial judge misconstrued the meaning of syndicated banking while handling the matter before him as the loans in issue were separate and documented separately. That notwithstanding, where two banks come together to offer a syndicated loan, the bank that is lending from deposits taken and held in Uganda, will require a license under **S. 4 of the FIA** while the bank which provides funds externally from foreign sources requires no such license.

3) WHETHER AN AGENT OF A FOREIGN LENDER REQUIRES A LICENSE UNDER THE FINANCIAL INSTITUTIONS (AGENT BANKING) REGULATIONS 2017

It is our contention that the learned trial judge misconstrued the concept of Agent Banking under the **Financial Institutions (Agent Banking) Regulations 2017** and a Banking Agent under a contractual relationship.

In **Kelly v Cooper [1993] AC 205** quoted with approval in **Torre Asset Funding Limited v RBS [2013] EWHC 2670 (Authority No.20)**, a case dealing with a syndicated lending relationship, Lord Browne Wilkinson set out two critical propositions in relation to agency. His Lordship noted that; *"first, agency is a contract made between principal and agent; second, like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied. It is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract."*

Under **section 4 of the Financial Institutions (Agent Banking) Regulations 2017**

> *"Agent" means a person contracted by a financial institution to provide financial institutions business on behalf of a financial institution in accordance with the Act and these Regulations.*

"Agent banking" means the conduct by a person of financial institutions business on behalf of a financial institution as may be approved by the Central Bank. A financial institution is clearly defined in the FIA as one licensed by the BOU to conduct financial institutions business in Uganda.

As discussed above, a Financial Institution is clearly defined in the FIA as one licensed by the BOU to conduct financial institutions business in Uganda. Financial Institutions Business means taking of deposits in Uganda and lending the deposits so taken. The regulations in issue are therefore not applicable to a foreign bank. This is also clear from the objects of the Regulations.

The objects of the Regulations are set out under **section 3** of the **Financial Institutions (Agent Banking) Regulations 2017** are which provides:

3. Objectives

The objectives of these Regulations are—
(a) to provide for agent banking as a delivery channel for offering banking services in a cost-effective manner to foster financial inclusion;

We have had occasion to establish the intention of Parliament as expressed in the Hansard of 6th January 2016, when the Committee on Finance, Planning and Economic Development tabled the Financial Institutions (Amendment) Bill, 2015 at (https://www.parliament.go.ug/documents/1118/hansards-2016-january). The relevant page is at Page 42 where the Chairperson, Committee on Finance, Planning and Economic Development (Mr Robert Kasule) clearly explains the reasoning behind the introduction of agent banking as follows:

1. Introduction of Agent Banking
The Bill seeks to introduce agent banking in Uganda. Agent banking is commonly referred to as branchless banking. This literally means the delivery of limited scale banking and financial services outside the conventional branches to the underserved population through engaged agents under a valid agency agreement rather than a teller or a cashier. It is the owner of the outlet who conducts banking transactions on behalf of

a bank. A banking agent is a retail or postal outlet contracted by a licensed deposit-taking financial institution or a mobile money operator to provide a range of financial services to customers.

The committee observes that:

a) With proper guidelines, agency banking will offer a viable solution to increasing and expanding the outreach of financial services in Uganda, particularly in rural areas.

b) There is need for clear definitions on who an agent under this Act should be.

It is inconceivable that lending $11 Million to the Appellants was an exercise in financial inclusion of an underserved rural citizen. Clearly the regulations apply to extending banking to the unbanked in rural areas. Also, the 2nd Respondent is not a Financial Institution within the meaning of the FIA capable of appointing an agent under the Regulations.

We therefore pray that my lords find it appropriate to provide clarity on this matter utmost importance to the economy of the country. We pray that as argued above you find that:

a) Lending of money to Ugandans from funds, which are not derived from deposits taken and held in Uganda, does not require a license from the BoU;

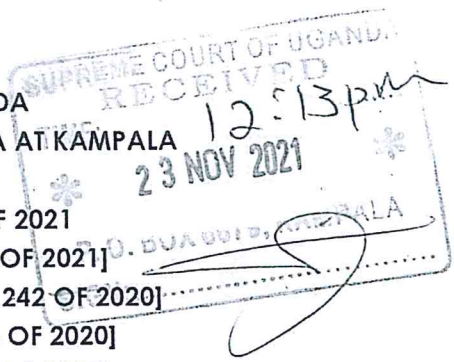
b) Syndicated lending between two or more financial institutions is not illegal provided that the financial institution(s) which provides funds from deposits taken and held in Uganda has a license from the BoU;

c) The Agency Banking Regulations 2017 do not apply to a contractual agency relationship derived between two or more banks on the management of credit facilities.

Dated at Kampala this 17th day of November 2021.

COUNSEL FOR THE RESPONDENTS

Drawn & Filed by:
K&K ADVOCATES,
K&K CHAMBERS
PLOT 5A2, ACACIA AVENUE
P.O.BOX 6061 KAMPALA-UGANDA



THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLTN NO. 51 ... OF 2021
[ARISING FROM SCCA NO. 13 OF 2021]
[ARISING FROM CIVIL APPEAL NO. 242 OF 2020]
[ARISING FROM HCMA NO 654 OF 2020]
[ARISING FROM HCCS NO. 43 OF 2020]

1.	HAM ENTERPRISES LTD	]		
2.	KIGGS INTERNATIONAL (U) LTD	]		
3.	HAMIS KIGGUNDU	]	.....	APPLICANTS

VERSUS

1.	DIAMOND TRUST BANK (U) LTD	]		
2.	DIAMOND TRUST BANK (K) LTD	]	.....	RESPONDENTS

SUMMARY OF EVIDENCE

The Applicants shall adduce evidence in support of the orders sought herein on the grounds set out herein above.

