

Approved for tabling ^{BT} SWA
15/6/17



REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

Paper laid on the Table of the House by the Vice Chairperson of the Departmental Committee on



ELEVENTH PARLIAMENT – FIFTH SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

Finance Planning and Trade at 6.50pm. during the Special Sitting

REPORT ON THE CONSIDERATION OF PUBLIC PETITION ON THE IRREGULAR TRANSFER OF MUIRI COFFEE ESTATE LIMITED PROPERTY BY KENYA COMMERCIAL BANK

of the House.

DIRECTORATE OF COMMITTEE SERVICES
CLERKS CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

JUNE, 2017

TABLE OF CONTENTS

LIST OF ABBREVIATIONS	- 2 -
CHAIRPERSON'S FOREWORD	- 3 -
EXECUTIVE SUMMARY	- 4 -
1.1 MANDATE OF THE COMMITTEE	- 6 -
1.2 COMMITTEE MEMBERSHIP	- 7 -
1.3 COMMITTEE SECRETARIAT	- 8 -
1.4 RECOMMENDATIONS	- 8 -
2.0 INTRODUCTION	- 9 -
2.1 Background Information	- 9 -
2.2 The Petition	- 9 -
3.0 SUBMISSIONS AND EVIDENCE	- 10 -
3.1 Meeting with the Petitioner	- 10 -
3.2 Meeting with the CEO, Kenya Commercial Bank (KCB)	- 11 -
3.3 Report from the Criminal Investigative Department (DCI)	- 11 -
4.0 COMMITTEE'S OBSERVATIONS	- 13 -
4.1 BACKGROUND	- 13 -
4.2 ISSUES FOR DETERMINATION	- 14 -
5.0 COMMITTEE RECOMMENDATIONS	- 18 -

LIST OF ABBREVIATONS

DCI	-	Directorate of Criminal Investigations
KCB	-	Kenya Commercial Bank
Ltd	-	Limited
CEO	-	Chief Executive Officer

CHAIRPERSON'S FOREWORD

The Public Petition on irregular transfer of Muiri Coffee Estate Limited property by Kenya Commercial Bank (KCB) was presented to the National Assembly by the Hon. (Dr.) Humphrey Kimani, MP on 18th August 2016 pursuant to Standing Order 225(2) and the Petition to Parliament (Procedure) Act, 2012. The petition dated 7th June 2016 prays “that the National Assembly:

1. establishes why Kenya Commercial Bank sold Muiri Coffee Estate Limited without the consent of the owner and before realizing the securities offered by Benjoh Amalgamated Limited parcel LR 12411/1 and 12411/2 Nyandarua;
2. recommends that necessary action be taken against the Bank if found culpable of the sale and transfer of Muiri Coffee Estate without following the due process; and
3. makes any orders as it deems fit in plight of the Petitioner.

In considering the petition, the Committee met with the petitioner, Hon. (Dr.) Humphrey Kimani, MP, the owners of Muiri Coffee Estate Limited and the Chief Executive Officer of the Kenya Commercial Bank (KCB). The Committee also received submissions of the Directorate of Criminal Investigations. The views of the petitioner and those of the KCB are incorporated in this Report.

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

I take this opportunity to thank all the Members of the Committee for their commitment and dedication, which enabled the Committee to complete consideration of the Petition.

The Committee wishes to record its appreciation for the services rendered by the staff of the National Assembly attached to the Committee. Their efforts made the work of the Committee and the production of this Report possible.

Finally, it is now my pleasant duty, on behalf of the Departmental Committee on Finance, Planning & Trade to present this report to the House pursuant to the provisions of Standing Order 227 (2).

Hon. Benjamin Langat, CBS, M.P.

EXECUTIVE SUMMARY

This Report contains the Committee's proceedings during the hearing of the Petition on the alleged irregular transfer of Muiri Coffee Estate Limited by the Kenya Commercial Bank Limited. The Petition was presented to the National Assembly by the Hon. (Dr.) Humphrey Kimani, M.P. on 18th August 2016. While considering the Petition, the Committee observed the following:

a) In the year 1988, the Bank granted Benjoh Amalgamated Limited an overdraft of Ksh: 1, 800, 000; and a loan of Ksh: 16, 875, 000, through letter dated 12th April 1989.

b) The Bank's terms for the security were as follows—

(a) a debenture for Kshs. 11, 675, 000/- over the borrowers assets;

(b) a legal charge for Kshs. 11, 675, 000/- over land reference number 124/182 and land reference Number 12411/1;

(c) a further legal charge for Kshs. 7, 000, 000 over L.R No.10075 Kiambu in the name of Muiri Coffee Estate Ltd. In support of a guarantee for a like sum which was to be executed by the guarantor (Muiri Coffee Estate Ltd);

(d) directors' joint and individual guarantee for Kshs. 11, 675,000/-;

(e) An individual guarantee for Ksh. 7, 000, 000/- which was to be signed by James Ngengi Muigai;

(f) board resolutions authorizing borrowing;

(g) board resolution from the Guarantor authorizing execution of the guarantee and charge for Kshs. 7, 000, 000/-

c) Benjoh Amalgamated Limited defaulted and the Bank sought recovery of the principal sum, interest and charges thereof. This instigated Civil Case No.1219 of 1992, which both the plaintiffs and defendant recorded a consent decree to be executed in the following manner:

(a) the plaintiffs to pay the total outstanding sums, principal and interest, to the defendant on or before the 31st day of July 1992;

(b) in default, the defendant be at liberty to proceed with the realization of the two securities; and

(c) the plaintiffs pay the costs of the application and auctioneer charges.

It is at this stage that numerous court cases arose seeking injunctive orders to restrain the Bank from selling the security properties. The cases were dismissed in favour of the Bank citing *res judicata* due to the consent decree recorded whose effect terminated the suit.

Having considered the Petition, the Committee noted that all the issues raised in the petition had been litigated upon and determined by a court of competent jurisdiction whose independence is guaranteed by Article 160 of the Constitution. In light of this, Parliament is prohibited from scrutinizing or amending the content of any decision made by a court of law.

The Committee, however, noted that the bank was quick to sell the guarantor's property in Kiambu before selling the principal borrower's security in Nyandarua. The Committee also noted that The Law of Contract Act is silent on the hierarchy to be followed in such cases and that it was against the law natural justice for KCB to do that. The Committee therefore noted the need for amendment of the Law Contract Act to provide for a clear hierarchy to be followed whenever a lender seeks to realize his/her money from the debtor.

1.1 MANDATE OF THE COMMITTEE

The Departmental Committee on Finance, Planning & Trade is one of the twelve Departmental Committees of the National Assembly established under SO 216 and mandated to:-

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
- (b) study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
- (c) study and review all legislation referred to it;
- (d) study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary and as may be referred to them by the House;
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*); and
- (g) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

1.2 COMMITTEE MEMBERSHIP

The Committee comprises the following members:-

Chairperson	The Hon. Benjamin Langat, MP
Vice Chairperson	The Hon. Nelson Gaichuhie, MP
	The Hon. Dr. Oburu Oginga, MP
	The Hon. Jimmy Nuru Angwenyi, MP
	The Hon. Eng. Shadrack Manga, MP
	The Hon. Ahmed Shakeel Shabbir, MP
	The Hon. Sammy Koech, MP
	The Hon. Sammy Mwaita, MP
	The Hon. Tiras N. Ngahu, MP
	The Hon. Hezron Awiti, MP
	The Hon. Abdullswamad Sheriff, MP
	The Hon. Abdul Rahim Dawood, MP
	The Hon. Alfred W. Sambu, MP
	The Hon. Anyanga Andrew Toboso, MP
	The Hon. Daniel E. Nanok, MP
	The Hon. Dennis Waweru, MP
	The Hon. Joash Olum, MP
	The Hon. Jones M Mlolwa, MP
	The Hon. Joseph Limo, MP
	The Hon. Kirwa Stephen Bitok, MP
	The Hon. Lati Lelelit, MP
	The Hon. Mary Emase, MP
	The Hon. Ogendo Rose Nyamunga, MP
	The Hon. Patrick Makau King'ola, MP
	The Hon. Ronald Tonui, MP
	The Hon. Sakaja Johnson, MP
	The Hon. Sakwa John Bunyasi, MP
	The Hon. Sumra Irshadali, MP

1.3 COMMITTEE SECRETARIAT

First Clerk Assistant	-	Evans Oanda
Third Clerk Assistant	-	Nicodemus Maluki
Third Clerk Assistant	-	Fredrick Otieno
Legal Counsel II	-	Emma Essendi

1.4 RECOMMENDATIONS

Having considered the Petition keenly and the prayers sought, the Committee recommends as follows:

- (a) On the prayer that the National Assembly establishes why Kenya Commercial Bank Ltd sold Muiri Coffee Estate Limited without the consent of the owner and before realizing the securities offered by Benjoh Amalgamated Limited parcel which are LR 12411/1 and 12411/2 Nyandarua, the Committee did investigate the matter and found that due process was followed in the sale of the said property. This is inferred from the Decree issued on May 4, 1992 in *HCC No. 1219 of 1992 Nairobi Benjoh Amalgamated Ltd and Muiri Coffee Estate Ltd versus Kenya Commercial Ltd*. The Committee also noted that though not obligated, KCB should have auctioned the securities belonging to the principal borrower before proceeding to auction the guarantor's property. This action contravenes the rules of natural justice;
- (b) On the prayer that the National Assembly makes any orders as it deems fit in the circumstances, the Committee recommends-
 - (i) that the National Assembly amends section 3 of the Law of Contract Act (Cap 23) to provide that in the event of default, a creditor shall realise the property of the principal borrower before proceeding to realise the property of the guarantor;
 - (ii) that all parties involved be at liberty to enter into negotiations with a view of having the matter settled amicably.

2.0 INTRODUCTION

2.1 Background Information

Article 119 (1) of the Constitution provides that every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation. This provision is operationalized by the Petitions to Parliament (Procedure) Act, 2012 and Standing Orders 219 and 220.

The Petition on the alleged irregular transfer of Muiiri Coffee Estate Limited by the Kenya Commercial Bank (KCB) was presented to the House by the Hon. (Dr.) Humphrey Kimani, MP on 18th August 2016 pursuant to Standing Order No. 225 (2)(a). In accordance with Standing Order 227, the Petition was referred to the Departmental Committee on Finance, Planning & Trade for consideration and preparation of a report.

2.2 The Petition

The petitioner wished to draw the attention of the House to the following:

- i) **THAT**, Muiiri Coffee Estate is located in Juja Constituency, Kiambu County;
- ii) **THAT**, Benjoh Amalgamated Limited borrowed a loan from Kenya Commercial Bank of Ksh. 9 million in April 1989;
- iii) **THAT**, in April 1989 Muiiri Coffee Estate Limited acted as a limited guarantor to Benjoh Amalgamated Limited to a tune Ksh.11.5 million from Kenya Commercial Bank at all times;
- iv) **THAT**, in December 1994, the late Mr. James Muigai on behalf of the Guarantor (Muiiri Coffee Estate Limited) paid Ksh.6million to Kenya Commercial Bank towards offsetting the loan and the said bank acknowledged receipt of the payment leaving an outstanding balance of Ksh.3.4 million;
- v) **THAT**, in July, 1995 Mr. Muigai's widow of the late mama Ngina Muigai made an enquiry to the Bank to confirm the outstanding balance owed to Benjoh Amalgamated Limited in order to clear the outstanding balance. In March 1996, the bank responded indicating that the outstanding balance amounted to Ksh.44.3 million;

- vi) **THAT**, in 2002 the Bank advertised Benjoh Amalgamated Limited properties on public auction. Benjoh Amalgamated Limited moved to court and demanded that the Bank produces statement of accounts. However, the Bank did not provide statement of accounts as requested but instead advertised for auction of Muiri Coffee Estate Limited in June 2007;
- vii) **THAT**, in spite of this, no auction took place, nevertheless two months later, Muiri Coffee Estate Limited was transferred to Bidii Kenya Limited ;
- viii) **THAT**, at the time of sale of Muiri Coffee Estate Limited was worth well over Kshs. 70 million while the two properties belonging to Benjoh Amalgamated Limited LR 12411/1 and 12411/2 Nyandarua were also worth over Kshs. 70 Million.
- ix) **THAT**, the Petitioner has established that there has not been any court order for the sale of Muiri Coffee Estate; and
- x) **THAT**, efforts to pursue this matter with relevant authorities has been fruitless;

The Petitioner prayed that the National Assembly, through the Departmental Committee on Finance, Planning and Trade:

- (a) establishes why Kenya Commercial Bank sold Muiri Coffee Estate Limited without the consent of the owner and before realizing the securities offered by Benjoh Amalgamated Limited parcel LR 12411/1 and 12411/2 Nyandarua;
- (b) recommends that necessary action be taken against the Bank if found culpable of the sale and transfer of Muiri Coffee Estate without following the due process; and
- (c) makes any orders as it deems fit in plight of Petitioner.

3.0 SUBMISSIONS AND EVIDENCE

3.1 Meeting with the Petitioner

On 1st September 2016, the Hon. (Dr.) Humphrey Kimani, MP accompanied by Mr. Ngengi Muigai, appeared before the Committee to brief the Committee on contents of the petition. During the meeting, the Hon. (Dr.) Kimani highlighted the following in the petition:

- A. Benjoh Amalgamated Limited borrowed a loan from Kenya Commercial Bank of Ksh. 9 million in April 1989;
- B. Muiri Coffee Estate Limited acted as a limited guarantor to Benjoh Amalgamated Limited to a tune Ksh.11.5 million from Kenya Commercial Bank at all times;

- C. Other securities for KCB loan was the two properties owned by Benjoh Amalgamated Limited namely parcel LR 12411/1 and 12411/2 Nyandarua
- D. Benjoh Amalgamated Limited defaulted servicing of the loan facility prompting KCB to commence recovery of her money through auction.
- E. In 2002 and instead of auctioning the properties belonging to Benjoh Amalgamated Limited, KCB transferred Muiri Coffee Estate Limited (Guarantor) to Bidii Kenya Limited.
- F. At the time of transfer, Muiri Coffee Estate was worth more than Kshs 70 million.
- G. The Committee should ascertain the reasons why the KCB auctioned guarantors' limited property before auctioning the properties that formed the first charge (parcel LR 12411/1 and 12411/2 Nyandarua)

3.2 Meeting with the CEO, Kenya Commercial Bank (KCB)

On 16th February 2017, the Chief Executive Officer (CEO) for the Kenya Commercial Bank appeared before the Committee and submitted the following regarding the petition:

- The matter started in 1992 following default in payment of a loan which was extended by Kenya Commercial Bank to Benjoh Amalgamated in 1989. The loan was secured with two properties in Kiambu and Nyandarua and guaranteed by Muiri Coffee Estate.
- The companies defaulted in repayment and the bank moved to auction its property.
- A consent was reached with the companies undertaking to pay up, failing which the bank would sell off the properties. This money was not paid, marking the beginning of the cases in 1992.
- On failure to honor the consent decree, the KCB proceeded to auction Muiri Coffee Estate with a view to realizing all the money lent to Benjoh Amalgamated including the cost of the suit and the accrued interest.
- The matter was in the courts for 28 years and all matters raised in the petition had been heard and determined in favour of the Kenya Commercial Bank (KCB); culminating in the Supreme Court ruling of 2016.

3.3 Report from the Criminal Investigative Department (DCI)

On 12th June 2017, the Committee received various correspondences from the Directorate of Criminal Investigations that were done in during the consideration of various litigations on the

loan advanced to Benjoh Amalgamated Ltd. From the said documents, the Committee noted the following:

- The Department of Criminal investigations had unsuccessfully investigated the matter at different times due to non-cooperation of the KCB and a order prohibiting such investigations.
- The Attorney General had on several occasions advised on the suits arising from the advanced loan.
- The matter had been litigated upon and judgment rendered in favour of KCB.

4.0 COMMITTEE'S OBSERVATIONS

Upon analyzing the petition and through interaction with the Petitioner, the Committee made the following observations:

4.1 BACKGROUND

- I. In the year 1988, the Bank granted Benjoh Amalgamated Limited the following bank facilities through a facility letter dated 12th April 1989. That is—
 - (a) an overdraft of Ksh1, 800, 000; and
 - (b) a loan of Ksh 16, 875, 000.

- II. The Bank's security was as follows:
 - (a) A debenture for Kshs. 11, 675, 000/- over the borrowers assets;
 - (b) A legal charge for Kshs. 11, 675, 000/- over land reference number 124/182 and land reference Number 12411/1;
 - (c) A further legal charge for Kshs. 7, 000, 000 over L.R No.10075 Kiambu in the name of Muiri Coffee Estate Ltd. In support of a **guarantee for a like sum** which was to be executed by the guarantor (Muiri Coffee Estate Ltd);
 - (d) Directors' joint and individual guarantee for Kshs. 11, 675,000/-;
 - (e) An individual guarantee for Ksh. 7, 000, 000/- which was to be signed by James Ngengi Muigai;
 - (f) Board resolutions authorizing borrowing;
 - (g) Board resolution from the Guarantor authorizing execution of the guarantee and charge for Kshs. 7, 000, 000/-

- III. Benjoh Amalgamated Limited defaulted and the Bank sought recovery of the principal sum, interest and charges thereof. This instigated civil case no.1219 of 1992, which both the plaintiffs and defendant recorded a consent decree to be executed in the following manner:
 - (a) the plaintiffs to pay the total outstanding sums, principal and interest, to the defendant on or before the 31st day of July 1992;
 - (b) in default, the defendant to be at liberty to proceed with the realisation of the two

securities; and

(c) the plaintiffs to pay the costs of the application and auctioneer charges.

IV. It is at this stage that numerous court cases arose seeking injunctive orders to restrain the Bank from selling the security properties. The cases were dismissed in favour of the Bank citing *res judicata* due to the consent decree recorded whose effect terminated the suit.

4.2 ISSUES FOR DETERMINATION

I. Whether the sale of the said property was valid in accordance with the law and consent decree

The Committee noted that petitioners are not contesting the existence of a loan or even the consent decree between both parties but the process of realising the debt owed by them to the Bank. In its response to the Committee, the Bank produced a facility letter as described above, which was between Benjoh Amalgamated Limited and not Muiri Coffee Estate Limited. The latter only acted as a guarantor to the former for an initial sum of Kshs 7,000, 000 shillings and a further sum of Kshs 4, 500,000. A guarantor is defined as follows:

- *Section 4 of the Statute of Frauds 1677 (England), defines a contract of guarantee as a promise to be liable for the debt, or failure to perform some other legal obligation, of another person.*
- *Section 3 (1) of the Contracts Act of Kenya defines a guarantee is a contract to answer for the debt, default or miscarriage of another. There exist three parties to a contract of guarantee that is the creditor, debtor and the guarantor.*

From these definitions, the contract imposes a secondary obligation on the guarantor. Therefore the surety's liability depends upon default by the principal debtor.

The Committee observed that Muiri Coffee Estate guaranteed Benjoh Amalgamated Limited for the sum of Kshs 7,000, 000 shillings and a further sum of Kshs 4, 500,000 as shown in the charge documents. The latter states that- "...In pursuance of the said agreement and in consideration of the premises THIS CHARGE WITNESSETH as follows:-

(a) on the 5th day of June, one thousand nine hundred and eighty nine (hereinafter called

“the legal date of redemption”) to pay to the bank such sum not exceeding shillings seven million as may then be due....”

The committee further observed that similar cases had been determined against the guarantors in cases of default such as:

- a. In ***Development Bank of Kenya Ltd v Riva Oils Co. Ltd & 3 others [2013] eKLR*** the learned Judge Havelock held *inter alia*:

It therefore falls upon the 2nd and 4th Defendant being the guarantors of the 1st Defendant (who has since closed shop), to satisfy the loan facilities extended to it to the limit of their respective Guarantees plus any other charges incidental to or occasioned from the loan agreement, including any interest, fees and charges.

- b. In ***Ebony Development Co. Ltd v Standard Chartered Bank Ltd [2008] KLR*** Khaminwa, J on delivering on the issue of the liability of guarantors held that:

“The security of charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal debtor. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.”

From the above cases, it can be inferred that once notice is given to the guarantors to pay the outstanding debt, the guarantor must comply with the contractual obligation, and consent from the owner cannot dissolve liability. Where a limitation exists in the guarantee, the guarantor shall pay to extent of the limitation plus any other incidental charges. Therefore, the amount Muiri Coffee Estate Limited was liable to pay to the Bank was Kshs 11, 500, 000/- plus any other incidental charges occasioned from the loan agreement between Benjoh Amalgamated Ltd and the Bank.

The Committee also noted that that judgment was entered for the realization of the two securities. In civil appeal case ***Kenya Commercial Bank vs Benjoh Amalgamated limited & another***; the learned judges described the two securities as follows:

“The appellant lent the respondents a sum of Kshs. 23, 175, 000/= which was secured by a charge over the two pieces of land namely L.R No. 1211/1 and 12411/2 Kiambu. Upon

default, the appellant moved to realize the security and the respondent thereupon filed the suit to forestall the exercise”

In the civil case *Benjoh Amalgamated Ltd & Muiri Coffee Estate vs Kenya Commercial Bank 239 of 2004*; the Court pronounced itself on the validity of the consent order and the genesis of the same. It stated that “...earlier on by an application dated 14th March, 1992, the appellants (the Plaintiffs) had sought, among other things, an order that “.....*the 1st plaintiff be allowed to sell L.R Nos. 12411/1 & 2 aforesaid by private treaty to discharge its indebtedness to the defendant.*”

The same case reiterated the terms of the consent decree as “*the plaintiffs to pay the total outstanding sums, principal and interest, to the defendant on or before the 31st day of July 1992; in default, the defendant to be at liberty to proceed with the realization of the two securities*”

The above can be interpreted to mean that—

- (a) the plaintiffs were ordered to pay the total outstanding sum;
- (b) in default, the Bank was to proceed with the realisation of the two securities being L.R Nos. 12411/1 & 2; and
- (c) the defendants were stopped realizing any other security as provided for in the facility letter.

From the above, it is clear that Benjoh Amalgamated Ltd defaulted to pay the debt and the outstanding sum as contained in the consent decree. The KCB proceeded to realize its money by auctioning the guarantor’s security (Muiri Coffee Estate) before going for the Principal borrower’s property (L.R Nos. 12411/1 & 2).

Under the Law of Contract Act, there is no provision that gives the hierarchy to be followed whenever the debtor wants to realize his money from the borrower and the guarantor. It is the practice within the banking sector to go for the most liquid security regardless of whether it is from the principal borrower or his guarantor.

Whether the National Assembly has the authority to interrogate the Petition

The right to petition Parliament is anchored under Article 119 of the Constitution. It states:

*119 (1) every person has the right to petition Parliament to consider **any matter within its Authority** including to enact, amend or repeal any legislation.* Although the wording of Article 95

(2) may suggest that Parliament is able or even obliged to concern itself with every request and complaint, the Constitution taken as a whole indicates the limits to the right of petition.

In view of the independence of the Judiciary, which is constitutionally guaranteed by Article 160 (1) of the Constitution of Kenya, Parliament is prohibited from scrutinizing or amending the content of any decision made by a court of law. Judges are independent in their decisions, and subject only to the law. Consequently, judicial decisions can only be quashed or modified by other competent courts, and only in accordance with the due processes laid down by law.

Further, the case presented concerns itself with matters between private citizens that have been heard and determined by a court of competent jurisdiction. *In light of this Parliament cannot make a determination on the aforesaid matters as they are matters of law and fact or vary any judgment made.*

5.0 COMMITTEE RECOMMENDATIONS

Having considered the Petition keenly and the prayers sought, the Committee recommends as follows:

- (c) On the prayer that the National Assembly establishes why Kenya Commercial Bank Ltd sold Muiri Coffee Estate Limited without the consent of the owner and before realizing the securities offered by Benjoh Amalgamated Limited parcel which are LR 12411/1 and 12411/2 Nyandarua, the Committee did investigated the matter and found that due process was followed in the sale of the said property. This is inferred from the Decree issued on May 4, 1992 in *HCC No. 1219 of 1992 Nairobi Benjoh Amalgamated Ltd and Muiri Coffee Estate Ltd versus Kenya Commercial Ltd*. The Committee also noted that though not obligated, KCB should have auctioned the securities belonging to the principal borrower before proceeding to auction the guarantor's property. This action contravenes the rules of natural justice;
- (d) On the prayer that the National Assembly makes any orders as it deems fit in the circumstances, the Committee recommends-
- (iii) that the National Assembly amends section 3 of the Law of Contract Act (Cap 23) to provide that in the event of default, a creditor shall realise the property of the principal borrower before proceeding to realise the property of the guarantor;
- (iv) that all parties involved be at liberty to enter into negotiations with a view of having the matter settled amicably.

Signed:

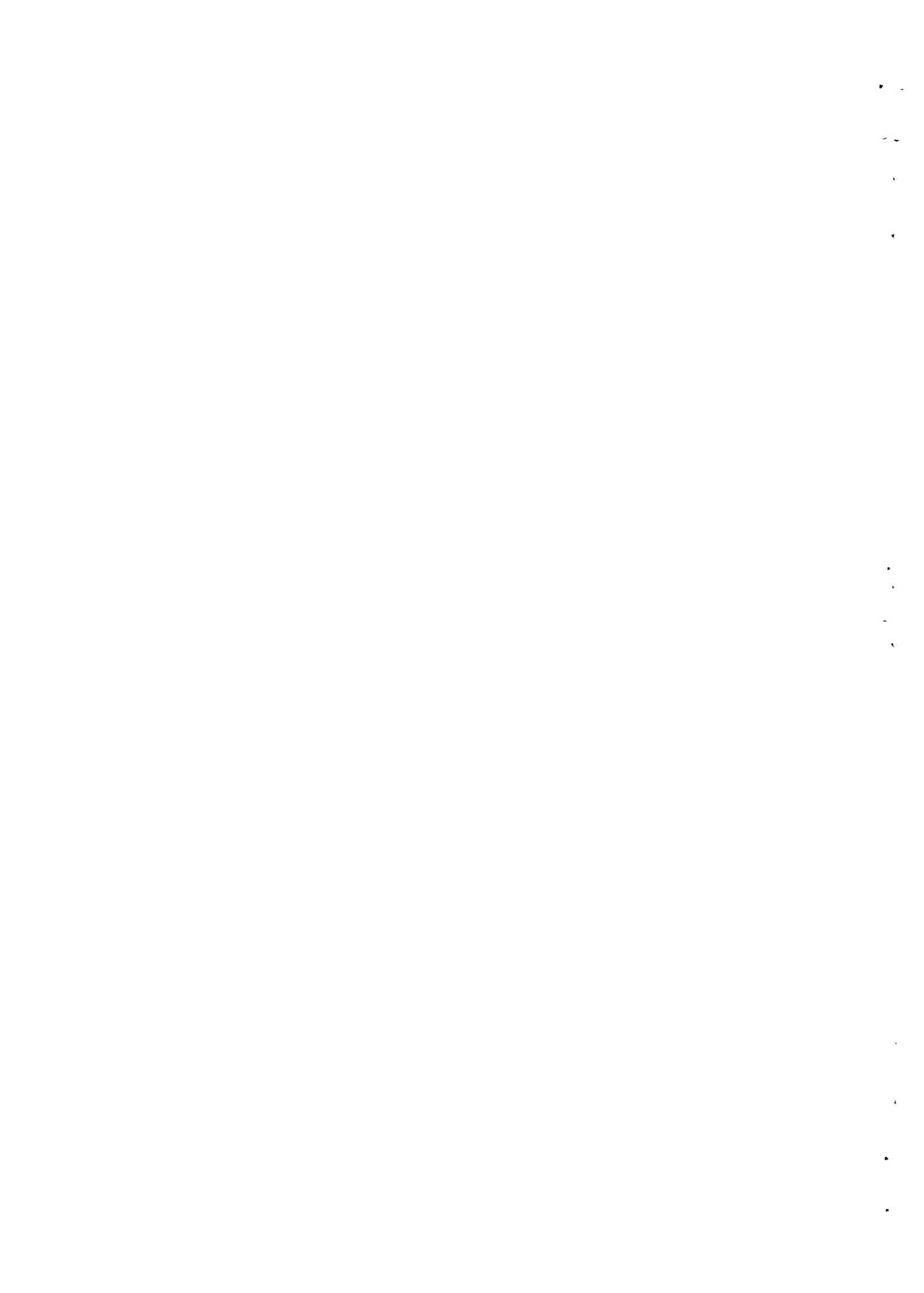


Date:

15th June 2017

(THE HON. BENJAMIN LANGAT, C.BS, M.P.)

CHAIRPERSON, DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING &
TRADE



MINUTES OF THE 36TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON WEDNESDAY 15TH JUNE, 2017 IN THE COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDING AT 11.30AM

PRESENT

- | | | |
|------------------------------------|---|-------------------------|
| 1. Hon. Benjamin Langat, MP | - | Chairperson |
| 2. Hon. Nelson Gaichuhie, MP | - | Vice-Chairperson |
| 3. Hon. Daniel Epuyo Nanok, MP | | |
| 4. Hon. Ronald Tonui, MP | | |
| 5. Hon. Patrick Makau King'ola, MP | | |
| 6. Hon. Lati Lelelit, MP | | |
| 7. Hon. Jones Mlolwa, MP | | |
| 8. Hon. Sakwa John Bunyasi, MP | | |
| 9. Hon. Abdul Rahim Dawood, MP | | |
| 10. Hon. Jimmy Nuru Angwenyi, MP | | |
| 11. Hon. Sumra Irshadali, MP | | |

APOLOGIES

1. Hon. Joash Olum, MP
2. Hon. Eng. Shadrack Manga, MP
3. Hon. Shakeel Shabbir, MP
4. Hon. Hezron Bolo Awiti, MP
5. Hon. Abdullswamad Shariff, MP
6. Hon. Mary Emase, MP
7. Hon. Anyanga Andrew Toboso, MP
8. Hon. Joseph Limo, MP
9. Hon. Kirwa Stephen Bitok, MP
10. Hon. Alfred Sambu, MP
11. Hon. Dennis Waweru, MP
12. Hon. Sammy Koech, MP
13. Hon. Sakaja Johnson, MP
14. Hon. Tiras Ngahu, MP
15. Hon. Dr. Oburu Oginga, MP
16. Hon. Sammy Mwaita, MP
17. Hon. Ogendo Rose Nyamunga, MP

COMMITTEE SECRETARIAT

- | | | |
|--------------------------|---|-----------------------|
| 1. Mr. Martin Masinde | - | SDD |
| 2. Mr. Evans Oanda | - | First Clerk Assistant |
| 3. Mr. Nicodemus Maluki | - | Third Clerk Assistant |
| 4. Mr. Fredrick Otieno | - | Third Clerk Assistant |
| 5. Ms. Emma Esendi | - | Legal Counsel |
| 6. Mr. Omar Machage | - | Fiscal Analyst |
| 7. Ms. Catherine Mukunyi | - | SAA |

FRIEND OF THE COMMITTEE

Hon. Daniel Maanzo, MP

Hon Kimani Ichungwa, MP

Hon. Francis Mwangangi, MP

MIN.NO. DCF/ 138/2017: PRELIMINARIES

The Chairperson called the meeting to order at 11:40am followed by a word of prayer from the Hon. Nelson Gaichuhie, MP.

MIN.NO. DCF/139/2017: CONSIDERATION OF SESSIONAL PAPER NO.3 OF 2017

The Committee approved the sessional paper on the following grounds:

- The guarantee requested will help in the proposed financial restructuring
- The government is not giving any money but only a guarantee
- Already changes made by the KQ has seen positive results for the airline's balance sheet in 2017

Concerns

- The outgoing CEO should have been retained as a lead adviser having been around during the down turn of the airline
- The commercial agreement KQ entered with KLM need to be relooked and reviewed
- Treasury should report to Parliament every six months on the repayment, balance and performance of KQ.

The secretariat was directed to process a report for tabling in the same afternoon.

MIN.NO. DCF/140/2017: PRESIDENTIAL MEMORANDUM ON FINANCE BILL 2017

The Committee went through the Presidential Memorandum and observed that the proposed 35% taxation will be over and above the 30% corporation tax. The Hon. Nelson Gaichuhie, MP proposed 35% as the final tax.

After lengthy deliberations, the Committee postponed the matter.

MIN.NO. DCF/141/2017: PETITION ON IRREGULAR TRANSFER OF COFFEE MUIRI ESTATE

The Committee's legal counsel advised the Committee that the issues being raised in the petition had been litigated upon and determined in court and therefore the Committee may not maybe to recommend any remedial actions against KCB. However, there is need to amend the Contract law to provide for the hierarchy to be followed whenever a lender wants to recover his money from a defaulted borrower.

Having been briefed accordingly; the Committee nevertheless recommend the following:

- (a) on the prayer that the National Assembly establishes why Kenya Commercial Bank Ltd sold Muiri Coffee Estate Limited without the consent of the owner and before realizing the securities offered by Benjoh Amalgamated Limited parcel which are LR 12411/1 and 12411/2 Nyandarua, the Committee did investigate the matter and found that due process was followed in the sale of the said property. This is inferred from the Decree issued on May 4, 1992 in *HCC No. 1219 of 1992 Nairobi Benjoh Amalgamated Ltd and Muiri Coffee Estate Ltd versus Kenya Commercial Ltd*. The Committee also noted that though

not obligated, KCB should have auctioned the securities belonging to the principal borrower before proceeding to auction the guarantor's property. This action contravenes the rules of natural justice;

(b) On the prayer that the National Assembly makes any orders as it deems fit in the circumstances, the Committee recommends-

(i) that the National Assembly amends section 3 of the Law of Contract Act (Cap 23) to provide that in the event of default, a creditor shall realise the property of the principal borrower before proceeding to realise the property of the creditor;

(ii) that all parties involved be at liberty to enter into negotiations with a view of having the matter settled amicably.

The secretariat was advised to process the report for tabling in the same afternoon.

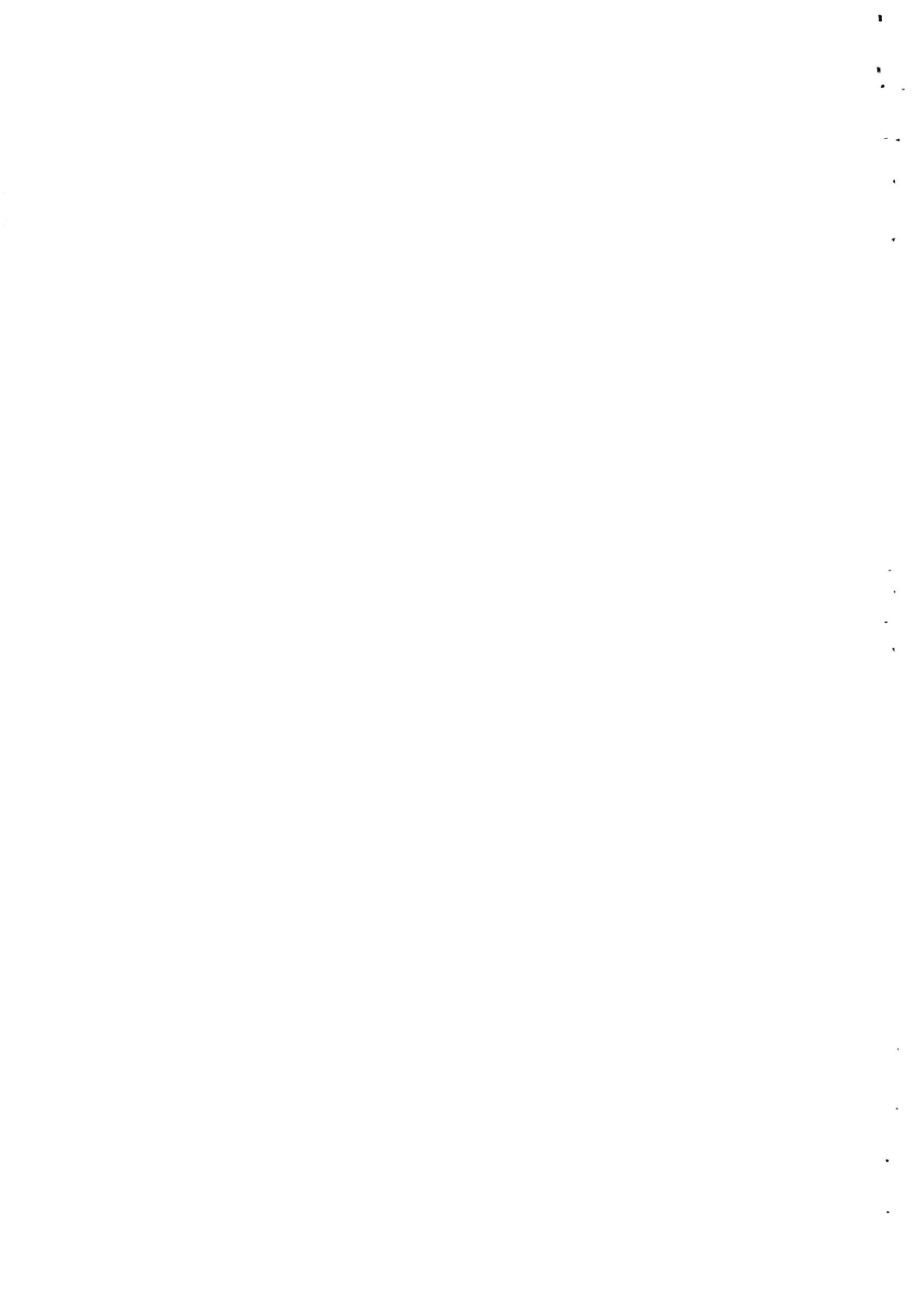
MIN.NO. DCF/141/2017: ADJOURNMENT

The Chairperson adjourned the meeting at 1:24pm

Signed.....