LIST OF DOCUMENTS

1. Memorandum of Appeal in SCCA No. 13/2021;
2. Submissions in SCCA No. 13/2021;
3. Memorandum of Appeal in CACA No. 242/2020
4. Any other with leave of the Court

LIST OF WITNESSES

1. Directors of the Applicant Company;
2. Any other with leave of the Court

LIST OF AUTHORITIES

1. The 1995 Constitution of the Republic of Uganda.
2. The Judicature Act, Cap 13.

3. The Judicature (Supreme Court Rules) Directions S.I. 13 -11.
4. Case law
5. Any other with leave of the Court.

DATED at Kampala this 22nd day of Nov., 2021

.....

COUNSEL FOR THE APPLICANTS

JOINTLY DRAWN & FILED BY:

1. M/s **Muwema & Co. Advocates and Solicitors,**
   Plot 50 Windsor Crescent Road, Kololo,
   Opposite Metropole Hotel Main Gate,
   P.O. Box 6074, Kampala,
   Tel: +256-414-257661

2. M/s **Kimara Advocates & Consultants,**
   Plot 67B, Spring Road, Bugolobi,
   4th Floor Kisakye Complex,
   P. O. Box 11916, Kampala
   Tel: +256 200 944412
   Email: info@kimara-advocates.com


AE3

Muwema & Co.
Advocates and Solicitors

Plot 14 Windsor Crescent Kololo
P.O. Box 6074 Kampala, Uganda
Telephone +256 414 347 881
Email: info@muwemaadvocates.com
Website: www.muwemaadvocates.com

MC/27/21/FM

3rd December, 2021

The Assistant Registrar,
The Supreme Court of Uganda,
P. O. Box 6679,
KAMPALA

SUPREME COURT OF UGANDA
RECEIVED
03 DEC 2021
P.O. BOX 6679, KAMPALA

Your Honour,

RE: **REQUEST FOR A HEARING DATE OF CIVIL APPLICATION NO.51OF 2021: HAM ENTERPRISES LTD & ANR VS DIAMOND TRUST BANK & ANR**

We still act for the Applicants in the above matter and are in receipt of your letter dated **1st December, 2021** in respect thereof.

We have taken note of the views conveyed in your said letter. However we do not agree that the substance of our Clients' Application does not merit a hearing by this Honourable court.

Such a stance does not foster the administration of justice as it inevitably erodes our Clients' non-derogable right to be heard which is guaranteed by **Article 28** of the **Constitution.**

In the premise therefore, we request that our Application be forwarded to the Justices of the court for the necessary action.

Yours Faithfully,

For: MUWEMA & CO. ADVOCATES

c.c.: M/s K&K Advocates

c.c.: Clients

THIS IS THE EXHIBIT MARKED AE3 REFERRED TO IN THE ANNEXED AFFIDAVIT OF Hamis Kiggundu SWORN/DECLARED BEFORE ME THIS 8th DAY OF June 20 22 AT [illegible]
COMMISSIONER FOR OATHS

Muwema & Co.
Advocates and Solicitors
Experienced | Driven | Effective

Plot 50 Windsor Crescent Kololo
P.O. Box 6074 Kampala, Uganda.
Telephone +256 414 257 661
Email: info@madvocates.com
Website: www.madvocates.com

MC/27/21/FM

26th November 2021

SUPREME COURT OF UGANDA
RECEIVED
TIME:
29 NOV 2021
P. O. BOX 6078, KAMPALA
SIGN:

28 NOV
P. O. Box 2183, Kampala, Uganda

The Registrar,
Supreme Court of Uganda,
Kampala, Uganda.

Dear Madam,

RE: REQUEST FOR A HEARING DATE OF CIVIL APPLICATION NO. 51/2021 (ARISING FROM CIVIL APPEAL NO. 13 OF 2021):
HAM ENTERPRISES LTD & ORS
Versus
DIAMOND TRUST BANK (U) LTD & ANOR:

We, together with **M/s Kimara Advocates & Consultants** represent the Applicants in the above matter wherein we address you as hereunder;

We filed the above Application seeking an order for judgement on admission of the grounds of appeal by the Respondents.

It is evident that the above application if successful, can dispose of the whole appeal.

Since judgement in the appeal was reserved on notice, it is necessary that this Application be heard earlier so that any further steps in the appeal are guided by the outcome of the application.

In the premise, we humbly request that the said application be fixed for hearing on a date convenient to the honourable court.

We shall oblige your action in the matter.

KIMARA ADVOCATES & CONSULTANTS
P.O.Box 11916 Kampala (U)

Date	29/11/2021
Time	10:24AM
File No.	

RECEIVED
Name: Claire
Sign:

K&K ADVOCATES

Date Received	29-11-21
Time	9.40am
File No.	—
Received by:	
Action by:	EK

Much obliged,

For: MUWEMA & CO. ADVOCATES

c.c.: M/s Kimara Advocates & Consultants.
c.c.: M/s K & K Advocates.
c.c.: Clients.

AE 4 (9)

Muwema & Co.
Advocates and Solicitors
Experienced | Driven | Effective

Plot 50 Windsor Crescent Kololo
P.O. Box 6074 Kampala, Uganda.
Telephone +256 414 257 661
Email: info@madvocates.com
Website: www.madvocates.com

AEAG

THIS IS THE EXHIBIT MARKED AEAG REFERRED TO IN THE ANNEXED AFFIDAVIT OF Hamis Kagundy SWORN / DECLARED BEFORE ME THIS 8th DAY OF June 2023 AT Mengo COMMISSIONER FOR OATHS

MC/41/20/FM

2nd May, 2023

The Registrar,
Supreme Court of Uganda,
KAMPALA

SUPREME COURT OF UGANDA
RECEIVED
P. O. BOX 6679, KAMPALA
SIGN:

Your Honour,

RE: CIVIL APPEAL NO. 13 OF 2021:
HAM ENTERPRISES LTD & 2 OTHRS
VERSUS
DIAMOND TRUST BANK (U) LTD & ANOR

We act for the Appellants in the above matter.