Chairperson

Date.....14/6/2017



**MINUTES OF THE 76TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
FINANCE, PLANNING & TRADE HELD ON THURSDAY 1ST SEPTEMBER, 2016 IN
COMMITTEE ROOM 9, PARLIAMENT BUILDINGS AT 10.00AM**

PRESENT

1. Hon. Benjamin Langat, MP
2. Hon. Nelson Gaichuhie, MP
3. Hon. Eng. Shadrack Manga, MP
4. Hon. Shakeel Shabbir, MP
5. Hon. Abdikadir Ore Mohammed, MP
6. Hon. Abdullswamad Shariff, MP
7. Hon. Tiras Ngahu, MP
8. Hon. Sakwa John Bunyasi, MP
9. Hon. Ronald Tonui, MP
10. Hon. Abdul Rahim Dawood ,MP
11. Hon. Dr. Oburu Oginga, MP
12. Hon. Patrick Makau King'ola, MP
13. Hon. Ogendo Rose Nyamunga, MP
14. Hon. Kirwa Stephen Bitok, MP
15. Hon. Jones Mlolwa, MP
16. Hon. Sumra Irshadali, MP

Chairperson
Vice-Chairperson

APOLOGIES

1. Hon. Jimmy Nuru Angwenyi, MP
2. Hon. Iringo Cyprian Kubai, MP
3. Hon. Mary Emase, MP
4. Hon. Lati Lelelit, MP
5. Hon. Sammy Koech, MP
6. Hon. Joash Olum, MP
7. Hon. Joseph Limo, MP
8. Hon. Sammy Mwaita, MP
9. Hon. Anyanga Andrew Toboso, MP
10. Hon. Daniel Epuyo Nanok, MP
11. Hon. Alfred Sambu, MP
12. Hon. Dennis Waweru, MP
13. Hon. Sakaja Johnson, MP

KENYA NATIONAL ASSEMBLY

- | | | |
|-------------------------|---|-----------------------|
| 1. Mr. Evans Oanda | - | First Clerk Assistant |
| 2. Mr. Nicodemus Maluki | - | Third Clerk Assistant |
| 3. Mr. Fredrick Otieno | - | Third Clerk Assistant |
| 4. Ms. Emma Esendi | - | Legal Counsel |

PETITIONERS

1. Hon. Dr. Humphrey Njuguna, MP
2. Mr. Ngengi Mugai
3. Mr. Kungu Muigai
4. Mr. Nicholas M. Njeru –
5. Mr. Charles Make
6. Mr. Ephantus G. Kabuku
7. Mr. William G. Wachira
8. Mr. Peter Kimani Runo

FRIENDS OF THE COMMITTEE

1. Hon. Ferdinand Waititu MP
2. Hon. Francis Munyua Waititu,MP

MIN.NO. DCF/286 /2016: PRELIMINARIES

The Chairperson called the meeting to order at 10.30am followed by a prayer from the Hon. Abdul Rahim Dawood, MP. He further requested all present to make self- introduction.

MIN.NO. DCF/287/2016: CONSIDERATION OF THE PETITION BY HON. HUMPHREY KIMANI, MP ON THE IRREGULAR TRANSFER OF MUIRI COFFEE ESTATE LIMITED PROPERTY BY THE KENYA COMMERCIAL BANK

The petitioner Hon. Humphrey Kimani, MP appeared before the Committee and briefed as follows:-

- i) Muiri Coffee Estate located in Juja Constituency, Kiambu County
- ii) Benjoh Amalgamated limited borrowed a loan from the Kenya Commercial Bank of Kshs. 9 million in April, 1989
- iii) Muiri Coffee Estate Limited acted as a limited guarantor to Benjoh amalgamated limited to a tune of Kshs. 11.5million from the KCB at all times
- iv) In December 1994 there was a payment of 6 million to the KCB towards offsetting the loan by the late James Muigai on behalf of the guarantor. The Committee was further informed that the Bank acknowledged the receipt of the payment leaving an outstanding balance of Kshs. 3.4 million.

- v) On inquiry of the outstanding balance owed to Benjoh Amalgamated Limited in July 1995 the balance amounted to Kshs. 44.3 million
- vi) In 2002 the Bank advertised Benjoh Amalgamated Limited properties on public auction, however the Company moved to court and demanded that the bank provides statement of the loan accounts which was never provided
- vii) The auction did not take place however Muiri Coffee Estate was transferred to Bidii Kenya Limited.
- viii) At the time of sale Muiri Coffee Estate was worth over Kshs. 70million while the other two properties belonging to Benjoh Amalgamated Limited LR12411/1 and 12411/2 Nyandarua were also worth over Kshs. 70 million

The Petitioners prayers to the Committee are:-

- i) Establish why KCB sold Muiri Coffee Estate without the consent of the owner and without realizing the securities offered by Benjoh Amalgamated Limited parcel LR.12411/1 and 12411/ 2 Nyandarua
- ii) Recommend that necessary action be taken against the bank if found culpable of the sale and transfer without the due process
- iii) Make any orders as it deems fit in plight of petitioner

Committee Concerns/ Clarifications

- i) The relationship between the two pieces of land mentioned
- ii) The property which was charged by the bank
- iii) Whether the petitioners had the bank statement showing the outstanding amount.
- iv) What was the court ruling in the year 2002

Committee Resolutions

- a) To invite the Kenya Commercial Bank Limited to apprise it on the petition at an opportune time
- b) That the petitioner provides a summary of the court cases and rulings in regard to Benjoh Amalgamated limited.

MIN.NO. DCF/288/2016: CONSIDERATION OF THE PETITION TO DISMISS CREDIT REFERENCE BUREAU ACT BY MR. PETER RUNO

The petitioner appeared before the Committee and briefed as follows:-

- The petition proposes an amendment to the banking Act, in order to disband the Credit Reference Bureaus. The petitioner further informed the Committee that the Credit Reference Bureaus has listed more than 700,000 individuals in their database as defaulters. He claimed that this was causing a lot of anguish to the listed individuals as they are unable to access financial facilities from local banks and financial institutions.
- The petitioner prays that the Committee initiates the process of amending the Banking Act and any other relevant laws to disband Credit Reference Bureaus.

Committee Observations

- i) The Credit Reference Bureaus allows for credit information sharing among the financial institutions. This plays a key role in reducing the information asymmetry that exist between the bank and the borrower. The major benefit that the bank receive from CRB is that they are able to get credit information on prospective borrowers and a good credit record acts as an incentive for competitive pricing of loans.
- ii) The Committee felt that the petitioner should come up with specific proposals to amendment CBR Act in order to make the credit references bureaus fully operational.

MIN.NO. DCF/289/2016: CONSIDERATION OF THE PETITION TO CREATE MEN FUND FOR MALES AGED 36 ONWARDS

The petitioner alleges that the government has neglected the male gender, in particular men who are over the age of thirty five 35 years. The petitioner cites the need to empower men to enable them cater for the needs of their families.


The petitioner prays for the establishment of a revolving fund for men to be referred as *“Men Enterprise Fund “similar to women Enterprise Fund.*

Committee Observations

The Committee felt that there exist several funds that the mentioned age group could benefit from hence the petition is not necessary.

MIN.NO. DCF/290 /2016: ADJOURNMENT

The Chairperson adjourned the meeting at 1.35 pm

Signed.....

Vice - Chairperson

Date..... 22nd Nov 2016 .

MINUTES OF THE 2ND SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON TUESDAY 31ST JANUARY, 2017 IN COMMITTEE ROOM 12, PARLIAMENT BUILDINGS AT 10.00AM

PRESENT

1. Hon. Nelson Gaichuhie, MP - Vice-Chairperson
2. Hon. Dr. Oburu Oginga, MP
3. Hon. Shakeel Shabbir, MP
4. Hon. Mary Emase, MP
5. Hon. Ronald Tonui, MP
6. Hon. Sammy Mwaita, MP
7. Hon. Sumra Irshadali, MP
8. Hon. Lati Lelelit, MP
9. Hon. Daniel Epuyo Nanok, MP
10. Hon. Anyanga Andrew Toboso, MP
11. Hon. Kirwa Stephen Bitok, MP

APOLOGIES

1. Hon. Benjamin Langat, MP - Chairperson
2. Hon. Eng. Shadrack Manga, MP
3. Hon. Abdul Rahim Dawood, MP
4. Hon. Jones Mlolwa, MP
5. Hon. Jimmy Nuru Angwenyi, MP
6. Hon. Ogendo Rose Nyamunga, MP
7. Hon. Alfred Sambu, MP
8. Hon. Sakwa John Bunyasi, MP
9. Hon. Dennis Waweru, MP
10. Hon. Sammy Koech, MP
11. Hon. Sakaja Johnson, MP
12. Hon. Joseph Limo, MP
13. Hon. Patrick Makau King'ola, MP
14. Hon. Abdullswamad Shariff, MP
15. Hon. Joash Olum, MP
16. Hon. Tiras Ngahu, MP
17. Hon. Hezron Awiti Boro, MP

INATTENDANCE

Committee Secretariat

- | | | |
|-------------------------|---|-----------------------|
| 1. Mr. Evans Oanda | - | First Clerk Assistant |
| 2. Mr. Nicodemus Maluki | - | Third Clerk Assistant |
| 3. Mr. Fredrick Otieno | - | Third Clerk Assistant |
| 4. Ms. Briggitha Mati | - | Legal Counsel |

MIN.NO. DCF/ 006 /2017: PRELIMINARIES

The Vice Chairperson called the meeting to order at 10.30am followed by a prayer from the Hon. Kirwa Stephen Bitok, MP .

MIN.NO. DCF/007 /2017: CONSIDERATION OF THE LEGAL BRIEF ON THE PUBLIC PETITION ON THE IRREGULAR TRANSFER OF MUIRI COFFEE ESTATE LIMITED PROPERTY BY THE KENYA COMMERCIAL BANK

The Legal Counsel appeared before the Committee and briefed on the submissions by the Kenya Commercial Bank on the petition as follows:-

1. Background Information

In the year 1988, the Bank granted Benjoh Amalgamated Limited the following bank facilities through a facility letter dated 12th April 1989.

- (a) an overdraft of Ksh: 1, 800, 000; and
- (b) a loan of Ksh: 16, 875, 000.

The Bank's security was as follows:-

- (a) a debenture for Kshs. 11, 675, 000/- over the borrowers assets;
- (b) a legal charge for Kshs. 11, 675, 000/- over land reference number 124/182 and land reference Number 12411/1;
- (c) a further legal charge for Kshs. 7, 000, 000 over L.R No.10075 Kiambu in the name of Muiri Coffee Estate Ltd. In support of a **guarantee for a like sum** which was to be executed by the guarantor (Muiri Coffee Estate Ltd);
- (d) Directors' joint and individual guarantee for Kshs. 11, 675,000/-;
- (e) An individual guarantee for Ksh. 7, 000, 000/- which was to be signed by James Ngengi Muigai;
- (f) board resolutions authorizing borrowing;
- (g) board resolution from the Guarantor authorizing execution of the guarantee and charge for Kshs. 7, 000, 000/-

Benjoh Amalgamated Limited defaulted and the Bank sought recovery of the principal sum, interest and charges thereof. This instigated civil case no.1219 of 1992 which both the plaintiffs and defendant recorded a consent decree to be executed in the following manner:

- (a) the plaintiffs to pay the total outstanding sums, principal and interest, to the defendant on or before the 31st day of July 1992;

- (b) in default, the defendant to be at liberty to proceed with the realisation of the two securities; and
- (c) the plaintiffs to pay the costs of the application and auctioneer charges.

It is at this stage that numerous court cases arose seeking injunctive orders to restrain the Bank from selling the security properties. The cases were dismissed in favour of the Bank citing *res judicata* due to the consent decree recorded whose effect terminated the suit.

2. Pertinent issues for determination

- a) Whether the sale of the suit property was valid in accordance with the law and consent decree

While deliberating on the validity of the sale of the suit property the Committee noted that:-

1. The consent decree was for the realization of *L.R No. 1211/1 and 12411/2* and not *L.R No. 10075 Kiambu*. Therefore, the suit property for purposes of realization of the debt was *L.R No. 1211/1 and 12411/2* hence it is important to ascertain how *L.R No. 1211/1 and 12411/2* was substituted into *L.R No. 10075 Kiambu* in total disregard of the consent decree, why the decree was not adhered to in the strictest sense, was there undue influence on the plaintiffs to accept the terms of the sale of L.R No.10075 and if the courts were aware of that irregularity.
2. In all the cases presented by the Bank as annexures, the decree 4.8.92 is upheld which in essence mandated the Bank to sell the two securities and if the debt was not realized, the sale of the guarantor's property would have sufficed.
3. If indeed the contents of the consent decree were not adhered to, then it can be inferred that the Bank was in breach of the contractual terms as provided by the consent decree.
4. The suit property L.R No. 10075 was sold by way of public auction on 19th September, 2007 to Bidii Kenya Ltd.

- b) Whether the National Assembly has the authority to interrogate the Petition

The Committee was further informed that:-

The right to petition Parliament is anchored under Article 119 of the Constitution. It states:
119 (1) every person has the right to petition Parliament to consider any matter within its Authority including to enact, amend or repeal any legislation.

Although the wording of Article 95 (2) may suggest that Parliament is able or even obliged to concern itself with every request and complaint, the Constitution taken as a whole indicates the limits to the right of petition.

In view of the independence of the Judiciary, which is constitutionally guaranteed by Article 160 (1) of the Constitution of Kenya, Parliament is prohibited from scrutinizing or amending the content of

any decision made by a court of law. Judges are independent in their decisions, and subject only to the law. Consequently, judicial decisions can only be quashed or modified by other competent courts, and only in accordance with the due processes laid down by law.

Further, the case presented concerns itself with matters between private citizens that have been heard and determined by a court of competent jurisdiction. In light of this Parliament cannot make a determination on the aforesaid matters as they are matters of law and fact or vary any judgment made.

Committee Resolutions

In the end the Committee resolved to invite Chief Executive Officer, Kenya Commercial Bank to apprise on the on the following issues:-

- a) How L.R No. 1211/1 and 12411/2 was substituted into L.R No. 10075 Kiambu in total disregard of the consent decree
- b) Why the decree was not adhered to
- c) Whether there was undue influence on the plaintiffs to accept the terms of the sale of L.R No. 10075
- d) Whether the courts were aware of the irregularity

MIN.NO. DCF/008 /2017: ADJOURNMENT

The Chairperson adjourned the meeting at 12. 25pm

Signed.....

Chairperson

Date..... 23-03-2017

MINUTES OF THE 5TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON THURSDAY 7TH FEBRUARY, 2017 IN COMMITTEE ROOM, 5TH FLOOR, CONTINENTAL HOUSE PARLIAMENT BUILDINGS AT 10.00AM

PRESENT

1. Hon. Nelson Gaichuhie, MP - Vice-Chairperson
2. Hon. Eng. Shadrack Manga, MP
3. Hon. Dr. Oburu Oginga, MP
4. Hon. Shakeel Shabbir, MP
5. Hon. Ogendo Rose Nyamunga, MP
6. Hon. Patrick Makau King'ola, MP
7. Hon. Sammy Mwaita, MP
8. Hon. Ronald Tonui, MP
9. Hon. Sumra Irshadali, MP
10. Hon. Anyanga Andrew Toboso, MP
11. Hon. Abdul Rahim Dawood, MP
12. Hon. Jones Mlolwa, MP

APOLOGIES

1. Hon. Benjamin Langat, MP - Chairperson
2. Hon. Jimmy Nuru Angwenyi, MP
3. Hon. Mary Emase, MP
4. Hon. Lati Lelelit, MP
5. Hon. Daniel Epuyo Nanok, MP
6. Hon. Kirwa Stephen Bitok, MP
7. Hon. Sakwa John Bunyasi, MP
8. Hon. Alfred Sambu, MP
9. Hon. Dennis Waweru, MP
10. Hon. Sammy Koech, MP
11. Hon. Sakaja Johnson, MP
12. Hon. Joseph Limo, MP
13. Hon. Abdullswamad Shariff, MP
14. Hon. Joash Olum, MP
15. Hon. Tiras Ngahu, MP
16. Hon. Hezron Bolo Awiti, MP

INATTENDANCE

Committee Secretariat

1. Mr. Evans Oanda - First Clerk Assistant
2. Mr. Nicodemus Maluki - Third Clerk Assistant
3. Mr. Fredrick Otieno - Third Clerk Assistant
4. Mr. Omar Abdirahim - Fiscal Analyst
5. Mr. Yakubu Ahmed - Media Officer

MIN.NO. DCF/ 017 /2017: PRELIMINARIES

The Vice - Chairperson called the meeting to order at 10 30am followed by a prayer from Hon. Ronald Tonui, MP.

MIN.NO. DCF/018 /2017: MEETING WITH THE CHIEF EXECUTIVE OFFICER KENYA COMMERCIAL BANK TO CONSIDER A PUBLIC PETITION ON IRREGULAR TRANSFER OF MUIRI COFFEE ESTATE LIMITED PROPERTY BY THE BANK.

This agenda was deferred to Thursday 16th February, 2017. The Chief Executive Officer, KCB wrote to the Committee requesting for rescheduling of the said meeting.

MIN.NO. DCF/019 /2017: ANY OTHER BUSINESS

Under this agenda the following issues were raised:-

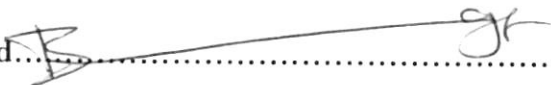
1. The Chairperson informed Members that the Auditor General had forwarded the Special Audit Report on the Lake Basin Development Authority Mall in Kisumu to Parliament and the Attorney General also gave his opinion on the recommendations given by the Auditor General.

Following the Auditor General's recommendations the Committee proposed that Kshs 4.1 billion should be allocated to the Lake Basin Development Authority (LBDA) for payment of the pending bills for the construction of the mall.

2. The Chairperson reminded Members that the Committee will be vetting Dr. Jane Wangui Kiringai on Tuesday 14th February, 2017. He further urged Members to be present during the vetting process.
3. The Secretariat was requested to liaise with the Ministry of Tourism on the upcoming ITB conference in Berlin between 8th - 12th March, 2017 and get the invitation letter.

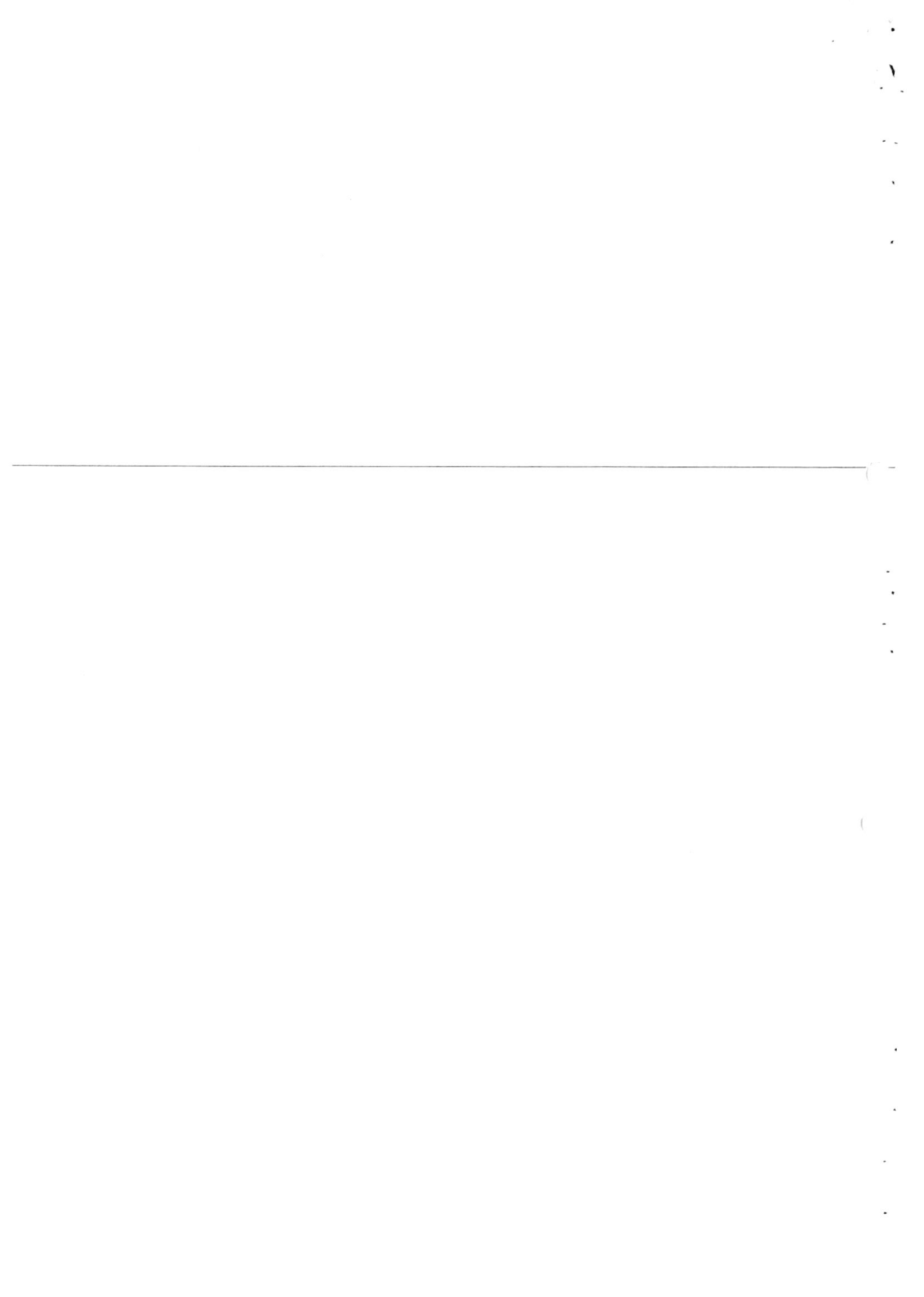
MIN.NO. DCF/020/2017: ADJOURNMENT

The Chairperson adjourned the meeting at 12.55pm

Signed.....


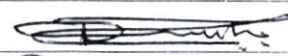


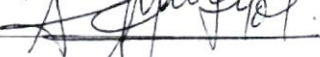


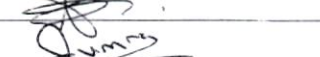
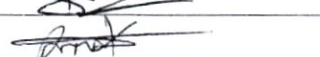

Chairperson

Date.....23-03-2017



DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

MEMBERS ATTENDANCE REGISTER

DATE	15/6/2017	TIME	10:00AM
AGENDA	CONSIDERATION OF SESSIONAL PAPER NO. 3 OF 2017, THE PETITION ON THE IRREGULAR TRANSFER OF MURU COFFEE ESTATE LIMITED PROPERTY BY KCB & PARSONS PRESIDENT'S MEMORANDUM ON FINANCE BILL, 2017 REPORTS		
	NAME	TITLE	SIGNATURE
1	Hon Benjamin Lungat	Chairman	
2	Nelson Gaichiro	Member	
3	Hon. Jimmy Angwenyi	Member	
4	Hon. Lath Leleht	"	
5	Hon. Daniel Eyo Nank	"	
6	Hon. Jones Mbulwa	"	
7	Hon. SARAHA BUNYISA	"	
8	Hon. Abdul Rahim Dawood	"	
9	Hon IRSHAD Sumra	"	
10	HON RONALD TONVI	"	
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
29			

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY
ELEVENTH PARLIAMENT
(FOURTH SESSION)



Approved. Bot
SNA
17/8/16

PUBLIC PETITION
ON IRREGULAR TRANSFER OF MUIRI COFFEE ESTATE LIMITED
PROPERTY BY KENYA COMMERCIAL BANK (KCB)

I, the undersigned, on behalf of residents of Juja Constituency,

DRAW the attention of the House to the following:-

- i. **THAT**, Muiri Coffee Estate is located in Juja Constituency, Kiambu County;
- ii. **THAT**, Benjoh Amalgamated Limited borrowed a loan from Kenya Commercial Bank of Ksh. 9million in April 1989;
- iii. **THAT**, in April 1989 Muiri Coffee Estate Limited acted as a limited guarantor to Benjoh Amalgamated Limited to a tune Ksh.11.5 million from Kenya Commercial Bank at all times;
- iv. **THAT**, in December 1994, the late Mr. James Muigai on behalf of the Guarantor (Muiri Coffee Estate Limited) paid Ksh.6million to Kenya Commercial Bank towards offsetting the loan and the said bank acknowledged receipt of the payment leaving an outstanding balance of Ksh.3.4 million;
- v. **THAT**, in July, 1995 Mr. Muigai's widow the late mama Ngina Muigai made an enquiry to the Bank to confirm the outstanding balance owed to Benjoh Amalgamated Limited in order to clear the outstanding balance. Around March 1996, the bank responded indicating that the outstanding balance amounted to Ksh.44.3 million;
- vi. **THAT**, in 2002 the Bank advertised Benjoh Amalgamated Limited properties on public auction. Benjoh Amalgamated Limited moved to court and demanded that the Bank produces statement of accounts. However, the Bank did not provide statement of accounts as requested but instead advertised for auction of Muiri Coffee Estate Limited in June 2007;

PUBLIC PETITION
ON REVERTING OF MUIRI COFFEE ESTATE LIMITED BY KENYA
COMMERCIAL BANK (KCB)

- vii. **THAT**, despite of this no auction took place, nevertheless two months later, Muiri Coffee Estate Limited was transferred to Bidii Kenya Limited ;
- viii. **THAT**, at the time of sale Muiri Coffee Estate Limited was worth well over Kshs. 70 million while the two properties belonging to Benjoh Amalgamated Limited LR 12411/1 and 12411/2 Nyandarua were also worth over Kshs. 70 Million.
- ix. **THAT**, the Petitioner has established that there has not been any court order for the sale of Muiri Coffee Estate; and
- x. **THAT**, efforts to pursue this matter with relevant authorities has been fruitless;

THEREFORE your humble petitioners pray that the National Assembly, through the Departmental Committee on Finance, Planning and Trade to:-

1. establish why Kenya Commercial Bank sold Muiri Coffee Estate Limited without the consent of the owner and before realizing the securities offered by Benjoh Amalgamated Limited parcel LR 12411/1 and 12411/2 Nyandarua;
2. recommend that necessary action be taken against the Bank if found culpable of the sale and transfer of Muiri Coffee Estate without following the due process; and
3. make any orders as it deems fit in plight of Petitioner.

And your **PETITIONERS** will ever pray.

PRESENTED BY,



HON. (DR). HUMPHREY KIMANI, M.P.
MEMBER FOR GATANGA CONSTITUENC

DATE: 7/6/2016

NATIONAL POLICE SERVICE

103
Telegrams: "CRIMINAL" Nairobi
Email: director@cid.go.ke
Tel: 020343312, 0202603724.



MAZINGIRA HOUSE
KIAMBU ROAD
P.O. Box 30036 NAIROBI.

① D/Committees

DIRECTORATE OF CRIMINAL INVESTIGATION

13/6/17

CID/IB/SEC/4/4/9/1/VOL.II/75

13TH JUNE, 2017

The Clerk of National Assembly
P.O. Box 41842-00100
NAIROBI

② ERANS
pls deaf
FA 14/6/17

ATTN. MICHAEL R. SIALAI, EBS

**RE: PETITION TO PARLIAMENT ON IRREGULAR TRANSFER OF MUIRI
COFFEE ESTATE LTD PROPERTY BY KENYA COMMERCIAL BANK
KCB**

The above matter refers. During the cause of investigation, initially the officers of the DCI came out with two cases i.e.

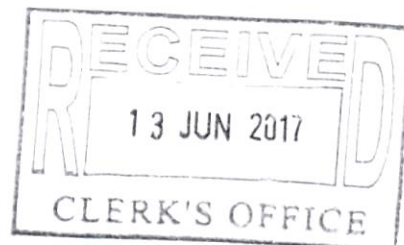
1. CR. 121/672/2007 CF. 1447/2007
2. CR. 121/619/2007 CF. 1328/2007

The accused were HALKANO MOLU and JOHN AKELO OUGO (both working at KCB and Oraro and Company Advocates respectively). The complainant was made by directors of Benjoh Amalgamated Limited, Samuel Kung'u Muigai (Rtd Captain) on 11th June, 2007.

Later the AG entered a nolle prosequi into the matter and ordered for further investigations. However, before further investigations could be conducted prohibitory orders were granted by the court which made the case to stall followed by several suits. For your ease of reference I do attach: -

1. letter dated 17th October, 2007 from DCI to AG signed by late Maurice Amatta.
2. Letter dated 31st December, 2008 addressed to DCI by Keriako Tobiko - Director of Public Prosecution.

1



3. Letter dated 9th October, 2007 addressed to May Gen Hussein Ali, by Keriako Tobiko DPP dated 9th October, 2007.
4. A copy of the court order prohibiting investigations account No. 315043651017 among others dated 25th July, 2007.
5. Letter dated 23rd August, 2007 addressed to DCI by Senior Principal State Counsel Vincent M. N. Wohoro.
6. A letter dated 15th April, 2011 addressed to DCI by Principal State Counsel for the AG to cover some points which were difficult because the order had never been lifted.
7. A letter dated 1st November, 2011 addressed to Commissioner of Police by DCI explaining the position of the investigations and the non-cooperation of the KCB officials in the investigations.
8. A judgment & order made by Justice Majanja restraining the DCI not to do further investigations dated 2nd March, 2012 which was never uplifted.

Hoping that the above attachments will be able to assist the Departmental Committee on Finance, Planning Trade Administration and National Security to their deliberations.



JOHN N. KARIUKI, HSC
FOR: DIRECTOR OF CRIMINAL INVESTIGATIONS

Encl.

REPUBLIC OF KENYA
OFFICE OF THE PRESIDENT

Telegrams: "CRIMINAL" Nairobi
Telephone: Nairobi 512090
When replying please quote



CRIMINAL INVESTIGATION DEPARTMENT
P.O. Box 30036
NAIROBI

CID/IB/SEC/4/4/16/VOL.II/109

17th October 2007

The Hon. Attorney General
Attorney General's Chambers
P O Box 40112
NAIROBI

Mr. Wdhorro
To note & deal
22/10

ATTN. VINCENT M. WAHORO

- RE: 1) HIGH COURT MISCELLANEOUS CIVIL APPLICATION
NO. 784 OF 2007 NAIROBI, KENYA COMMERCIAL
BANK LTD – VS – THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL AND BENJOH
AMALGAMATED LTD
2) CRIMINAL CASES NO. 1447 OF 2007 NAIROBI
REPUBLIC – VS – JOHN OKELLO OUGO
3) CRIMINAL CASES NO. 1328 OF 2007 NAIROBI
REPUBLIC – VS – HALKANO MOLU

This is in reference to your letter AG/CR/2014/2673 dated 9th October 2007 addressed to Commissioner of Police and copied to DCI over the above captioned matter.

The facts surrounding the case are that on 11th June 2007 one of the directors of Benjoh Amalgamated Ltd, Samuel Kung'u Muigai (Rtd Captain) registered a complaint at CID Headquarters. The gist of the complaint was that KCB officials had made a document without authority of the Board Members to indicate that a loan balance of about Kshs.45 million which had been written off by the Bank had been written back by the new Board Members of KCB. The same official had conspired later with Joseph Okello Ougo of Oraro and Company advocates to defraud the complainant by

CONFIDENTIAL

advertising his Land property (securities) for sale without any instruction from Bank to do so.

During the investigations, IP Evans Sang and IP Ali Samatar (Investigating Officers) obtained a warrant to investigate the account of Benjoh Amalgamated held at Kenya Commercial Bank. Upon obtaining the warrant the bank's lawyers (Oraro & Company Advocates) sensed danger and proceeded to apply for prohibitory orders which were granted on 25th July 2007 on the following grounds among others:-

- 1) THAT, leave be and is hereby granted to the applicant to apply for an order of prohibition directed to the first respondent, his officers, agent or servants prohibiting them from investigating account No. 315043651017
- 2) THAT, leave be granted to the ex-parte applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from scrutinizing any books, records or documents whatsoever relating to the account
- 3) THAT, leave be granted to the ex-parte applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from making copies of any book, records or documents whatsoever relating to the account
- 4) THAT, leave be and is hereby granted to the applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from requiring any officer of the applicant to appear before them to record statements or to produce any document relating to the account

The import of the prohibitory orders was unveiled to the investigating officers through the DCI immediately the order was served on the first respondent. It is markedly clear that order 1, 2 and 3 were complied with to the letter, by the investigating officers. In other words, the said account was not accessed, no books, records or documents relating to the account was scrutinized, and finally, no copies of books, records or documents relating to the account were obtained.

CONFIDENTIAL

However, with regard to order 4, it is implicitly clear that the investigations against HALKANU MOLU and JOSEPH OKELLO OUGO had commenced on 11th June 2007 and three weeks later the bank officials were summoned at CID Headquarters for a joint discussion with investigating officers. Unreferenced letter purportedly from Kenya Commercial Bank writing off the Bank Loan of Kshs.45,900,000 was showed to HALKANU MOLU and he accepted to have authored the letter. He was asked for the KCB Board resolutions which wrote-off the Kshs.45,900,000 and the one which endorsed the write back of the loan but instead asserted that those records were destroyed by the Bank. The investigating officers endeavoured frantically to be shown the bank's certificate of destruction but to no avail. He was invited to reduce whatever he has acceded to in writing but declined to do so unless at a later date. Attempt to get him or access him with a view of recording statement ended up in an exercise in futility. The investigating officers had no better option except to apply for warrant of arrest as a last resort.

It is regrettable that HALKANU MOLU's warrant of arrest came into force more or less the same time the prohibitory order had been secured but was still not within the purview of the investigating officers. The fact that he was charged in court when the prohibitory order was in force is indeed inadvertent exercise. The only available recourse as at now is to place the actions of the investigating officers squarely under the aegis of Justice Kassanga Mulwa's recent ruling of 3rd January 2002 in respect of Misc. Civil Application No. 966 of 2000 in the High Court of Kenya, Nairobi between Peter Kuria & 3 others (Applicants) versus the Hon. Attorney General, where he cited **Kuloba J. in Floriculture International (Supra) and Khamoni J. in Kangwana vs AG (Supra)** by stating **"that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts or to say that a person should never be prosecuted in criminal proceeding when he has a civil suit filed against him relating to matters in the criminal proceedings."**

After desperate attempts to reach JOSEPH OUGO by the investigating officers who reckoned that the case against HALKANU MOLU cannot stand without enjoining JOSEPH OUGO, the latter's case was subsequently registered in court, hence the delay in the submission of the file(s) in

question to the Attorney General. Once again, the inordinate delay in forwarding the said file(s) to your end is highly regretted.

Please, I remain craving for direction.



MAURICE AMATTA
FOR: DIRECTOR, CRIMINAL INVESTIGATIONS

AG/CR/2014/2673

31st December 2008

Mr. Simon K. Gatibai nde (K) S/DCP II
Director of Criminal Investigations
CID Headquarters
NAIROBI

**RE: BENJOH AMALGAMATED LIMITED-VS.-KENYA
COMMERCIAL BANK**

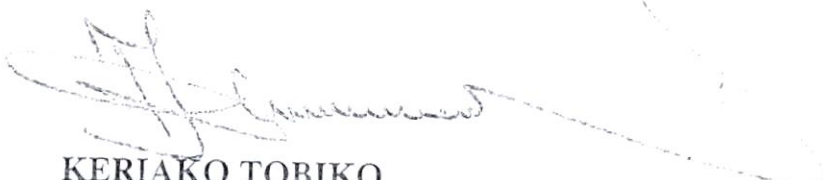
The above matter refers.

As you are well aware the Hon. Attorney General terminated by way of *Nolle Prosequi* two criminal cases against John Akelo Ougo (Advocate) and Halkano Molu, an officer of the Kenya Commercial Bank because the police had rushed to charge the said persons without carrying out thorough investigations notwithstanding the fact that the Hon. Attorney General had called for the investigations file(s) so as to give appropriate directions before the suspects could be arraigned in court.

A request has been made to the Hon. Attorney General to order investigations into Benjoh Amalgamated Limited's Account with Kenya Commercial Bank (No.315043651017) to determine whether or not there were any fraudulent transactions in relation thereto, as alleged by the complainants.

In the circumstances the Hon. Attorney General has directed that you undertake full and thorough investigations into the afore-said account and any other related matters and upon completion of the said investigations forward the file to the Hon. Attorney General for perusal and appropriate directions. The Hon. Attorney General further directs that under no circumstances should anybody be charged in relation to this matter without his specific instructions.

Be advised accordingly.



KERIAKO TOBIKO
DIRECTOR OF PUBLIC PROSECUTIONS

C.C

The Hon. Attorney General
Attorney General's Chambers
NAIROBI

Telegrams: "SHERIA", Nairobi

Telephone: Nairobi 227461

When replying please quote

Ref. No. **AG/CR/2014/2673**
and date



ATTORNEY-GENERAL'S CHAMBERS

P.O. Box 40112-00100

NAIROBI, KENYA

....., 20.....

9th October, 2007

Maj Gen. Hussein Ali, MGH, MBS
The Commissioner of Police,
Vigilance House,
Harambee Avenue,
NAIROBI.



- RE: 1. HIGH COURT MISCELLANEOUS CIVIL APPLICATION NO. 784 OF 2007 NAIROBI, KENYA COMMERCIAL BANK LTD - VS - THE COMMISSIONER OF POLICE, THE ATTORNEY GENERAL AND BENJOH AMALGAMATED LTD**
- 2. CRIMINAL CASE NO. 1447 OF 2007 NAIROBI REPUBLIC - VS - JOHN OKELLO OUGO**
- 3. CRIMINAL CASE NO. 1328 OF 2007 NAIROBI REPUBLIC - VS - HALKANO MOLU**
-

I refer to the above mentioned cases in respect of which the Hon the Attorney General has directed me to address you as hereunder;

On 26th August, 2007, Kenya Commercial Bank Ltd filed and served us with an application for Orders of Prohibition and court order dated 25th July, 2007. The gist of the application was to prohibit further investigations by police officers into an account held by Benjoh Amalgamated Ltd with KCB. The order granted KCB leave to institute the application for prohibition and directed that the grant of the leave do operate as stay. The effect of the stay order was to prohibit the police from investigating the said Bank account. Attached hereunto is a copy of the court order.

Upon receipt of the application, Mr. Vincent M. N. Wohoro, Senior Principal State Counsel, promptly wrote to call for the police file relating to the investigations on 1st, 16th and 23rd August, 2007 from the Director of Criminal Investigations. However, the police file was not forwarded to this office until 4th September, 2007, i.e., one month later and after the officer had proceeded to institute criminal proceedings against the above-named person. Attached hereunto are copies of the letters to the DCI.