We were served with a hearing notice late last Friday for hearing of the above appeal scheduled for the 5th day of May 2023 at 9.30 a.m.

We note however that the Appellants' application for Judgment vide; **Civil Application No. 51 of 2021** which was filed on 23rd November, 2021 has never been heard. We request that the same be fixed for hearing as well.

In the meantime, our Fred Muwema who is lead Counsel in conduct of the Appeal has a prior arranged medical appointment on 5th May 2023 and therefore his attendance in court on the same date will not be secured.

We therefore pray that hearing of the Appeal/Application be moved to the next available dated.

We remain most obliged

For: MUWEMA & CO. ADVOCATES

c.c.: Kimara Advocates & Consultants
c.c.: K&K Advocates
c.c.: Clients

K&K ADVOCATES

Date Received	3/5/2023
Time	10:08
File No.	
Received by	STANLEY
Action by:	OCHAMA

"Received without Prejudice"

AE 4 (b)

AE 4b

THE JUDICIARY
CHAMBERS OF THE REGISTRAR
SUPREME COURT UGANDA
P.O. BOX 6679 KAMPALA
TEL: +256 414 273121

Our Ref: REG/GEN/2021

Our Ref: Gen/2023

Date: 2nd May, 2022

Your Ref:

To: Muwema & Co Advocates and Solicitors,
Plot 50 Windsor Crescent Kololo,
P.O BOX 6074 Kampala, Uganda,

RE: CIVIL APPEAL NO. 13 OF 2021
HAM ENTERPRISES LTD & 2 OTHERS
VERSUS
DIAMOND TRUST BANK(U) LTD & ANOR

Reference is made to your letter dated ref: MC/41/20/FM, 2nd May,2023 in regard to the captioned matter.

This is to inform you that court is to hear only the above captioned civil appeal No.13 of 2021 Ham Enterprises Ltd & 2 Others versus Diamond Trust Bank(U) Ltd & Anor on the 05/05/2023 during the reconstitution session.

The date for the hearing Civil Application will be communicated to you later.

THIS IS THE EXHIBIT MARKED AE 4(b)
REFERRED TO IN THE ANNEXED AFFIDAVIT OF Hamis Kiggundu SWORN/ DECLARED
BEFORE ME THIS 8th DAY OF June
20 23 AT
COMMISSIONER FOR OATHS

Ssali Harriet Nalukwago
REGISTRAR, SUPREME COURT

AE5

Receiving Copy

AE5

THE JUDICIARY
CHAMBERS OF THE REGISTRAR
SUPREME COURT UGANDA
P.O. BOX 6679 KAMPALA
TEL: +256 414 273121

Our Ref: Gen/2023

K&K ADVOCATES	
Date Received	6/6/23
Time	8:58am
File No.	
Received by:	
Action by:	Peter

Date: 29th May, 2023

To: 1. The Attorney General.

2. The Advocates on List Attached.

RE: INVITATION TO ATTEND SUPREME COURT CIVIL APPLICATIONS PRE-HEARING CONFERENCE.

Notice is hereby given that a Pre-hearing conference will take place on **8TH June 2023** at **9:30 A.M** at the Supreme Court before **Hon. Lady Justice Elizabeth Musoke, JSC.** The objective of the conference is to fix the hearing dates for Civil Applications and to determine the format for presentation of arguments, and time frames for filing written submissions.

List of Appeals/Applications due for hearing is attached.

This serves as summons to Parties on the attached list to attend the pre-hearing conference. Advocates need not to wear robes.

Ssali Harriet Nalukwago
REGISTRAR, SUPREME COURT

c. c. The Hon. The Chief Justice

c. c. Hon. Justices of the Supreme Court

c. c The Registrar. Supreme Court

THIS IS THE EXHIBIT MARKED AE5
REFERRED TO IN THE ANNEXED AFFIDAVIT OF
Hamis Kiggundu SWORN/DECLARED
BEFORE ME THIS 8th DAY OF June
2023 AT
COMMISSIONER FOR OATHS

"Justice for All"

LIST OF CIVIL APPLICATION CASES PROPOSED FOR PRE-HEARING ON 8/06/2023 AND PROPOSED ADVOCATES.

NO.	CASE NO.	PARTIES	ADVOCATES	COMMENTS
1.	Civil Application No 51/2021	Ham Enterprises Ltd & 2 Others Vs Diamond Trust Bank (U) Ltd & Anor	M/S Muwema & Co. Advocates	
2.	Misc. Application No. 27/22	Solome Adumo & Anor Vs Basima Kabonesa & 3 Others	M/S Kimanje Nsibambi Advocates	
3.	Civil Application Eccmis No. 02/23	Remegio Obwana Vs The Registered Trustees of Tororo Diocese	M/s Nagemi & Co. Advocates	
4.	Civil Application Eccmis No. 17/22	Dembe Trading Enterprises Limited Vs Birungyi Cephas Kagyenda	AF Mpanga Advocates	
5.	Misc. Application No.05/21	John Magezi Vs Andrew Babigumira & Anor	Magezi, Ibale & Co. Advocates	
6.	Civil Application No. 36/21	Paddy Musoke Vs John Agard & 2 others	Mujuzi & Co Advocates	

AE 6

AE6

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL 13 OF 2021

1.HAM ENTERPRISES LTD
2.KIGGS INTERNATIONAL(U)
3.HAMIS KIGGUNDU::APPELLANTS

VERSUS

1.DIAMOND TRUST BANK(U) LTD

2.DIAMOND TRUST BANK(K) LTD:::RESPONDENTS

JUDGMENT NOTICE

TO: 1. M/S K & K ADVOCATES

2. M/S MUWEMA & CO ADVOCATES.

3. M/S KIMARA ADVOCATES & CONSULTANTS. (SPRING ROAD BUGOLOBI, 4TH FLOOR, KISAAKYE COMPLEX)

TAKE NOTICE that the **JUDGMENT** of this **APPEAL** has been fixed for the 13TH Day of **JUNE, 2023 at 10.30 a.m.** O'clock, at in the fore/ afternoon; or soon thereafter as Court will convene.

IF NO APPEARANCE is made by yourself, your pleader or by someone by Law authorized to act for you; the **Judgment** will be delivered in your absence.

GIVEN under my hand and Seal of the Court this ...8th...day of...JUNE...2023.

....
REGISTRAR
SUPREME COURT

Muwema & Co.
Advocates and Solicitors
P. O. BOX 6074 KAMPALA UGANDA
08 JUN 2023
RECEIVED
SIGN: ...... at 4:06 pm

THIS IS THE EXHIBIT MARKED ...AE6... REFERRED TO IN THE ANNEXEL AFFIDAVIT OF ...Hamis Kiggundu... SWORN / DECLARED BEFORE ME THIS ...... DAY OF ...June... 20...23...AT......
COMMISSIONER FOR OATHS

AF7

AE7

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

CIVIL APPEAL NO.13 OF 2021

HAM ENTERPRISES LTD & ORS :::::::::::::::::: APPELLANTS

VERSUS

DIAMOND TRUST BANK (U) LTD & ANOR::::RESPONDENTS

PROCEEDINGS OF 11TH NOVEMBER 2021

CORAM: **OWINY-DOLLO, CJ; OPIO-AWERI; MWONDHA; TUHAISE; CHIBITA; JJ.S.C**

REPRESENTATION

Mr. Fred Muwema, Mr. Anold Kimara and Matthew Kiwunda appearing for the appellants.

Mr. Edwin Karugire, Mr. Usama Sebuwufu and Mr. Richard Bibangambah appearing for the 1st and 2nd respondents.

Representative for the appellants Director Hajji Amis Kigundu

Representative of the two respondents Ms. Mbabazi Emergent, Executive Director of the 1st Respondent.

Muwema: My lords we were directed to file written submissions which we did file, however, the submissions we filed were more than 20 pages each. So I am laying ground for the application for leave to allow the submissions filed as filed with 20 pages, the reason we failed to

THIS IS THE EXHIBIT MARKED AE7 ANNEXED TO THE AFFIDAVIT OF ... REFERRED TO IN THE AFFIDAVIT SWORN/DECLARED BEFORE ME THIS 5TH DAY OF June 20 22 AT ... COMMISSIONER FOR OATHS

DEPUTY REGISTRAR
SUPREME COURT

compress the submissions in 10 pages as required by the directions because of the novelty and complexity of the subject of this appeal. We could only manage to condense it in 20 pages.

Court: Both sides are guilty of that not so?

Karugire: My lord the Chief Justice in regard to the guilty of the respondents, they were only replying the voluminous submissions. So it surely would have prejudiced the respondents to compress their answer to the appellants' submissions in the 10 pages. However, we do agree with my learned colleague that this is a complicated and novel matter which pauses a challenge to address the grounds effectively within the 10 pages.

Court: Counsel Edwin what you are saying is that the greater blame should be apportioned to counsel for the appellant.

Karugire: My lord, if he had given us 10 pages we would also be stuck.

Court: Because in the Bible God already knew that Adam had acted in disobedience to his command about the fruit from the tree at the centre of the garden. Nonetheless he gave Adam a hearing, and the cardinal principle of do not condemn anybody

DEPUTY REGISTRAR
SUPREME COURT

unheard. But when he asked Adam and it was a leading question; have you eaten of the fruit which I forbid you to and Adam's answer is one of the best example of apportionment or blame that the woman you gave me. Adam blamed God saying if you had not given me this woman I would still have been a good boy but the woman you gave me made me eat. So you are saying counsel for the appellant led you..

Karugire: Led us into temptation My lord.

Court: Mr. Muwema

Muwema: My lord following Adam's case and other cases..

Court: You made your prayer already. So we will look into this kindly. The position is this I think it would be good practice if you find a situation where the 20 page limit imposed in the practice direction is not workable you come back to court, you bring it to the attention of court and get some direction. So we will allow this one but I think and because of the peculiar nature of the case, and because of points of law which we would want to deal with for the good of our jurisprudence, we think that we should not push this into the throat of the court. You should come and seek leave then court can look at each case to make a decision accordingly.

DEPUTY REGISTRAR
SUPREME COURT

Muwema: Most obliged My lord. So in that case My lord we await court's direction on the next cause of action.

Court: No for this we have allowed.

Muwema: Most obliged My lord. We pray that they be adopted.

Court: Okay, lets hear from your colleague.

Karugire: My lord Chief Justice, My lord Justices of Supreme Court. We ask for leave to make some highlights on a matter that we raised in our submissions which has to do with foreign lending to Ugandan citizens. My lords a quick highlight on three points.

Court: How many minutes? Can you do in five minutes because you have written it down just highlight.