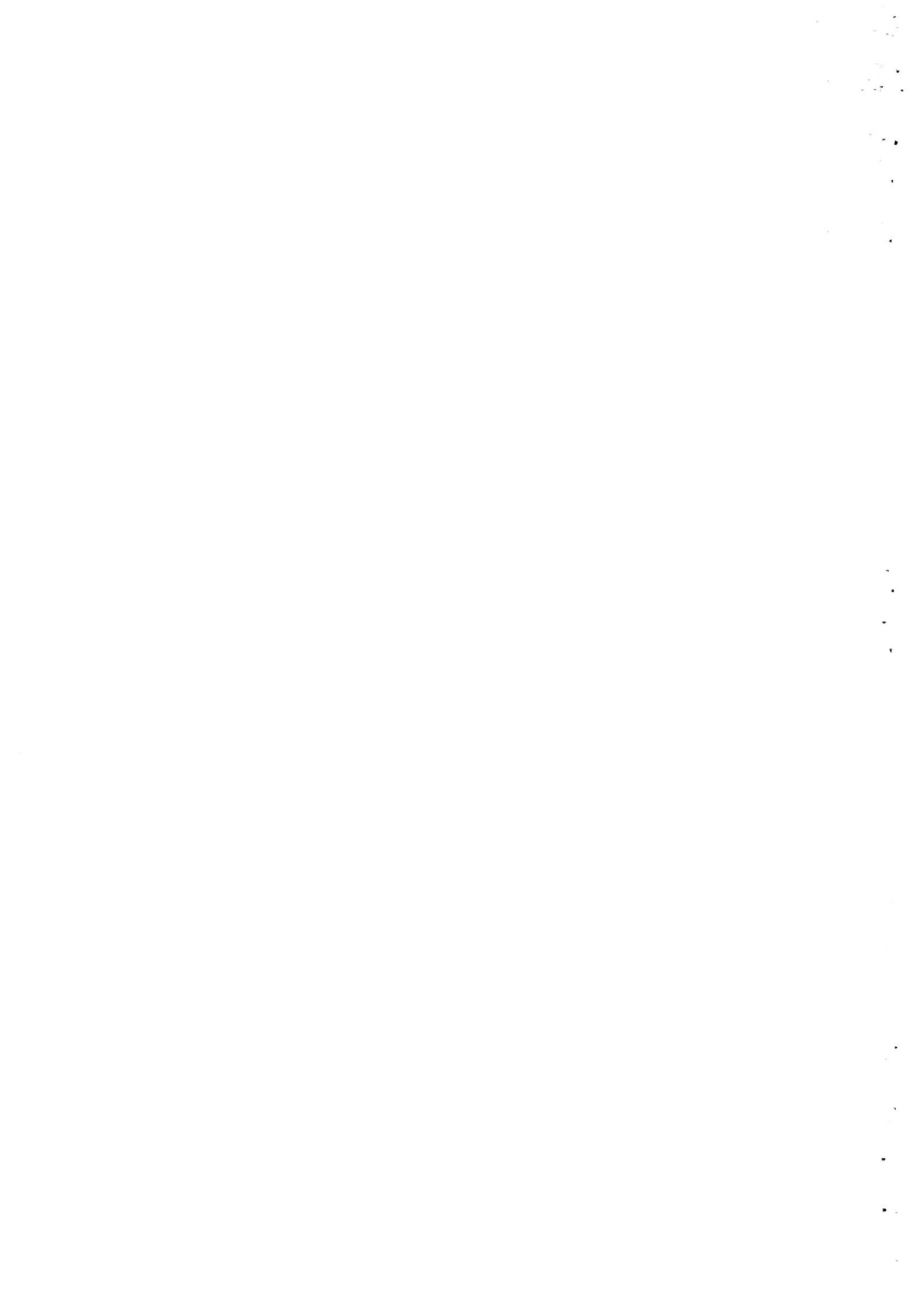
In the letter of 23rd August, 2007, we advised the police that we had been served with a notice to institute contempt proceedings against the Commissioner of Police and the officers investigating the case. Further, we advised that if they did not forward the police file, we would have no option but to terminate the case in the lower court. That letter was copied to you.

Instead of forwarding the file to us as directed, the police proceeded to institute criminal charges against the advocate for the bank (Mr. John O. Ougo) for alleged conspiracy to defraud. The said advocate was charged in criminal case number 1337 of 2007 while the bank official was charged in criminal case number 1328 of 2007. The said advocate was charged on 3rd September, 2007, after which the police file was then belatedly forwarded to us on 4th September, 2007.

On perusal of the police file, it became obvious that the charges preferred against the Bank Official (Mr. Molu) and those against the Bank's advocate (Mr. Ougo) were **hopelessly** unsustainable. For instance, although Mr. Molu was charged with the offence of **Making a Document without authority** c/s 357(a) of the Penal Code (Cap 63), no statement was recorded from any representative of the bank to confirm whether or not the letter in question was written by Mr. Molu **without the authority of the Bank**. In the absence of such confirmation, one wonders what would be the factual/or evidential basis of the charge of making a document without authority!

Similarly, as regards Mr. Ougo, although he was charged with conspiring to defraud Mr. Kungu Muigai the sum of Kshs. 70,102,456/= **"by advertising his properties through public auction for failure to service a bank loan, a fact he knew to be false"**, there is not a single statement from the Bank or any of its representatives confirming **whether or not Mr Ougo had been duly authorized or instructed by or on behalf of the bank to advertise for sale the property in question**. In the absence of such evidence, the charge of conspiracy to defraud had no legs to stand on!

In addition, the matters that the police sought to investigate had been the subject of protracted civil cases between the complainant and the Bank both in the High Court and the Court of Appeal, all of which were decided against the complainant and in favour of the Bank. Yet, the police did not consider the obvious implication of the numerous judgments in these case on the criminal charges preferred against Mr. Molu and Mr. Ougo.



Having given serious consideration to all the foregoing matters, the Hon. Attorney General concluded that no evidence had been disclosed to warrant the prosecution of the afore-mentioned persons and as a result directed that the criminal charges preferred by the police against them be terminated by way of Nolle Prosequi, which was duly done.

Further, the Attorney General directed me to inform you that he has taken great exception to the fact that, despite three letters calling for the relevant police file(s), the police failed and or refused to forward the same to this office until after one month and after they had already preferred criminal charges as afore-mentioned. The Attorney General has written to you previously to emphasize the importance of timely compliance with our directives by your officers.

Lastly, I wish to inform you that the application for leave to commit you, Inspector Evans Sang and Inspector Ali Samator to prison for contempt came for mention on 8th October, 2007 and Attorney General was given 21 days within which to file and serve his reply. The Attorney General by law is obliged to respond appropriately to the application. However, the flagrant disobedience and contemptuous conduct of the investigating officers may make it difficult for the Attorney General to offer a plausible explanation or justification for such conduct.

Accordingly, in order for the Attorney General to be able to adequately respond to the said application, we would **urgently** require an appropriate written explanation from the said officers in the form of affidavits. They should thus be directed accordingly.

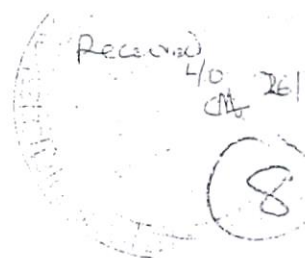


KERIAKO TOBIKO
Director of Public Prosecutions

Copy to:
Hon. Attorney General
NAIROBI

DCI
CID HQs
NAIROBI





REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. 784 OF 2007

In the matter of: An application by Kenya Commercial Bank Limited for leave to apply for an order of prohibition.

In the matter of: An application for Judicial Review under Order LIII Civil Procedure Rules.

In the matter of: An intended investigation of account number 315 043 651 017 at Kenya Commercial Bank Limited.

TOM WACHAKA
ADVOCATE
AND COMMISSIONER FOR OATHS
P. O. Box 9167-00300, NRB.
TEL: 020-2738803

An order issued by the Chief Magistrate's Court at Kibera on the 13th day of June, 2007.

24/07/07
1:30 pm

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPLICANT

VERSUS

THE COMMISSIONER OF POLICE.....FIRST RESPONDENT
THE ATTORNEY GENERAL.....SECOND RESPONDENT
BENJOH AMALGAMATED LIMITED.....THIRD RESPONDENT

In Chambers on the 24th day of July, 2007
before the Honourable Lady Justice Wendo

ORDER

APPLICATION FOR ORDERS:-

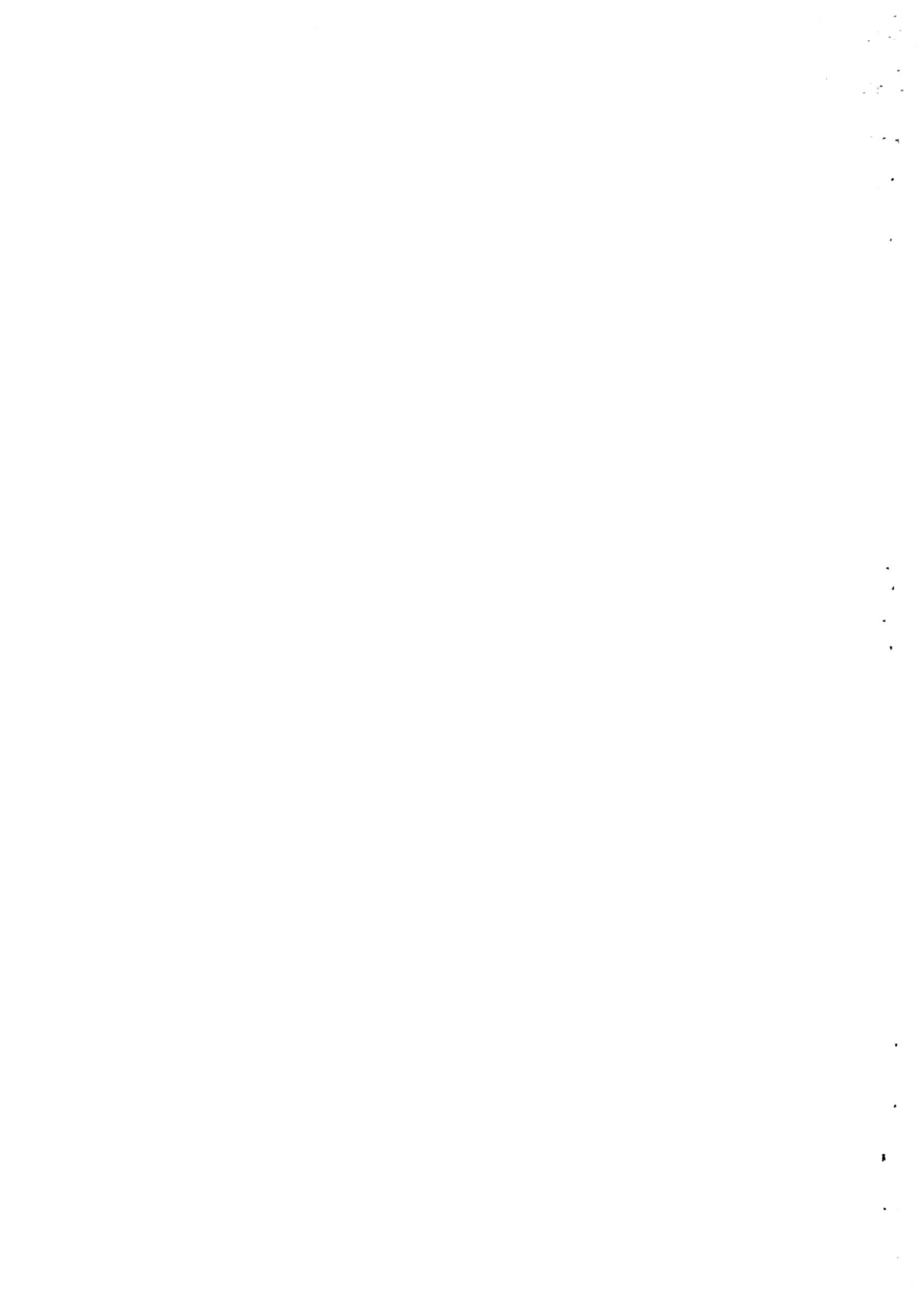
- (a) **THAT**, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from investigating account number 315 043 651 017 ('the account') in the name of the third respondent, in the *ex-parte* applicant's books.
- (b) **THAT**, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from scrutinizing any books, records or documents whatsoever relating to the account.



- (c) **THAT**, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from making copies of any books, records or documents whatsoever relating to the account.
- (d) **THAT**, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from requiring any officers of the *ex-parte* applicant to appear before them to record statements or to produce any document relating to the account.
- (e) **THAT**, the leave so granted do operate as a stay of the order issued by the Chief Magistrate's Court at Kibera on the 13th day of June, 2007, in Miscellaneous Criminal Application No. 180 of 2007 until the hearing and final determination of this application.
- (f) **THAT**, the leave so granted do operate as a stay of any directions by the first respondent, his officers or agents requiring any of the *ex-parte* applicant's officers to appear before them in relation to any matter concerning account, until the hearing and final determination of this application.
- (g) **THAT**, the leave so granted do operate as a stay of the scrutiny of any books, records, ledgers, banking slips or any other documents whatsoever relating to the account, or the making any copies thereof, by the first respondent or any his officers or agents.

UPON READING the application presented to this court on the 24th day of July, 2007 by counsel for the applicant under the provisions of Order LIII Rule 1(2) of the Civil Procedure Rules **AND UPON READING** the statutory statement also filed under the provisions of Order LIII Rule 1(2) of the Civil Procedure Rules and the verifying affidavit of **HALKANO MOLU** sworn on the 24th day of July, 2007 together with the annexures thereto in support of the application and **UPON HEARING** counsel for the applicant, in the absence of the respondents **IT IS HEREBY ORDERED:-**

- (1) **THAT**, leave be and is hereby granted to the applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from investigating account number 315 043 651 017 ('the account') in the name of the third respondent, in the *ex-parte* applicant's books.
- (2) **THAT**, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from scrutinizing any books, records or documents whatsoever relating to the account.



- (3) THAT, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from making copies of any books, records or documents whatsoever relating to the account.
- (4) THAT, leave be and is hereby granted to the applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from requiring any officers of the applicant to appear before them to record statements or to produce any document relating to the account.
- (5) THAT, the leave granted herein do operate as a stay.
- (6) THAT the substantive notice of motion be filed and served within the next 15 days of today's date.
- (7) THAT, in default, all the above orders will lapse automatically.
- (8) THAT, costs be in the cause.

GIVEN under my hand and the seal of this court at Nairobi this 24th day of July, 2007.

ISSUED at Nairobi this

25th day of July 2007

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.

DATED: 25th July 2007

DEPUTY REGISTRAR
HIGH COURT OF KENYA
NAIROBI

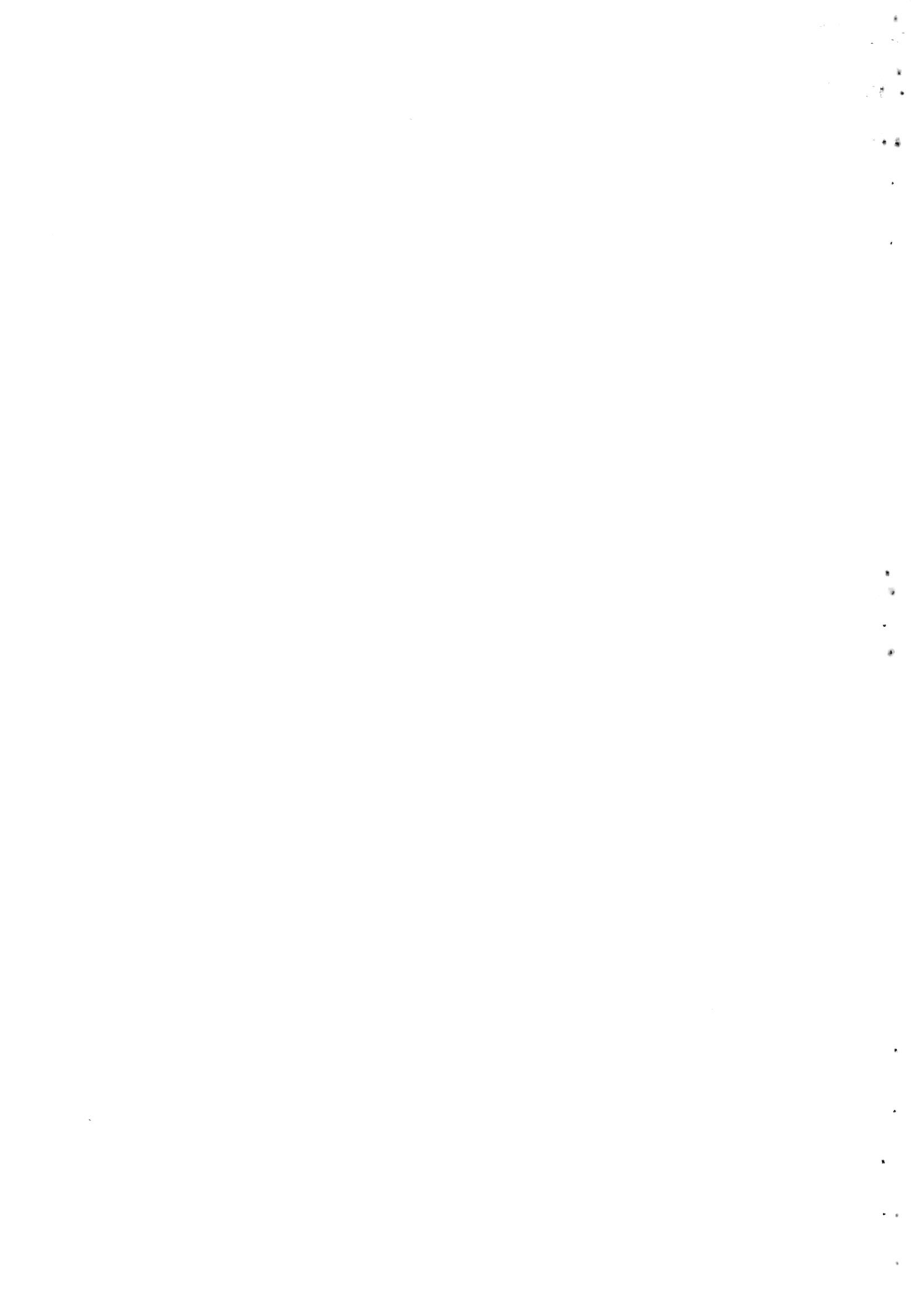
DEPUTY REGISTRAR
HIGH COURT OF KENYA AT NAIROBI

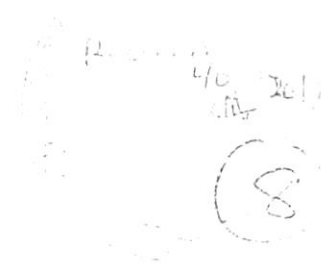
PENAL NOTICE

TAKE NOTICE that unless you comply with the terms of this order, contempt of court proceedings will be taken against you and you shall be liable to imprisonment or to the attachment of your property or to both of the above mentioned penalties.

DATED at Nairobi this 25th day of July 2007

ORARO & COMPANY
ADVOCATES FOR THE APPLICANT





REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. 784 OF 2007

In the matter of An application by Kenya Commercial Bank Limited for leave to apply for an order of prohibition.

In the matter of An application for Judicial Review under Order LIII Civil Procedure Rules.

In the matter of An intended investigation of account number 315 043 651 017 at Kenya Commercial Bank Limited.

TOM WACHUKA Advocate
AND COMMISSIONER FOR OATHS
P. O. Box 9161 - 00300, NRB.
TEL: 020-2726903

An order issued by the Chief Magistrate's Court at Kibera on the 13th day of June, 2007.

BETWEEN

24/07/07
1:30 pm KENYA COMMERCIAL BANK LIMITED.....APPLICANT

VERSUS

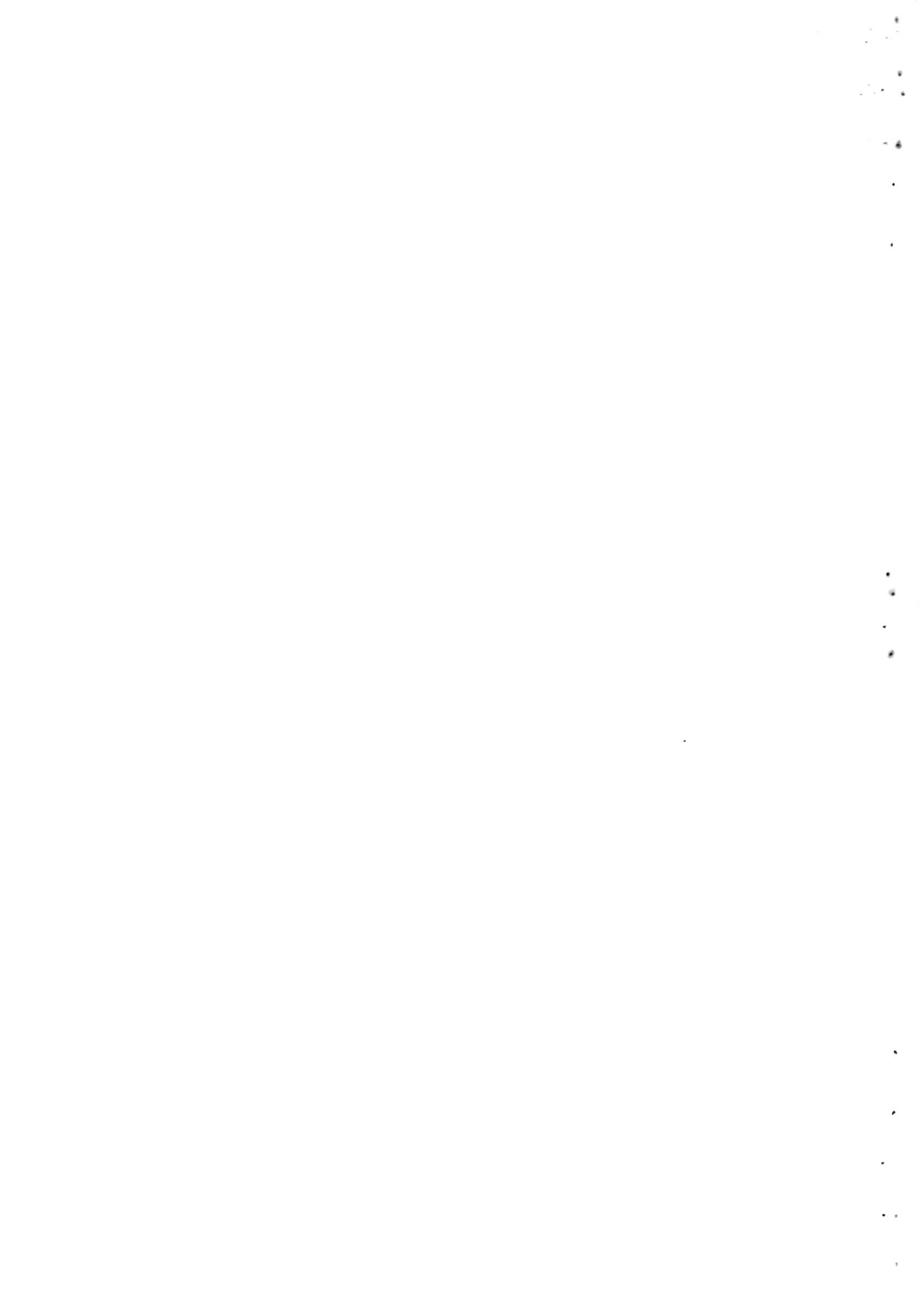
THE COMMISSIONER OF POLICE.....FIRST RESPONDENT
THE ATTORNEY GENERAL.....SECOND RESPONDENT
BENJOH AMALGAMATED LIMITED.....THIRD RESPONDENT

In Chambers on the 24th day of July, 2007
before the Honourable Lady Justice Wendo

ORDER

APPLICATION FOR ORDERS:-

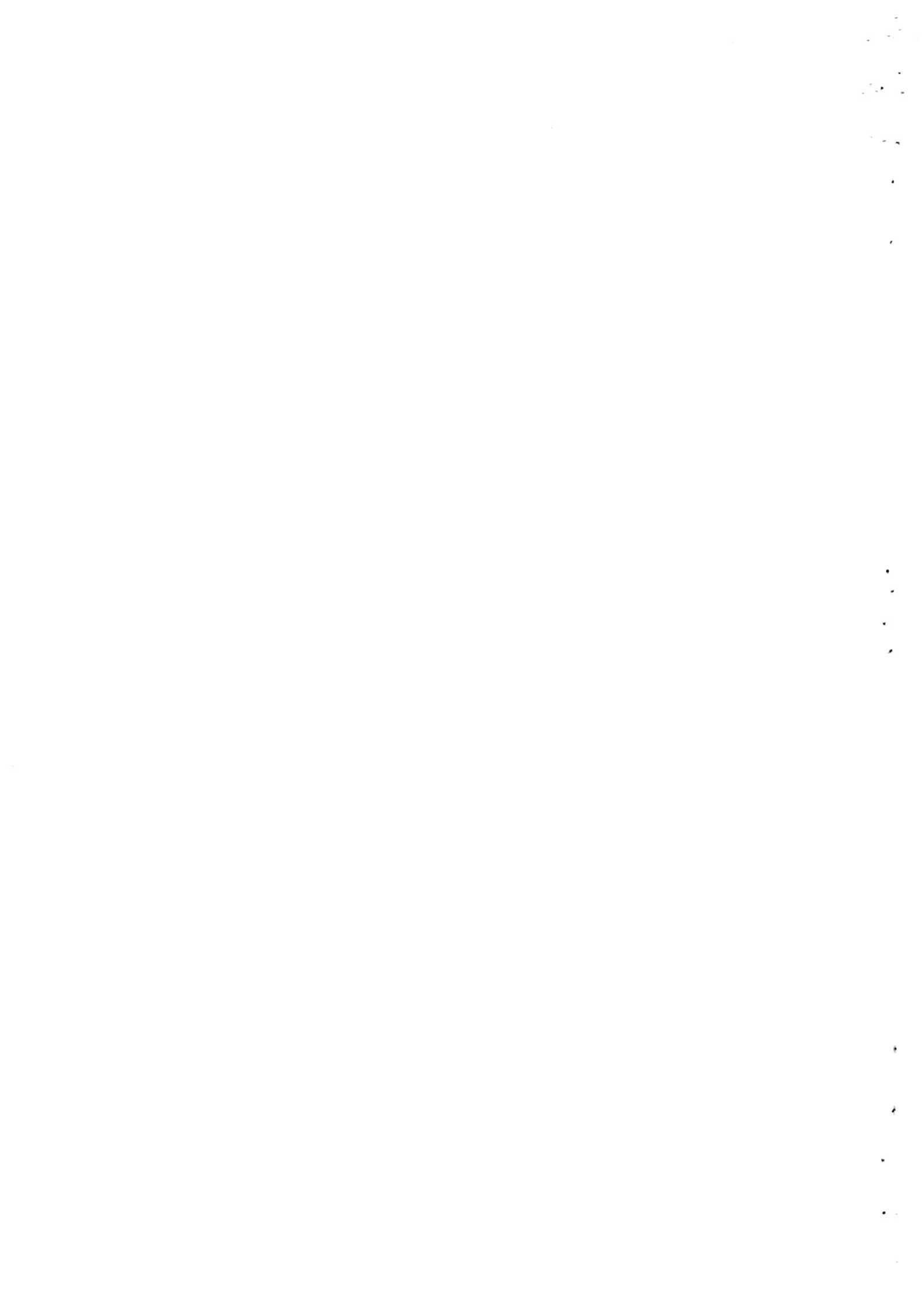
- (a) **THAT**, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from investigating account number 315 043 651 017 ('the account') in the name of the third respondent, in the *ex-parte* applicant's books.
- (b) **THAT**, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from scrutinizing any books, records or documents whatsoever relating to the account.



- (c) THAT, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from making copies of any books, records or documents whatsoever relating to the account.
- (d) THAT, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from requiring any officers of the *ex-parte* applicant to appear before them to record statements or to produce any document relating to the account.
- (e) THAT, the leave so granted do operate as a stay of the order issued by the Chief Magistrate's Court at Kibera on the 13th day of June, 2007, in Miscellaneous Criminal Application No. 180 of 2007 until the hearing and final determination of this application.
- (f) THAT, the leave so granted do operate as a stay of any directions by the first respondent, his officers or agents requiring any of the *ex-parte* applicant's officers to appear before them in relation to any matter concerning account, until the hearing and final determination of this application.
- (g) THAT, the leave so granted do operate as a stay of the scrutiny of any books, records, ledgers, banking slips or any other documents whatsoever relating to the account, or the making any copies thereof, by the first respondent or any his officers or agents.

UPON READING the application presented to this court on the 24th day of July, 2007 by counsel for the applicant under the provisions of Order LIII Rule 1(2) of the Civil Procedure Rules AND UPON READING the statutory statement also filed under the provisions of Order LIII Rule 1(2) of the Civil Procedure Rules and the verifying affidavit of HALKANO MOLU sworn on the 24th day of July, 2007 together with the annexures thereto in support of the application and UPON HEARING counsel for the applicant, in the absence of the respondents IT IS HEREBY ORDERED:-

- (1) THAT, leave be and is hereby granted to the applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from investigating account number 315 043 651 017 ('the account') in the name of the third respondent, in the *ex-parte* applicant's books.
- (2) THAT, leave be granted to the *ex-parte* applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from scrutinizing any books, records or documents whatsoever relating to the account.



- (3) THAT, leave be granted to the *ex parte* applicant to apply for an order of prohibition directed to the first respondent, his officers, agents or servants prohibiting them from making copies of any books, records or documents whatsoever relating to the account.
- (4) THAT, leave be and is hereby granted to the applicant to apply for an order of prohibition directed to the first respondent, his officers or agents prohibiting them from requiring any officers of the applicant to appear before them to record statements or to produce any document relating to the account.
- (5) THAT, the leave granted herein do operate as a stay.
- (6) THAT the substantive notice of motion be filed and served within the next 15 days of today's date.
- (7) THAT, in default, all the above orders will lapse automatically.
- (8) THAT, costs be in the cause.

GIVEN under my hand and the seal of this court at Nairobi this 24th day of July, 2007.

ISSUED at Nairobi this

25th day of July 2007

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.

DATED: 25th July 2007

DEPUTY REGISTRAR
HIGH COURT OF KENYA
NAIROBI

DEPUTY REGISTRAR
HIGH COURT OF KENYA AT NAIROBI

PENAL NOTICE

TAKE NOTICE that unless you comply with the terms of this order, contempt of court proceedings will be taken against you and you shall be liable to imprisonment or to the attachment of your property or to both of the above mentioned penalties.

DATED at Nairobi this

25th day of July 2007

ORARO & COMPANY
ADVOCATES FOR THE APPLICANT

4A

AG/CR/2014/2673

23rd August, 2007

The DCI
CID Headquarters
Mazingira House
NAIROBI

Dear Sir

**RE: HIGH COURT MISC CIVIL APPLICATION NO. 784 OF 2007
REPUBLIC VERSUS THE COMMISSIONER OF POLICE, THE
ATTORNEY GENERAL AND BENJOH AMALGAMATED LTD EXPARTE
KENYA COMMERCIAL BANK LIMITED**

We refer to our letter of 1st August and 14th August, 2007 and note that we have yet to receive your reply thereto.

The Hon. Attorney General directs that the police file relating to the above matter and in particular the **Miscellaneous Criminal Application No. 180 of 2007, Republic through I.P Evans Sang Kenya Police Versus Kenya Commercial Bank**, be forwarded forthwith to the department of Public Prosecutions as a matter of urgency.

We wish to inform you that a notice to commence contempt proceedings has been filed and served on us seeking the committal of the Commissioner of Police, Inspector Evans Sang and Ali Samator for contempt of court.

We hereby notify you that if we do not receive the relevant police file, forthwith We shall have no option but do as follows:

- 1) Concede the applications filed by the bank in the High Court.
- 2) Terminate the Criminal Proceedings in the Lower Court.

Indeed we wish to express our surprise at the fact the police decided to charge the accused in the **Chief's Magistrate Court Criminal Case No. 1328 of 2007, Republic Versus Halkano Molu**, when we had already called for the police file relating to the matter.

Kindly expedite.

Yours faithfully



VINCENT M N WO HORO
SENIOR PRINCIPAL STATE COUNSEL

.cc: The Commissioner of Police
Vigilance House
Harambee Avenue
NAIROBI

Encl.

AG/CR/2014/2673

15th April 2011

Director of Criminal Investigations
CID Headquarters
NAIROBI

ATT: MICHAEL MUGO

RE: CR.121/672/2007 CF.1447/2007 AND CR.121/619/2007 CF.
1328/2007
ACCUSED: HALKANO MOLU AND JOHN AKELO OUGO
(DECEASED)

I have been directed by the Hon. Attorney General to acknowledge receipt of your letter Ref: CID/SEC/LCA/4/4/1/VOL.VII/183 dated 3rd February 2011 forwarding the afore-mentioned file for perusal and advice.

The file has been placed before the Hon. Attorney General who has directed that before he can give final directives on this matter the following areas should be covered by way of further and thorough investigations:

1. Confirm when, who and how Account No.315043651017 was opened. Who were the signatories to this account?
2. According to the letter by Martin Oduor Otieno, CEO, KCB dated 12th November 2010 (see "J10") the bank approved an overdraft facility of Kshs.1.8 million on 3rd August 1989 and an additional overdraft of Kshs.1.25 million on 16th July 1990. This made the total overdraft to be Kshs.3, 060, 000. How was the overdraft drawn down?
3. The same letter ("J10") also states that a loan of Kshs.7.2 million was approved on 3rd August 1989. However, the same letter in Part (b) of the paragraph headed "HISTORY OF ACCOUNT 315043651017" states that drawdown was made with effect from July 1989. How did this happen?

4. Wilfred Kipkorir Sang, D2 who is KCB's Director of Credit appears to contradict the letter by Martin Oduor by stating that Benjoh was given a loan of Kshs.16, 875, 000 and an overdraft of Kshs.1.8 million on 12th April 1989. Why this contradiction? Martin Oduor Otieno and Wilfred Kipkorir Sang, D2 should record a statement and further statement respectively to clarify this anomaly.
5. Conditions 3 and 4 of the Letter of Offer provided that the loan proceeds were to be released directly to the suppliers of goods and contractors of buildings. Which suppliers and contractors were paid by KCB and were the payments authorised by the account holder? Where are the documents to evidence such payments?
6. After Justice Khaminwa ordered KCB to supply Benjoh with the final statements of account on 3rd November 2008, KCB supplied a statement that opens with an entry of balance brought forward of Kshs.14 million as at 1st September 1991 (see **B56**). It is not clear how this balance was arrived at. In her ruling dated 17th November 2009 Justice Khaminwa held that this statement of account was manufactured to deceive Benjoh that it owed KCB Kshs.70 million. The investigating officer should establish who prepared this statement and record a statement from him/her on how the balance of Kshs.14 million was arrived at.
7. On 29th May 2006 KCB wrote to M/S Oraro & Company Advocates advising them that the amount KCB was demanding from Benjoh was Kshs.70, 102, 456 (see **B71**). In this letter KCB states that files and bank statements got lost or misplaced. The investigating officer should establish the circumstances under which the bank files got lost or misplaced. Was there foul play?
8. In the letter referred to above (**B71**) KCB says that Kshs.45, 900, 000 had been written off in 1996. In the absence of statements how was this figure worked out and in what circumstances was it written off? The investigating officer should record statements from the relevant officer(s).
9. According to the letter by Martin Oduor Otieno earlier mentioned ("**J10**") KCB instructed its lawyers on 16th August 2007 to sell the property to recover Kshs.70, 102, 456. A letter written by the auctioneers to Muiiri Coffee Estate Ltd also indicate the amount claimed to be Kshs.70, 102, 456 (see **B20**). However, according to the statement provided following Justice Khaminwa's orders

the debt as at 16th August 2007 was Kshs.167, 384, 841. What is the explanation for this disparity and why was KCB only demanding only Kshs.70 million which is less than half of the amount owed?


10. In 2006 KCB contracted Centenary Valuers to conduct a valuation of L.R. 10075, Kiambu and in a report dated 24th November 2006 they returned a market value of Kshs.82 million and a forced sale value of Kshs.58 million (see B17). Two other valuations were conducted by two other valuers namely Metrocosmo and Belair at the instance of the CID. The two valuers valued the property at Kshs.756 million and Kshs.693 million respectively. Benjoh have argued that KCB colluded with their valuer to undervalue the property. The property in question measures 443 acres and simple arithmetic shows that KCB's valuers namely Centenary Valuers valued the property at roughly Kshs.185, 000 per acre. All the valuers should record statements explaining the basis of their valuation.
11. The police should record detailed statements from all the people who are involved in this matter. These are the officials who prepared Benjoh's statement of account, those who approved the auction of Benjoh's property at Kshs.70 million, the lawyers who were/are handling this matter on behalf of KCB and Benjoh, the auctioneers who auctioned the property and the buyers.

This being a very old matter the afore-mentioned areas should be covered within **thirty (30)** days after which the file should be re-submitted for further directions.

The Hon. Attorney General has also received a copy of a letter of death threats complaint by Mr. Phillip Nyachoti of M/S Nyachoti & Company Advocates dated 4th March 2011 addressed to yourselves (a copy is enclosed herewith for ease of reference). The Hon. Attorney General has consequently directed that you urgently conduct thorough investigations into the matter and submit a separate investigations file for directions.

Kindly proceed accordingly.

Your file is herewith returned.


JAMES MUNGAI WARUI
PRINCIPAL STATE COUNSEL
For: ATTORNEY GENERAL



CONFIDENTIAL
OFFICE OF THE PRESIDENT

TELEGRAMS: CRIMINAL NAIROBI
TELEPHONE: NAIROBI 020-2603724
FAX: 020-2402245 NAIROBI
E-mail: director@cid.go.ke



KIAMBU ROAD
P.O. BOX 30036-00100 G.P.O.
NAIROBI

When replying, please quote our ref. No.
and date

DIRECTORATE OF CRIMINAL INVESTIGATION

CID/SEC/6/2/19/1/VOL.1/11

1st November 2011

The Commissioner of Police,
Police Headquarters,
P. O. Box 30083,
NAIROBI.

BENJOH AMALGAMATED LTD AND KENYA COMMERCIAL BANK

On 13th October, 1988 Benjoh Amalgamated Ltd applied to KCB for a loan of Kshs, 11,675,000/= to finance a flower farming project. Sometimes in early 1989, Benjoh bought two parcels of land in Njabini for the Flower project.

A charge was registered over the two parcels of land for Kshs. 11,675,000/=. A support guarantee of Kshs. 7,000,000 was also executed over LR NO. 10075 in Kiambu belonging to Muiri coffee estate (also belonging to Benjoh).

It was agreed in the terms of offer between them that KCB would effect payments directly to Benjoh's contractors when bills are due.

By 1990, Benjoh had planted flowers at the Njabini parcels of land, but according to Benjoh, KCB failed to release the remainder of the money thereby occasioning the project to fail. As a result, Benjoh was granted a further loan of Kshs. 4,500,000 to re-invigorate the failing project.