Muwema: My lord maybe before my learned friend proceeds to submit we saw it in their submissions the issue of foreign lending at page 20 and then he does state in paragraph 28 that there would be making an application for leave under rule 98(a) of the rules of this court. And we have had an opportunity to look at that rule in advance and we are of the view that it is not available for the respondent at this juncture to be making this application. In other words, we have an objection to the foundation of that application.

Court: What does the rule say?

DEPUTY REGISTRAR
SUPREME COURT

Muwema: Rule 98 is headed **Arguments adhere of an Appeal**. And it says: "***At the hearing of an appeal, no party shall without the leave of court argue that the decision of the Court of Appeal should be reversed or valid except on a ground specified in the memorandum of appeal or in a notice of cross appeal or support the decision of the Court of Appeal on any ground not relied on by that court or specific notice given under rule 88 of these rules***". Now the meaning of that rule is that a party should only be coming to this court to argue that a decision of the Court of Appeal should be reversed or valid, now we don't have a cross appeal arguing...

Court: No there is an or after that what does the or refer to?

Muwema: Yes My lord, then the second part which would have applied to them is the one in respect of a notice of affirmation provided for under rule 88. Rule 88 provides for notice of grounds for affirming the decision of the Court of Appeal and it says; "A respondent who desires to contend or on appear in the court that the decision of the court of Appeal shall be affirmed on grounds other than or additional to those relied upon by the court shall give notice to that effect specifying the grounds for his or her

contention." Now we are faced with a situation where we don't have a notice of affirmation we don't really know what they would like to affirm. Rule 88 has a clear procedure which must be given and notices served on us, what we have instead is just submissions which are now introducing a ground which is neither a ground of affirmation under rule 88 nor a ground to vary or set aside the Court of Appeal decision. So our objection is that the current application as fielded by my learned friend is not supported by the rules of this court, it should not be entertained in our view, it is not a proper application. And at this stage when we have closed and at the end of this case he cannot now be introducing issues which required notice of affirmation if he wants to. So that is our objection.

Court: Yes counsel Karugire.

Karugire: Thank you My lord. Rule 98 applies to what happens at the hearing of an appeal and today is the hearing of an appeal. And it says that when we come for the hearing of an appeal, no party shall without the leave of court argue that the decision of the Court of Appeal should be reversed or varied or even support the decision of the Court of Appeal on any ground not relied on by either the court or specified in the notice

DEPUTY REGISTRAR
SUPREME COURT

under Rule 88 that is the notice of affirmation. So the import of this rule My lords, is that a party can with the leave of court argue that the decision of the Court of Appeal can be supported and that is the application we are making for leave under 98 (a) of the rules of this court, to address court on the issue of foreign lending to Ugandan borrowers. This is an issue that arises directly out of the matter that is in issue before this court.

Court: So you are highlighting on that ground?

Karugire: Yes I want to highlight on this ground My lord with leave of this court.

Court: Which is part of the memo of appeal?

Karugire: My lord it is related to ground one but the manner in which it was argued and framed by the appellants does not cover this issue hence we seek the leave of court since it is a very important matter to be determined by this court My lords.

Court: Mr. Muwema did you make a rejoinder on that point?

Muwema: Yes My lord.

Court: Then why are you objecting if you rejoined.

Muwema: We are objecting because at page 23 of our submissions we objected this very objection we are talking about was raised there, but I just want to

highlight something, the impression my learned friend is creating is that rule 98 allows leave to be sought. At the hearing to argue a ground in support of the decision, what he did not mention is that that additional ground or ground in support of the decision must be captured in the notice under rule 88. By the time you come to argue under 98 you must have complied with 88. Now 88 says that you file a notice to affirm the decision on grounds other than or additional to those relied upon by the court. So if he is saying that there is a ground which the respondents would like to introduce and support additionally then they should have complied with this. Rule 98 does not dispense with the mandatory requirement of rule 88. So that is why we objected and said you cannot be making this kind of application now. Because you have not complied with the rules of this court, 88 is not complied with. It is true 98 you can come and seek leave but if you are going to bring additional grounds then comply with the notice of affirmation which has not been complied with.

Karugire: My lords I think my colleague is misreading 98(a). If one has taken out a notice of affirmation you don't need leave of court to address it on those grounds it is only when you have not taken out a notice of

affirmation that you come under 98(a) which says: **"No party shall without the leave of court..."** which means court can give you the leave, argue that a decision of court should be reversed, varied except on a ground specified. So the key word there is except. So if you have specified it in your notice of affirmation you don't need leave of court but if you haven't, 98 (a) gives this court the powers to grant such leave.

Court: Mr. Muwema I want you to look again at 98(a) **"No party shall without the leave of court argue that the decision of the Court of Appeal should be reversed or valid except"** ...and then it give the exceptions.. **"except on a ground specified in the Memorandum of Appeal or in a notice of cross appeal or support the decision of the Court of Appeal on any ground nor relied on by that court or specified in a notice given under rule 88 of these rules"**. My question is this ground which is sought to be argued was it a ground in the Court of Appeal?

Karugire: Yes, it was My lord.

Muwema: It wasn't a ground.

Court: But this what this rule is saying. If it was not a ground in the Court of Appeal, then you can seek leave of this court to argue it that is my

understanding in the concluding part. The other alternative and that is why it says, it was either not a ground in the Court of Appeal or you have not applied under rule 88 that is my understanding.

Muwema: My lord my understanding and appreciation of this for the entire practice in this court is that the rules provide for an orderly manner dealing with appeals and they specify the mode by which you can appeal or cross appeal and so on. Now, the rule requires the leave if: (1) you had a memorandum and there was a ground which is not in the memorandum and you now want to introduce it, you can make application for leave but there must be a memorandum (2) If there is a cross appeal but you feel there is a ground which wasn't included you can make leave under 98. (3) If there is a notice of affirmation and there is another ground you had not indicated you can come and seek for leave. Our understanding of 98 is that a party who has not filed either of the three documents; memorandum, notice of cross appeal and notice of affirmation, it's not available to that party to just walk here and say that is my understanding.