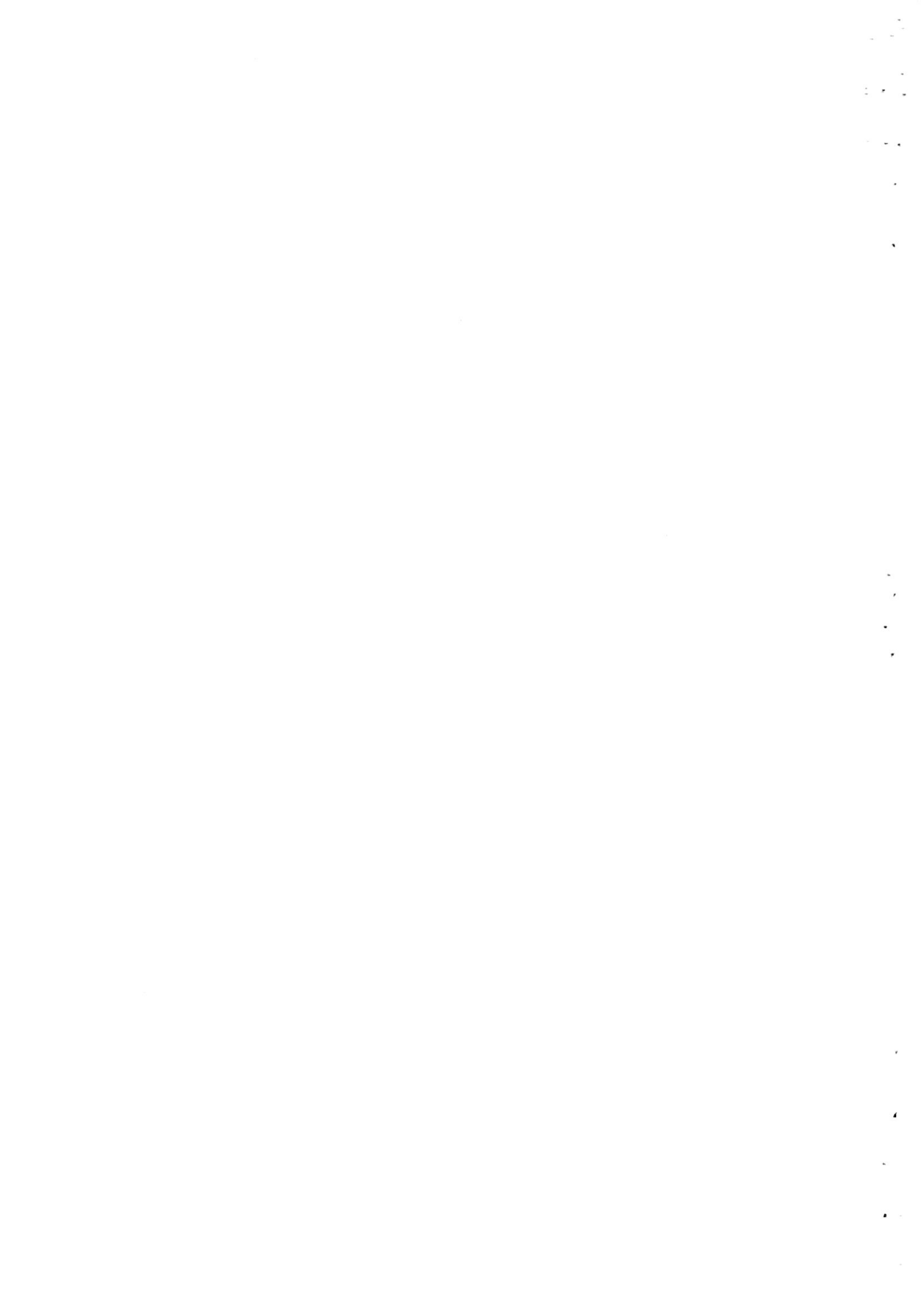
A further charge was registered in favour of the Bank with the Kiambu Land LR. No. 10075 for Kshs. 4,500,000/=. The bank then released Kshs. 1,200,000 to Benjoh who however, claim that when the flowers were ready, KCB failed to pay for the freight charges and thus adversely affecting their flower business.

There were further negotiations between Benjoh and KCB to jumpstart the project but these also failed and KCB advertised the securities for sale.

Benjoh's principle shareholder James Muigai Ngengi (deceased) paid the sum of Kshs. 6,000,000/= on 6th December, 1994 after attempts to have the loan written off due to shared blame between Benjoh and KCB failed to materialize. A lot of litigations subsequently followed between the two parties in the interest of their rights over property.

pg. 1

CONFIDENTIAL



In 1996 Benjoh filed HCC No. 1520/1996 against KCB and Muiri coffee estate. The case was lost in favour of KCB who went ahead to sell Muiri coffee estate for Kshs. 70,000/= to Bidii Kenya Ltd, on 19th September, 2007.

Sometimes in the year 2008, Benjoh filed another suit to restrain Bidii Kenya Ltd from taking possession of Muiri coffee farm and also seeking to be given the final loan accounts. The court did not grant an order restraining Bidii from taking possession of the farm but allowed the request for provision of the final accounts.

Pursuant to the court's ruling, KCB sent a statement of account to Benjoh on 11th December, 2008. The statement however, started with a Balance brought forward in September, 1991 of Kshs. 14,468,937.45 and a balance carried forward of Kshs. 124,105,636.55.

Dissatisfied with the statement, Benjoh went back to court on 17th December, 2008 to demand for a comprehensive statement. Before they could be heard, Bidii Kenya Ltd also filed an application dated 22nd January, 2009 seeking the court to strike out the plaint HCC No. 499 as being res judicata.

The applications were consolidated and Justice Khaminwa delivered the following ruling on 17th November, 2009:-

1. KCB has never supplied statements of accounts to Benjoh since opening of the account in 1989.
2. The balance of Kshs. 14,468,937.45 stated in first page of statement supplied on 1/9/1991 is not known where it originated from as no previous transactions are shown. In addition, balance brought forward should indicate commencement of the account.
3. The way the account is maintained by KCB is an indication of fraud. KCB made up accounts to deceive Benjoh that Kshs. 70,000,000 was due and owing without any basis at all and KCB sold the securities basing on that reason only.
4. On 17/7/2008 when the so called purchase price was credited in the account, the balance was Kshs. 168,065,347. That was tantamount to selling the land below half price. That under sale indicates fraud and negligence of the chargee in selling the chargor property without protecting his interests.
5. KCB furnished an account which is not satisfactory, exposes more disputes and brings to doubt if the right of sale by the bank had indeed arisen and whether there was any money outstanding and due to the Bank.

CONFIDENTIAL

The judge went on to rule that the plaint by Benjoh in HCC No. 494 of 2008 cannot be struck off as it contains substantial claim on accounts and consequently KCB filed a judicial review - (Misc Civil Appl. No. 275 of 2009) seeking to prohibit the Commissioner of Police from investigating the Benjoh account or recording statements or produce documents relating to the account.

This judicial review was argued before Justice Gacheche on 24th June, 2010 who later in her ruling dismissed it with costs in favour of Benjoh.

After dismissal of the application the DPP directed that investigations on Account No. 315043651017 proceeds. (copy of letter attached).


The relevant duplicate file was forwarded to the Hon. Attorney General vide CID/SEC/LCA/4/4/1/VOL.VII/183 dated 3rd February, 2011. After perusal, the Attorney General re-submitted the file to vide his letter AG/CR/2014/2673 dated 15th April, 2011 directing us to cover several areas by way of further and thorough investigations (copy of letter attached).

On 7th July, 2011 we wrote to the Chief Executive Officer KCB in an attempt to get a response to the points raised by the DPP. The CEO however failed to respond thus occasioning a meeting between Mr. Martin Oduor the CEO KCB, Mr. Malakwen the Company Secretary and Mr. Sang the Credit controller on one hand and Mr. Macharia, ACP, OC. ECCU Mr. Bosire, SSP and C.I. Chemitei. After lengthy discussions, the bank officials agreed to cooperate and assist the investigating team.

On 20th September, 2011 the bank replied but evaded addressing all the salient points raised. Instead, they referred us to previous correspondences and pending court matters.

It is on the strength of this that we finally decided to record statements from the Bank officials to shed light to the case. They have been evasive in meeting the investigators. As a result, they were served with Notification of attendance under Section 22 of the Police Act to appear at CID Headquarters on 28th October, 2011.

You may wish to note that on 15th September, 2009 METROCOSMO Ltd conducted an independent valuation of the acreage of Muiri farm. The finding revealed that acreage was 443 acres with a market value of Kshs. 740,000,000 with machinery worth Kshs. 16,000,000/=. This brought the total amount to 756,000,000. The forced value was found to be Kshs. 567,000,000/=.


NDEGWA MUHORO, 'ndc' (K)
DIRECTOR CRIMINAL INVESTIGATION

CONFIDENTIAL

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 218 OF 2011

BETWEEN

KENYA COMMERCIAL BANK LTD 1ST PETITIONER
DAVID KIPROP MALAKWEN 2ND PETITIONER
WILFRED KIPKORIR SANG 3RD PETITIONER

AND

THE COMMISSIONER OF POLICE AND
THE DIRECTOR OF CRIMINAL
INVESTIGATIONS DEPARTMENT 1ST RESPONDENT
HON ATTORNEY GENERAL 2ND RESPONDENT

AND

MUIRU COFFEE ESTATE
LIMITED 1ST INTERESTED PARTY
BENJOH AMALGAMATED LTD 2ND INTERESTED PARTY

JUDGMENT

Introduction

1. According to the material before the court, this petition is another proceeding in a long running saga that has occupied judicial space and time over the last 20 years. According to Justice Lenaola, *"This suit is one of those that fall within the category of a relationship between banker and customer gone sour. Sour is even mild....."* (See *Benjoh Amalgamated Ltd & Muiru*

Coffee Estate Limited v Kenya Commercial Bank Ltd, Nairobi
HCCC No. 1576 of 1999 (Unreported)).

2. This petition is not strictly a dispute between the bank and its customers but one between the bank and its the employees on one hand and the State on the other. The interested parties were the bank's customers who have precipitated these proceedings. The petitioners accuse the State of infringing and or violating their constitutional right to a fair trial under **Article 50** of the Constitution.
3. The genesis of the relationship between the Kenya Commercial Bank Limited ("KCB") and the interested parties is that sometime in 1988, USAID developed a programme whereby rural entrepreneurs would be granted loans through Kenya Commercial Bank ("KCB") to undertake commercial projects. Benjoh Amalgamated Limited applied for funds through KCB. An overdraft facility of Kshs.1.8 million was approved in 1989 and further loan was also approved in the same year. In 1990 an additional overdraft facility was granted to Benjoh Amalgamated Limited.
4. These facilities were secured by three parcels of land owned by the 1st and 2nd interested parties that is, LR 10075 situated in Kiambu, LR 12411/1 and LR 12411/2 situated in Njabini, Nyandarua.

The cases between KCB, Benjoh Amalgamated Limited and Muiru Coffee Estates Limited

5. Due to default by the interested parties in servicing the banking facilities, KCB evinced its intention to realise its securities. This led to a series of disputes between the parties. The suits and

decisions of the respective courts are matters of public record. These cases are as follows;

- (1) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd* Nairobi HCCC No. 1219 of 1992. By a consent judgment and decree dated 4th May 1992, the plaintiffs agreed to pay outstanding sums by 31st July 1992 failing which the defendant was at liberty to realise the securities. The plaintiffs successfully applied to set aside the consent order causing KCB to appeal.
- (2) *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited & Muiru Coffee Estate Limited* Nairobi Civil Appeal No. 276 of 1997. The Court of Appeal set aside the order of High Court which set aside the consent judgment recorded in *HCCC No. 1219 of 1992*. The consent so recorded was reinstated by the court in its judgment delivered on 10th March 1998.
- (3) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd* Nairobi HCCC No 285 of 1993. After the default in complying with the consent recorded in *HCCC No. 1219 of 1992*, KCB advertised the properties for sale, the plaintiffs filed this suit and applied for an injunction. On 8th February 1993, the Court dismissed the plaintiffs' application for an interim injunction to restrain the bank from selling the securities.
- (4) *Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd & Benjoh Amalgamated Ltd* Nairobi HCCC No. 1520 of 1996. This suit was filed after a further attempt to realise the securities. On 26th June 1996, the court dismissed both

the application for interlocutory injunction as well as the suit.

- (5) *Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd, Watts Enterprises and Meghji Kanji & Company Limited* Nairobi HCCC No. 1611 of 1996. On 26th January 1998, the court struck out the suit on application by the 1st defendant.
- (6) *Benjoh Amalgamated Ltd v Kenya Commercial Bank Ltd* Nyeri HCCC 24 of 1997. Once again the bank's efforts to realise the securities were thwarted by filing of this suit seeking to stop the sale. On 9th May 1997, the court struck out the suit on grounds that it was *res judicata*.
- (7) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd* Nairobi HCCC 1576 of 1996. This case was a further attempt to salvage the properties. It is noteworthy that one of the prayers in the suit was that the plaintiff's sought an account of the amount owed. After hearing the suit, Justice Lenaola dismissed the suit on the ground that it was *res judicata* and an abuse of process. Key to the court's finding was that the matter in issue had been settled by the consent recorded in *HCCC 1219 of 1992*.
- (8) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd* Nairobi Civil Appeal No. 239 of 2004. This was an appeal from the judgment of Justice Lenaola in *HCCC 1576 of 1999*. The Court of Appeal affirmed the decision of Justice Lenaola and held that the suit was *res judicata* and an abuse of the court process in view of the previously decided cases.

(9) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd* HCCC 243 of 2006. The suit was struck out on the grounds that it was *res judicata* and an abuse of the court process.

(10) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd* Nairobi Petition No. 352 of 2007. The petitioner sought to have the securities held by the bank declared unconstitutional and a breach of their fundamental rights and freedoms. On 30th May 2007, Justice Emukule struck out the petition on the ground that it raised no constitutional issue and the matters raised were *res judicata*.

(11) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd* Nairobi HCCC 122 of 2007. This suit was struck out by Justice Warsame on 17th June 2008 on the ground that it was frivolous, vexatious and an abuse of the court process in view of the previously decided suit.

Petitioner's Case

3. What triggered those proceedings were requisitions to compel attendance issued under section 22 of the *Police Act (Cap 84 of the Laws of Kenya)* to the 2nd and 3rd petitioners. These requisitions required them to report at the CID Headquarters along Kiambu road on 28th October 2011 in relation to an investigation concerning the making of a document without authority and conspiring to defraud in respect of the interested parties account with KCB.

4. It is common ground that these requisitions were issued based on a complaint lodged by Benjoh Amalgamated Limited alleging fraud in relation to A/C No. 31504365107. This matter was the subject of correspondence between KCB and the 1st respondent. In a letter dated 12th November 2010, the Chief Executive Officer of KCB wrote to the Director of the CID, in part, as follows, *“We refer to your letter dated 13.9.2010 on the above subject and write to confirm that the Bank will endeavour to respond to the issues raised to the best of our ability taking into consideration that this has been a long drawn-matter running into several years. We however wish to put to your attention that all the issues you have raised in your letter have been determined before by the various courts through civil litigation filed by the customer and by the bank and all information provided hereunder is on an entirely without prejudice basis more so bearing in mind the many rulings and judgments of both the High Court and the Court of Appeal on the same issues. As such we believe that the said proceedings, rulings and judgments made by the courts can be relied upon since such are admissible in evidence. We enclose herein some of the rulings and judgments for your ease of reference. Consequently our response and the customer’s complaints should be read together with the findings of the courts. Having registered our intention to cooperate fully in your investigations, it is our considered view without prejudice, that the customer having lost through the various civil cases in court over the years has now opted in bad faith to turn the whole matter into a criminal complaint for a purpose other than that of upholding the criminal law but to bring pressure to bear upon the bank to settle the civil dispute.....”*

5. The letter set out the background of the relationship between the 1st petitioner and the interested parties. That letter was duly

received and in response, a letter dated 7th July 2010 was sent from the CID to the Chief Executive Officer of KCB.

6. The letter from the CID raised several queries which the Attorney General had asked for certain clarifications. The query that led to the investigation and issuance of the requisitions was the ruling of Hon. Lady Justice Khaminwa in *HCCC No. 494 of 2008* which I shall advert to later in the judgment.
7. In response to the letter dated, 7th July 2011, the Chief Executive Officer, KCB once again wrote to the 1st respondent setting out in detail all the cases that had been determined by the High Court and Court of Appeal including those pending in respect of the inquiry at hand. In the letter he stated that in his view it, "*was grossly illegal, mischievous, unfair, unprocedural and totally untenable for the [the interested party] to try and use your good offices so as to illegally obtain information and for evidence on matters pending for trial in the High Court and the Court of Appeal.....*"
8. According Mr Nyachoti, counsel for the petitioners, the steps taken by the 1st respondent in relation to the complaints lodged by the interested parties while the various suits are still pending is an attempt to deprive them the right to a fair trial enshrined in **Article 50(1)** of the Constitution particularly in view of the fact that the matters subject of the complaint have been determined by the courts.

Respondents' Case

9. The respondents have opposed this petition through the replying affidavit of Chief Inspector James Chemitei sworn on 8th December 2011. Inspector Chemitei deposes that the 1st

petitioner answers to the allegations were unsatisfactory and unclear and the 1st respondent wrote to the KCB on 7th July 2011 requesting certain clarifications on matters contained in the letter dated 12th November 2010 but it did not give a comprehensive response. It was necessary to issue a requisition to compel attendance under **section 22** of the **Police Act** to the 2nd and 3rd respondents as investigations of allegations of making a document without authority in KCB's dealing with the complainant's loan account had been made.

10. The respondents argue that although the substantially touches on the disputes that have been and are before court, the 1st respondent has a constitutional duty to investigate any criminal aspect of the dealing with the loan account by the KCB and its employees. It was further contended that the requisition is not an act of coercion or undue influence but part of investigations of allegation of making a false document against KCB and only its officials can answer such a requisition which is not conclusive but part of the process of investigations.
11. The respondents also filed grounds of opposition dated 21st November 2011 where the petition was opposed on the following grounds:-
 - 1) *That the orders sought cannot be granted as they are in contravention of Article 245(2)(a) and 245(4)(b) of the Constitution of Kenya.*
 - 2) *That prayers sought cannot be granted as they are in contravention of Article 157(4) and 157(10) of the Constitution.*
 - 3) *That the rules of sub judice and res judicata cannot be invoked to bar concurrent and parallel criminal investigations to the civil suit.*

- 4) *That the entire petition ought to be dismissed with costs as the police are legally mandated to issue a requisition under section 22 of the Police Act but the petitioner have not demonstrated how the respondents have violated or usurped the powers conferred under section 22 of the Act.*
- 5) *That the prayers sought cannot be granted because the doctrine of self-incrimination does not extend to corporate criminal liability.*

12. Mr Kuria, counsel for the respondent, argued the case involves investigations by the police and the fact that a civil case is pending does not in itself mean that the criminal process must be stopped. Both processes can proceed contemporaneously. He contended that the petitioners had not demonstrated that the requisition under section 22 of the *Police Act* was unconstitutional in any manner and that no one would be compelled to give incriminating evidence.
13. Counsel further maintained that if KCB was aggrieved by the criminal process, then its remedy was to move the court in the civil matters to stop the police investigations.
14. As regards the 2nd and 3rd petitioners, Mr Kuria, submitted that it cannot be argued by the petitioners that since they were not employed by the bank at the material time the offences are alleged to have been committed, they cannot be investigated. In his view, the doctrine of perpetuity of a company entitles the state to investigate the employees of a company at a particular time as a company acts through people and it is the employees of the company who must be investigated. Counsel further submitted that the 2nd and 3rd respondents cannot resist investigations in respect of matters concerning the company.

15. Finally, Mr Kuria, asserted that this matter was *res judicata* in so far as the court dealt previously with similar matters. These matters are apparent from the affidavit of Samuel Kungu Muigai sworn on 3rd November 2011. They are as follows;

- (1) *Republic v Commissioner of Police & 2 others ex parte Kenya Commercial Bank Limited* Nairobi HC Misc. 784 of 2007. This was a judicial review application seeking to stop investigations of account No. 315043615017 at KCB and to stop an order issued by the Chief Magistrate's Court Kibera on 13th June 2007. The matter was withdrawn on 9th October 2008.
- (2) *Republic v The Commissioner of Police and others ex parte Kenya Commercial Bank Limited* Nairobi HC Misc 275 of 2009. This was an application for orders of judicial review seeking to stop the Commissioner of Police from investigating Account No. 315043651017 in the name of the Benjoh Amalgamated Limited. The application was dismissed by Justice Gacheche on 24th June 2010.

Interested Parties Case

16. The 1st interested party, Muiru Coffee Estate Limited, represented by Mr Wambugu, relied on the affidavit of Samuel Kung'u Muigai sworn on 3rd November 2011. Mr. Muigai confirms that two suits led to the filing of the complaint against the 1st petitioner.

- (i) *Benjoh Amalgamated Ltd v Kenya Commercial Bank Limited and Bidii Kenya Limited* Milimani HCCC No. 494 of 2008. The case concerned the sale of the property LR No. 10075, Kiambu to the 2nd defendant. Though the

court did not grant an injunction. Justice Khaminwa ordered that the proper accounts be furnished. The Court of Appeal stayed the order of Justice Khaminwa.

- (ii) *Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd, Benjoh Amalgamated Limited, Watts Enterprises and Bidii Kenya Limited.* Milimani HCCC No. 505 of 2008. The court granted interim orders in accordance with section 52 of the **Indian Transfer of Property** by restraining any further dealings with the suit properties. The orders issued by Justice Khaminwa have now been stayed by the Court of Appeal.

17. Mr Muigai confirms that KCB provided accounts in *HCCC No. 494 of 2008* but when the 2nd interested party applied to cross examine the KCB, Chief Executive Officer on the accounts produced, KCB appealed to the Court of Appeal and that court ordered a stay of further proceedings.
18. It is instructive to note that Mr Muigai deposes at paragraph 5 and 6 of the affidavit that, *".....the interested parties strongly believe that the High Court cases and Appeals thereto can only be resolved by a conclusive and independent investigation into the management and maintenance of records concerning Loan Account No. 315043651017 in the 1st Petitioners' Bank"* and *"... it is with this in mind that the 2nd interested party lodged its complaint with the Criminal Investigations Department."*
19. Counsel, for the 1st interested party noted that each of the civil cases is different, the parties are different and it is only proper that the investigations commenced do proceed to their logical conclusion.

20. Mr Wachakana for the 2nd interested party adopted the respondent's position and the contents of the affidavit sworn by Ngenji Muigai. He urged the court to dismiss these proceedings.

Criminal and civil proceedings

21. This petition concerns the enforcement of fundamental rights and freedoms. The petitioners are entitled, under **Article 22** of the Constitution to move this court of relief where the facts disclose an actual or threatened violation. The court is entitled to act *quia timet* where the circumstances call for it to act and as such it cannot be said that the mere issuing of a requisition by the police under **section 22** of the *Police Act* does not entitle the Court to act. The court can and will act when it is satisfied that fundamental rights and freedoms are threatened.

22. **Section 193A** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* provides that, "Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."

23. Although this matter is not one where criminal proceedings have not been commenced, it is one where the risk of criminal proceedings hangs over the heads of the petitioners. It is recognised even in light of **section 193A** of the *Criminal Procedure Code*, the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be

exercised sparingly as it is in public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.

Independence of Office of the Director of Public Prosecutions and Inspector General of the Police

24. The respondents have referred to the provisions of **Articles 157** and **245** which deal with the powers of the Director of Public Prosecutions and the Inspector General of the National Police Service to prosecute and investigate criminal offences independently and without interference. Counsel argues that this court should respect that independence and avoid interfering with the criminal process in a manner that diminishes the independence of those offices as provided in the Constitution.
25. The Office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.
26. In this case, the issue for consideration is whether the petitioners' rights to a fair hearing guaranteed under **Article 50** of the Constitution are infringed by the continued investigations, commenced by the issue of requisitions, under **section 22** of the *Police Act* to investigate making of documents without authority and conspiring to defraud.

Abuse of the court process

27. It is the petitioners' case that in light of the suits already instituted and the findings in each case that the matters concerning the relationship between the petitioners and the interested parties have been determined. It is their argument that subjecting them to parallel investigation on account of fraud in the same matters is unlawful, illegal and an abuse of the criminal process and an infringement of the right to a fair trial.
28. It is clear from the history of the relationship between the parties and the various decided cases I have cited in paragraph 5 above, that the interested parties are keen to keep matters alive in any forum that will lend them an ear. It is in this light that the complaint in respect of the account at KCB must be seen. I hold that the complaints in respect of the account are really a collateral attack on the decisions of the High Court and Court of Appeal on matters which those courts have held are settled. This is evident from the deposition of Ngengi Muigai which I have cited at paragraph 17 and 18 above.
29. It is true that the complaint was lodged based on decision by Justice Khaminwa as set out in paragraph 16 above. It is not disputed that those decisions have now been stayed by the Court of Appeal. As a court of law, I cannot shut my eyes to what is an obvious abuse of the legal process. This abuse must be stopped in its tracks and I am satisfied that I have jurisdiction to do so.

Breach of the petitioners fundamental rights and freedoms

30. As regards the rights of the petitioners, I hold that the continued invocation of the criminal process in light of the peculiar facts of

this case would impair the ability of the petitioners to have a fair trial. The intentions of the interested parties in lodging the criminal complaint is borne out by paragraphs 5 and 6 of the affidavit of Ngengi Muigai which I have set out at paragraphs 17 and 18 above.

31. The right protected under **Article 50** is not only in respect of the court or tribunal itself but also in respect of the acts third parties affecting a fair process. After all the Constitution is binding on all persons by virtue of **Article 20(1)** and it is the obligation of the interested parties not to do anything that would impair the 1st petitioner's rights.

32. I hold that, in effect, if the criminal process proceeds the petitioners will be called to answer for matters which have been settled by courts of law in disputes between the petitioners and complainants. I need not wait for that date and time to come, I need only be satisfied that such a threat is real. The intention of the interested parties is clear that they intend to use the criminal process to pry open the decisions that have dealt with matters in dispute. Subjecting the 1st petitioner's officers to an inquiry by the police outside the confines of the case where an application for cross examination of the Chief Executive Officer of KCB has been made and whose cross examination may be expected is, in my view, an interference with the fair determination of the pending claims in court.

33. I have looked at the orders issued in the judicial review matters and I am satisfied that the doctrine of *res-judicata* does not apply to these proceedings for several reasons. First, these proceedings are commenced under **Article 22** of the Constitution intended to enforce fundamental rights and freedoms. Second, this case has been triggered by the issuance of the requisition notices by the 1st

respondent's officer under the *Police Act*. It is a fresh cause of action which is different.

34. While exercising jurisdiction to interfere with criminal investigations and the criminal trial process, the court must balance the public interest and private interest. In this case, what is evident is that the parties have been at loggerheads since the first suit was filed in 1992. It is really a matter between two parties and it is in public interest that the integrity of the judicial process is preserved. The opening of a criminal inquiry which would result in impugning lawful court decisions, no doubt diminishes the standing of the court.

Disposition

35. Apart from what I consider to be *an infringement of the petitioners' right to a fair trial guaranteed under Article 50 of the Constitution, I must also exercise the courts inherent jurisdiction to prevent an abuse of the court process in the peculiar circumstances of this case as outlined in this judgment.

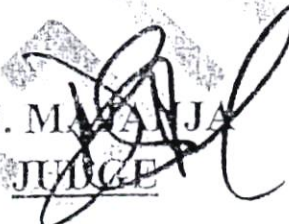
36. Under Article 23 of the Constitution I am entitled to frame an appropriate remedy that will give effect to the rights protected. I therefore grant the following orders;

- (i) A declaration that the continued investigation of the petitioners by the respondents in relation to matters concerning disputes between Kenya Commercial Bank Limited, Benjoh Amalgamation Limited and Muiru Coffee Estates Limited is a threat to the 1st petitioner's right to a fair trial guaranteed under Article 50 of the Constitution.

- (ii) The respondents, either by themselves, their servants and agents, are restrained from investigating, summoning or arresting the 1st petitioner's officers and or employees or in any way howsoever from investigating any matter in respect of the dispute between Kenya Commercial Bank, Benjoh Amalgamated Limited and Muiru Coffee Estate Limited.

37. Like all the judges who have dealt with these matters, I entertain the faint hope that one day we shall all wake up and find the matters settled with no order as to costs. In the circumstances, I make no order as to costs.

DATED and DELIVERED at NAIROBI this 2nd day of March 2012.

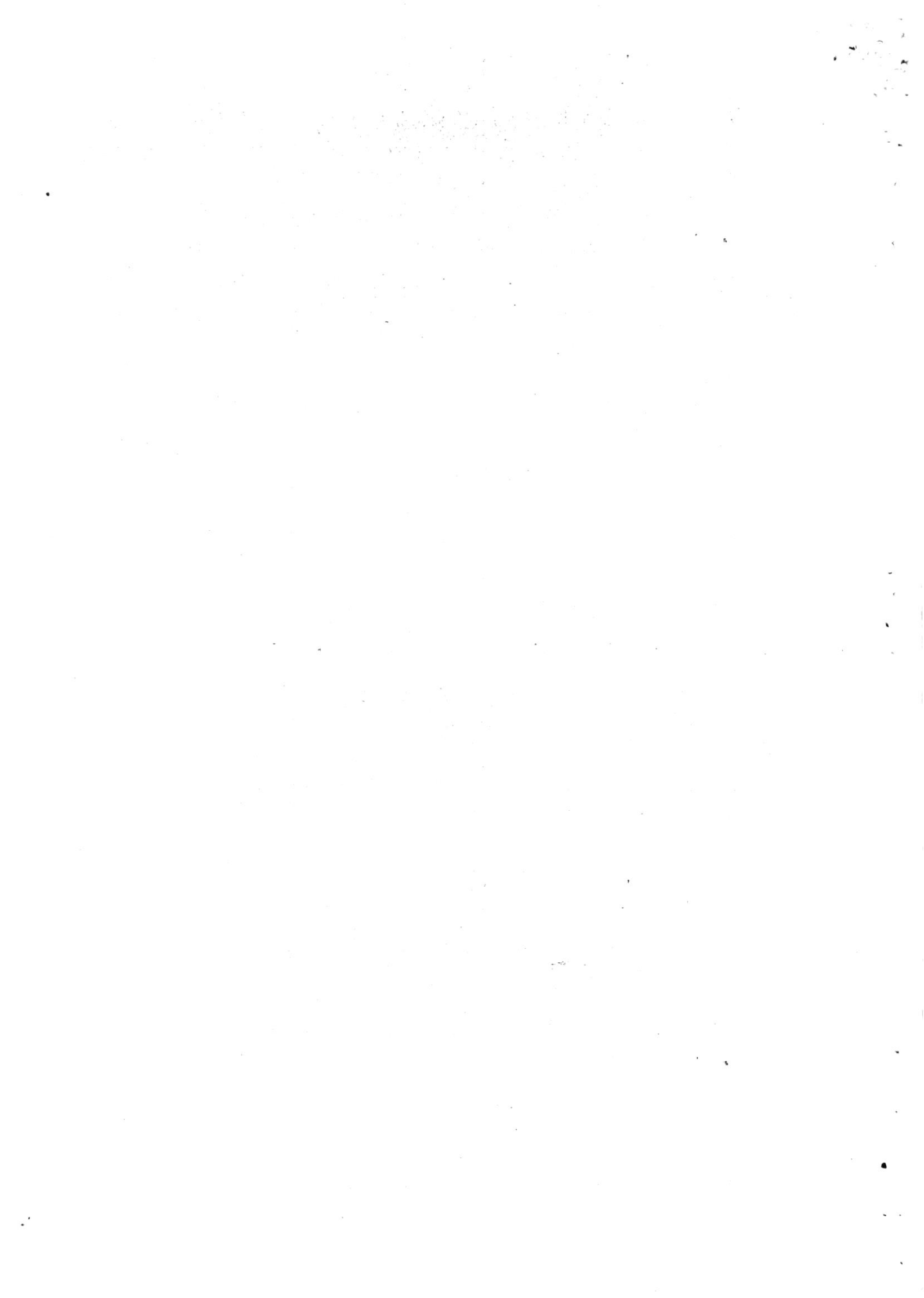

D.S. MWANJA
JUDGE

Mr Nyachoti instructed by Nyachoti & Company Advocates for the Petitioner.

Mr Kuria, Litigation Counsel, instructed by the State Law Office for the Respondents.

Mr Wachakana instructed by Wachakana & Company Advocates for the 1st Interested Party.

Mr Wambugu instructed by Gichuki King'ara & Company Advocates for the 2nd Interested Party.



RECOMMENDATIONS AND FINDINGS

From parties representations, the legal brief, and the CID report on the said petition, the Committee finds the following:

(1). The Court pronounced itself on the properties to be sold and directed as follows: “the plaintiff to pay the total outstanding sums, principal and interest to the defendant on or before the 31st of July 1992; ... In default, the defendant be at liberty to proceed with the realization of the two securities namely L.R. Nos 12411/1 & 2 in Nyandarua. These were the properties of the main principal borrower - Benjoh Amalgamated Limited.

From this judgment, the defendant Bank was stopped from realizing the guarantors property i.e. Muiri Coffee Estate L.R. No. 10075 - Kiambu.

(2). The consent decree that the courts have persistently upheld was for the realization of L.R. No. 12411/1 & 2 in Nyandarua and not L.R. No. 10075 Kiambu (Muiri Coffee Estate Limited). How this consent order was substituted for sale of L.R. No. 10075 Kiambu is not clear and need to be established.

(3). The Committee finds that there was a breach of the contractual terms as provided by the Consent Decree. In view of this apparent contradiction, were the courts aware of this irregularity and if they are aware or made aware what would be the remedy?

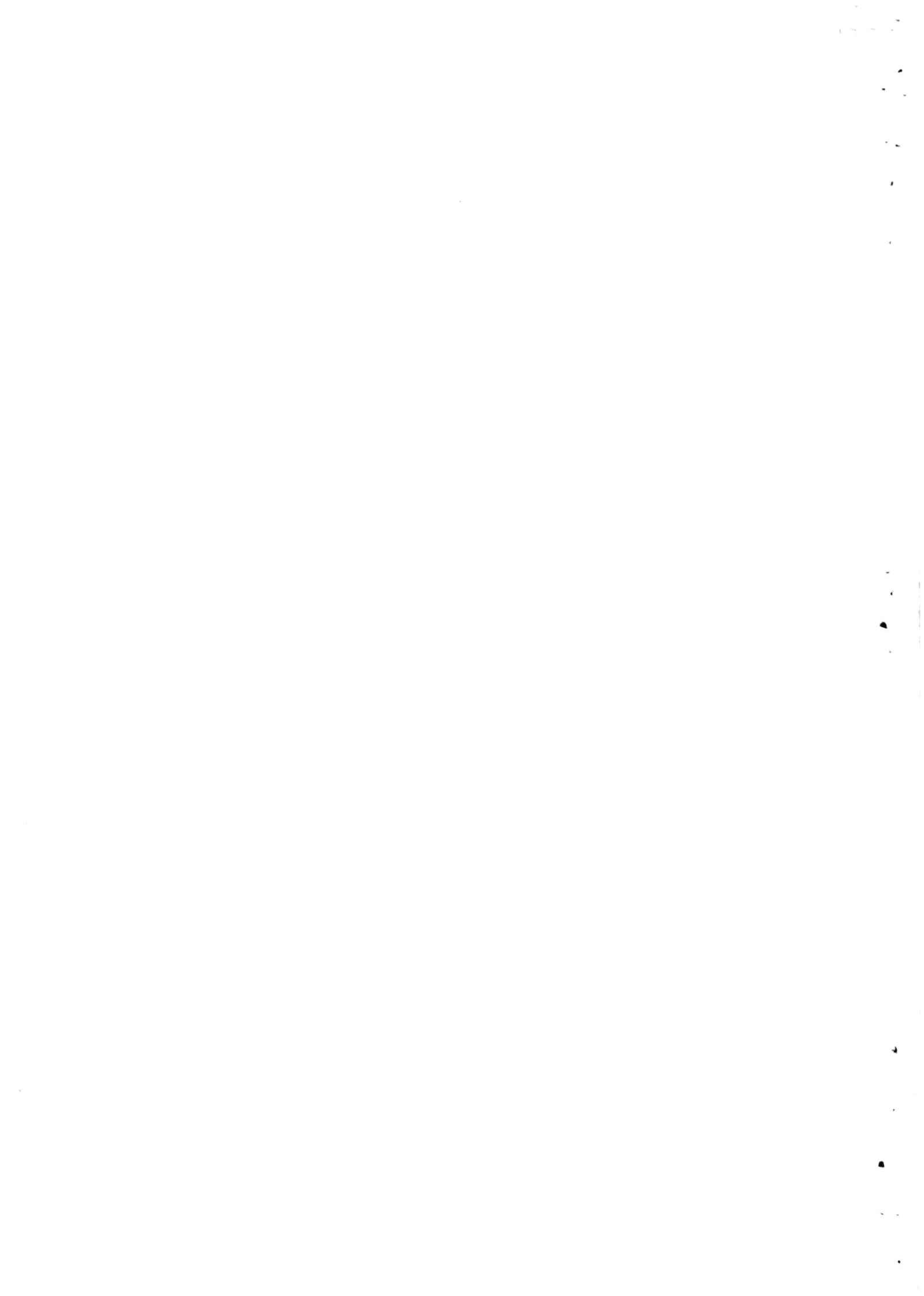
(4). Notwithstanding the above findings, the Committee observes that the Bank ought to have observed rules of natural justice where the principal borrower’s property ought to have been sold first before reverting to the guarantor’s property.

(5). The Committee also notes that the Consent Decree relied upon and so issued did not disclose the principal amount which is a basic requirement of any decree. In one of the judgments made by Justice Khaminwa delivered on the 17th November, 2009, the judge after perusing the account statement supplied by KCB that opened with an entry Balance brought forward of Kshs.14 Million, held that the account was manufactured to deceive Benjoh that it owed KCB Kshs.70 million.

(6). To date, Benjoh’s properties namely L.R. No. 12411/1 & 2 – (the principal debtor) has never been sold by the Bank.

(7). The Committee further perused the Criminal Investigations Department reports submitted before it and makes the following observations:

- (i) In view of the fact that the Consent Order/decree was breached, there was possible fraud and conspiracy to sell Muiri Coffee Estate Limited against Court orders/decree. The Committee observes that there exists no court ruling to date to



sell Muiri Coffee Estate Limited. The said sale of Muiri Estate was therefore irregular.

- (8). The Committee recommends to the petitioners to move to court in view of the emerging new evidence for review and remedy of this matter.
- (9). The Committee recommends that a law be put in place making it a criminal offense for anybody to participate to the sale and/or parties of a guarantor's property before the properties of the borrower charge to the lender has been exhausted in a transparent and open manner. Any person covering up this offense also commits a criminal offense.