Court: No counsel you are jumping to the issue of affirmation. You read after notice of cross appeal or support the decision of the Court of Appeal.. What do

DEPUTY REGISTRAR
SUPREME COURT

you understand by argument that support the decision of the Court of Appeal.

Muwema: It says: "On a ground specified in the Memorandum of Appeal or notice of appeal or support the decision of appeal on any ground not relied on by that court or specific notice...

Court: Just stop on that one because the other one takes you to rule 88. But the one where you apply rule 88 is linked to this with an "or". Let me ask this question because the argument which counsel seeks as pointed and seeks to address us on does it support the decision of the Court of Appeal, does it that it was not a ground or was not relied on in the Court of Appeal? That is the question I am asking.

Kimara: Much obliged My lord. Incidentally the respondent does not seek that this court confirms or support the decision of the Court of Appeal. My lords if you look at the end to their submissions what they ask this court to do, is to reject their own submissions from their submissions My lords. Their application seems to say they would like the decision of the Court of Appeal to be affirmed or to be supported. But in their submissions when they raise what my learned friend wants to highlight their prayer in the submissions says "we therefore pray this ground of appeal be

rejected." So they want this court to reject their own matter that they want have...

Court: But counsel has said it is tied to ground No. 1 or something.

Kimara: My lord ground 1 of appeal in this court does not even in any way relate to the issue. Ground one of the appeal in this court says;

Court: Well he will tell us I remember he mentioned ground 1 or something but he will tell us.

Kimara: My lord perhaps with leave of this court ground 1 says that; **'the learned Justices of Appeal erred in law and fact when they avoided adjudicating on the substantial question of illegality which was the basis of the respondent's appeal before them'.** My lord that is ground 1 in this court. The ground one at Court of Appeal was that **'the learned Justices of the Appeal erred in law and fact in finding that the Financial Institutions Act apply to the 2nd appellant who is now 2nd respondent in this matter, in respect to credit facilities issue in Kenya to Ugandan citizens.**

Court: So can we hear from counsel because my understanding when you break down, rule 98 paragraph (a) is breaking down circumstances under

which the court can allow the party to argue in the manner he seeks and rule 88 is the only one then actually the last circumstance there are several circumstances about 3 or 4 that is my understanding of this.

Muwema: My lord let me just clarify with your permission, there is this picture which is being painted that even if you didn't file a notice of affirmation but that you have another ground which is neither the cross appeal or notice of affirmation that you can just come to this court. Now I wish to take you back to 88, rule 88 covered the situation where there is a ground which either the Court of Appeal did not consider or any additional ground like he is now trying to bring an additional ground, all that must aggregate into a notice of affirmation. What I am trying to say is that the rules of this court do not allow any ground to come to this court, unless first and foremost there is a memorandum there is a notice of cross appeal or notice of affirmation. Then once you have those three documents, you then have the right to say, Your lordships, can I add to what I have already put in place, but you don't just come here on the day of hearing and say I am raising the ground, first comply with the rule. So even the additional ground for support is required to support what is already in

existence which is notice of affirmation. If there is one ground for court to support the decision of the Court of Appeal it should be additional to his notice of affirmation not just to come and submit orally, that is our view My lord.

Court: Counsel Muwema, I understand but I still want to task you because we should move together. When you look at 88 which you are relying on for affirmation and these procedures which are enlisted down, it is very clear that you only apply rule 88 if you comply with the timeframe of 30 days you bring it up on service of a memorandum of appeal on you. That is rule 88, now rule 98 seems to be saying I am providing for a separate procedure but at the hearing. At the hearing means the matter has been called for hearing and you are now appearing before court as now, you can with leave of court, now that seems to be different from rule 88, can we look at it again. With leave of court you can now apply and be allowed if you persuade court and the circumstances under which you can make this application and listed this is how I see it and I want you to look.. If it is on the grounds specified in the memorandum of appeal or in the notice of cross appeal that is one of the circumstances. If what you seek to be heard on is specified in the memorandum of appeal or the notice

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of appeal, then or in the alternative that is my understanding of "or" meaning another circumstance under which court may grant leave to argue is if you support the decision of the Court of Appeal on any ground not relied on by that court. In other wards it supports what you seek to do actually gives force to the decision of the Court of Appeal but on a separate ground not the one the Court of Appeal relied on. Then yet another alternative it is specified, in a notice given under rule 88 this last one is the one which takes you if counsel had complied with the provisions of rule 88 within 30 days he would be served with the memorandum had gone through this process then he could have stood up and not bothered about the other one he would have said in compliance with rule 88 we did this so now we seek leave to address court, this is my understanding.

Muwema: Yes My lord I appreciate the extent we are learning from this but My lord, I would like to respectfully submit that the rules of interpretation or Statutes as laid down by this court is that there must be a harmonious interpretation that gives the legal effect, the legislative intent must be there. Now I think that an interpretation which dilutes or waters down the essence of rule 88 which says please affirm and then you can give additional grounds to support, if we

interpret rule 98 the way the respondent want to interpret it, then we are doing away with rule 88.

Court: What is the first rule of Statutory construction.

Muwema: You interpret the words in a Statute as they appear.

Court: Unless it leads to absurdity.

Muwema: Yes and un interpretation that leads to an absurdity and that contradicts the intension is avoided. So we are just submitting here that in order not to lead to an abuse of the rules of this court because after this precedent people will just be coming here and say you know I am going under 98 and this is another ground I need to put. So we are going to throw away the notice of affirmation which has its own inherent advantages to us, for example the way we submitted and submissions are closed. We submitted saying that we cannot attend to this ground we are introducing because in our view this is extraneous to this appeal and that is where we stopped. Now we are being told at this material time without the benefit of sitting down to address that ground because for us we just rejected it. We are being told that the ground can be argued now and we are required to argue it now. We lose the benefit of this affirmation but also secondly there is a point my colleague raised and I request the court to look at the submissions of the

respondents if you will. The respondents are raising a ground to support the decision of the Court of Appeal. I was telling this court, that we therefore pray that this ground of appeal be rejected. My lord we don't have a ground..

Court: Which ground is that one?

Muwema: Now that is the question, we don't have a ground of appeal on foreign lending we don't have it in this court. We don't have a ground of appeal on foreign lending in the Court of Appeal and for them they are submitting saying this ground be rejected. If the court is inclined to allow the respondents to proceed on this ground for any reason for the interests of fair hearing and so on, then we need to make substantive written arguments to elucidate the point we are saying.

Court: Counsel let me cut you short, you see our rules are not cast on a stone. The rules are made for justice that is why we allowed your submissions to in access of the rules. So if you consider the importance of this case, why don't we go holistic, why don't we give chance to counsel to make highlights?

Muwema: My lord I am joining you on that submission that is why I was saying that if the respondent is allowed to make substantive submissions on foreign lending

then we would pray that we be accorded an opportunity to substantively answer that issue but through the written submissions.

Court: If court is pleased to allow him address us. Counsel Muwema this is how court feels we should proceed in accordance to opportunity to pronounce ourselves on the import the meaning and effect of rule 98 which you are contesting. So other than have an oral argument on this, we would allow counsel to address us can you do it in 5 pages?

Karugire: Yes My lord, I can do it in 5 pages.

Court: Yes you will also have 5 pages to respond in writing.

Muwema: My lord now I can use your rules which say at least 10 pages.

Court: No 5 pages it is a small point. That will be double jeopardy.

Muwema: The reason why we need this issue pinned down properly there is a narrative that the respondents are gaining in this case. That this case is stopping foreign lending, it is a narrative they are giving. They are saying that this Ham case is stopping foreign capital and foreign borrowing...

Court: Is it in the submissions?

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Muwema: That is what they are saying in the submissions. And this is a very important point we need to address in at least 10 pages.

Court: Why were you opposing then?

Muwema: I was opposing because it was improperly before this court.

Court: No those are just technicalities you see the most important thing is, this is the final court of the land. It is good where there is an opportunity for it to pronounce itself and give guidance to the courts of judicature. It is good for your practice; it is good for the country. I don't know what the decision will be but when such an opportunity comes we seize it all of us.

Muwema: Since it is good for jurisprudence of the country 10 pages will work.

Court: Fine you will have up to 10 pages and counsel you will also have up to 10 pages. If you passed by one word we will not consider that word.

Karugire: My lord the timelines for the filing.

Court: You are ready to address us can you do that in 5 days. He will have the same time. If you raise something else you have 3 days for rejoinder.

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SUPREME COURT

Muwema: My lords I am sorry my colleague is point out that the respondents have already filed written submissions on that point and it is us who had not submitted on it. We just ignored it and said they have no right. So it appears therefore....

Court: No there is something he wanted to explain, that is why he rose up to explain. Meaning he feels, you see the idea of highlight although you people normally abuse it but the idea of highlighting is not a new submission. The purpose of highlighting is you feel you have written down something but may be it did not come out clearly, then court gives you to clarify, to make it easier for court to understand. So notwithstanding what is on record, we are giving the opportunity to come out clear on that point and you have the opportunity now on what you have not responded to respond in 10 pages.

Muwema: So My lord can we be specific that he expounds on the submissions on page 20 paragraph 20 up to...

Court: No he gave notice to this court on what he wanted address us on. If it is covered in that that is fine. Anything else is that okay?

Karugire: That is okay My lord.

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Court: When we receive from you in the next 13 days which is for filing his submission on that point, your response and any rejoinder where it is necessary, we will sit down, consider the matter and judgment will be given on notice.

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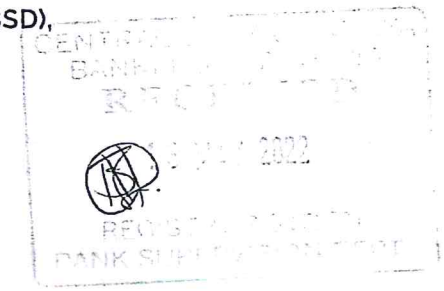
SUPREME COURT

AE 8 (9)

AE8 (9)

IN THE MATTER OF THE REPUBLIC OF KENYA
IN THE MATTER OF ARTICLE 35 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010
IN THE MATTER OF SECTION 4, 6 AND 8 OF THE ACCESS TO INFORMATION ACT, 2016
IN THE MATTER OF APPLICATION FOR ACCESS TO INFORMATION BY EDWIN LUBANGA
IN THE MATTER OF THE CENTRAL BANK OF KENYA
IN THE MATTER OF HAM ENTERPRISES LIMITED
IN THE MATTER OF DIAMOND TRUST BANK KENYA
APPLICATION FOR ACCESS TO INFORMATION

TO: THE DIRECTOR BANK SUPERVISION (BSD),
CENTRAL BANK OF KENYA,
NAIROBI.
ATTN: Mr. Gerald A. Nyaoma. for



DESCRIPTION OF THE APPLICANT

1. The Applicant is a qualified Technology Engineer and consults as such at the Law firm of Richard Muhereza & Associates. The Applicant is a concerned citizen who has a duty to guide the public on matters that come to his attention. The Applicant's address of service for the purpose of this application is care of **Richard Muhereza & Associates** Block C, Suite C7, 3rd Floor, Kindaruma Court-Kindaruma Road, P.O. Box 22393-00505, Nairobi and email:rmassociates60@gmail.com.

2. The Application is made to the Central Bank of Kenya a government institution established by Article 231 of the Constitution of the Republic of Kenya, 2010 and Act of Parliament of the Central Bank of Kenya Act CAP 491, Laws of Kenya and their address of service for purposes of this application is care of **Central Bank of Kenya**, Haile Selassie Avenue, P.O. Box 60000-00200, Nairobi.

BACKGROUND INFORMATION, FACTS AND PARTICULARS OF THE APPLICATION

3. By a term loan agreement dated 23rd October, 2017 Diamond Trust Bank Kenya Limited issued a term loan of USD 4,000,000 for a period of 60 months to Ham Enterprises (u) Limited under reference number: RC/1083/GK/cwm/2017 ***(Attached is a copy of the Agreement for your reference).***

4. By a banking facility aggregating agreement dated 24th August, 2018 Diamond Trust Bank Kenya Limited issued an additional loan of USD 500,000 to Ham Enterprises (u) Limited under reference number: RC/1083/GK/cwm/2018 ***(Attached is a copy of the Agreement for your reference)***.

5. It was a term under clause 4 of both agreements that Diamond Trust Bank Kenya appointed Diamond Trust Bank Uganda as their lending agent who were tasked with the collection of the loan principal and interest.

6. It was a term under clause 10 of the term loan agreement dated 23rd October, 2017 that the borrower or guarantor of the company shall be incorporated and be validly existing under the laws of Kenya.

7. That indeed Ham Enterprises Limited is not registered under the company laws of Kenya ***(Attached is correspondence regarding the search at the registry of companies).***

PARTICULARS OF THE INFORMATION REQUESTED.

8. The present application is to seek information and relevant documentation from the central bank confirming the approval given to Diamond Trust Bank

Kenya Limited in issuance of a loan facility to Ham Enterprises (U) Limited and the appointment of Diamond Trust Bank Uganda Limited as a lending agent to Diamond Trust Bank Kenya Limited.

9. The Applicant believes that Diamond Trust Kenya breached fundamental banking laws and practices and therefore in the interest of the public seeks to have access to information and documentation confirming;

    a) Whether the Central Bank of Kenya approved the loan transaction between Diamond Trust Bank Kenya and Ham Enterprises Limited.

    b) Whether the Central Bank of Kenya approved the appointment of Diamond Trust Bank Uganda as a lending agent of Diamond Trust Bank Kenya.

10. **Section 4 of the Access to Information Act** stipulates that every citizen has the right of access to information held by the state and another person and where that information is required for the exercise or protection of any right or fundamental freedom.

11. The Applicant has the right to access to information as per **article 35 of the Constitution of Kenya, 2010. Article 35(1) of the Constitution of Kenya** stipulates that every citizen has the right to access information held by the State or another person and where that information is required for the exercise or protection of any right or fundamental freedom.

12. **Section 6 of the Access to Information Act** contains the limitations for the right to access information however the information sought under this application does not fall within the stated criteria in this section.

13. The failure to comply with the Prudential guidelines offends public law and policy and the public economic interest by directly and adversely exposing the financial sector which is the lifeline of the economy to systemic risk of failure.

DATED at **NAIROBI** this 13TH day of MAY 2022.

EDWIN LUBANGA

DRAWN BY:
Richard Muhereza & Associates
Block C, Suite C7, 3rd Floor,
Kindaruma Court-Kindaruma Road,
P.O. Box 22393-00505,
NAIROBI
Email: rmassociates50@gmail.com **(REF: RMA/HAM/5/2021)**
Tel: 0757597372

TO BE SERVED UPON:
Central Bank of Kenya
Haile Selassie Avenue,
P.O. Box 60000-00200,
NAIROBI-KENYA

"If the requested access and relevant documentations are denied, the Applicant shall seek further redress as per the law"

AE 8(b)

AE 8(b)

BANKI KUU YA KENYA

CENTRAL BANK OF KENYA

Haile Selassie Avenue
P.O. Box 60000 - 00200 Nairobi, Kenya
Telephone: 2860000, Fax: 3340192

BSD/02/16

June 16, 2022

Mr. Edwin Lubanga
Richard Muhereza & Associates
Block C, Suite C7, 3rd Floor
Kindaruma Court-Kindaruma Road
P.O. Box 22393-00505
NAIROBI

APPLICATION FOR ACCESS TO INFORMATION IN THE MATTER DIAMOND TRUST BANK KENYA LIMITED VERSES HAM ENTERPRISES UGANDA LIMITED

Reference is made to your letter dated May 13, 2022, on the above subject.

The Central Bank of Kenya (CBK) has reviewed your request for information dated May 13, 2022. We advise that CBK does not hold any information or documents requested in paragraphs 8 and 9 of your application.

Yours faithfully,

GERALD NYAOMA
DIRECTOR, BANK SUPERVISION

RECEIVED
RICHARD MUHEREZA & ASSOCIATES
ADVOCATES
P.O. Box 22393 - 00505 NAIROBI

THIS IS THE EXHIBIT MARKED AE8(b) REFERRED TO IN THE ANNEXED AFFIDAVIT OF Hamis Kiggundu SWORN / DECLARED BEFORE ME THIS 8TH DAY OF June 20 23 AT
COMMISSIONER FOR OATHS