

*Paper tabled by
Chairperson of Finance
& Planning Committee on
Wed, 8/12/10 (Afternoon)*

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KENYA NATIONAL ASSEMBLY
TENTH PARLIAMENT - FOURTH SESSION

REPORT

OF THE
DEPARTMENTAL COMMITTEE ON FINANCE,
PLANNING & TRADE

ON
THE PETITION ON CHARTERHOUSE
BANK LIMITED

DECEMBER, 2010

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1.0 PREFACE

Hon. Speaker Sir,

On behalf of the Members of the Departmental Committee No. F on Finance, Planning & Trade, and pursuant to the provisions of Standing Order No. 210, it is my pleasure and duty to present to the House, the Committee's Report on the Petition on Charterhouse Bank Limited.

The Committee membership comprise of the following:-

The Hon. Chrysanthus Okemo, EGH, MP **(Chairman)**

The Hon. (Prof.) Philip Kaloki MP **(Vice Chairman)**

The Hon. Jakoyo Midiwo, MGH, MP

The Hon. Musikari Kombo, MP

The Hon. Lucas Chepkitony, MP

The Hon. Sammy Mwaita, MP

The Hon. Lenny M. Kivuti, MP

The Hon Nelson Gaichuhie, MP

The Hon. Ntoitha M'Mithiaru, MP

The Hon. Shakeel Ahmed Shabbir, MP

The Hon. Nkoidila Ole Lankas, MP

The Finance, Planning & Trade Committee is one of the Departmental Committees established under Standing Order No. 198 whose functions *are inter alia*:-

- (i) to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (ii) to study the programme and policy objectives of the ministries and departments and the effectiveness for the implementation.

- (iii) to 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.
- (iv) to make reports and recommendations to the House as often as possible including recommendations of proposed legislation.

The subjects falling within the purview of the Committee are:- public finance; banking and insurance; national planning and population development; trade, commerce and industry; tourism promotion and management.

1.1 PETITION (BACKGROUND)

The petition by the depositors of Charterhouse Bank calls on Parliament to investigate and to take all appropriate action required to bring to an end to their continued suffering due to the closure of Charterhouse Bank with effect from the 23rd of June 2006 to-date.

The petitioners in their petition require the National Assembly to investigate and respond to the 27 questions embodied in the petition.

The Committee responds as follows:-

1. Whether it is true that Charterhouse Bank was involved in massive VAT Tax evasion, and if so, how much.

Banking services are exempt from VAT, therefore Charterhouse Bank was not involved in VAT tax evasion.

2. Whether it is true that Charterhouse Bank was involved in massive tax evasion of any other taxes, and if it is true, how much as of 23rd June, 2006.

The Commissioner General of Kenya Revenue Authority confirmed that Charterhouse Bank had no outstanding tax liability or evasion of any type of tax as at 23rd June 2006.

3. Whether it is true that Charterhouse Bank was involved in money laundering as at 23rd June 2006, and if so;

- (i) How much money was involved?
- (ii) In what criminal offences was the money utilised?
- (iii) Where were the above criminal offences committed?
- (iv) Who was the recipient of the laundered money?
- (v) From which accounts did the money come from at Charterhouse Bank?

There was no anti-money laundering legislation as at 23rd June, 2006 and no credible evidence was presented before the committee that Charterhouse bank would have been involved in money laundering. Therefore Charterhouse bank was not involved in money laundering.

4. Whether it is true that Charterhouse Bank was involved in siphoning money to offshore accounts, and if it is true, then:

- (i) To which offshore accounts were the monies transferred?
- (ii) From which accounts at Charterhouse Bank did the monies originate?
- (iii) How much money was transferred in total?
- (iv) Indicate the amount by accounts if any.

The CBK Governor and the Statutory Manager having been in control of Charterhouse Bank for the last 4 years did not present before the Committee any credible evidence of money siphoned from any account from Charterhouse Bank to any account in foreign countries.

5. Whether it is true that Charterhouse Bank was involved in having fictitious accounts without titles or names of the account holders, and if it is true, then;

- (i) What are these accounts and how many are the accounts?
- (ii) How much money did each fictitious account have?
- (iii) And if indeed there were fictitious accounts, why would the Central Bank not collect that money and move it to the Central Bank requiring any claimant to claim it from the Central Bank and leave the petitioners to continue enjoying banking services?

The Governor of Central Bank and the Statutory Manager appeared before the committee and did not give any credible evidence of any fictitious account that did not have a title nor money found in the Bank or banking system without identity of the owner.

6. Whether Charterhouse Bank was involved in violations of the Banking Act, and the Central Bank Prudential Guidelines/Regulations, and if so to state which of the sections and/or Central Bank Prudential Guidelines/Regulations was violated.

The Governor of Central Bank and the Statutory Manager appeared before the Committee and informed the Committee that the Bank had violated, Section 10, 11, and 50 of the Banking Act and Central Bank Prudential Guidelines, CBK/PG/07, 3.1, 3.2 and CBK/PG/02.3.1, CBK/PG/08, Guidance on Foreign Exchange transactions Section 4, 5.2, and 6.5

7. Whether there are any other banks in Kenya which have been found to have violated the Banking Act and the Central Bank Prudential Guidelines/Regulations, and if so, provide a list of such violations by each bank.

The Governor of Central Bank confirmed that these violations are common violations by the banks in the conduct of banking business and the Attorney General confirmed that these are

technical offenses remedied by way of monetary penalty. A list of such violations is attached in the report.

8. Whether the remedial measure for the violation of the Banking Act and the Central Bank of Kenya Prudential Guidelines/Regulations is by way of monetary penalty.

This was confirmed to be so.

9. Whether it is true that the Charterhouse Bank was placed under statutory management due to the generated negative publicity against the bank.

The evidence confirms this to be so.

10. Whether it is true that the Statutory Manager was appointed in order to protect the interests of the institution, its depositors and other creditors.

The statement is correct in view of section 34 (1) (d) (2) (a), (3) (4) and (6) of the Banking Act.

11. Whether it is true that the Statutory Manager was supposed to take over the Bank and assume its banking business, management and operations to the exclusion of the institutions Board of Directors.

The statement is correct as this is what is provided for under Section 34 (2) (a) of the Banking Act.

12. Whether it is true that the negative publicity that necessitated the appointment of the Statutory Manager ceased to exist by December 2006.

There was no evidence before the Committee confirming how long the adverse publicity took.

13. Whether there is any evidence of money laundering held by any diplomat or development partner against Charterhouse Bank, and if so to provide full details.

No such evidence was adduced before the Committee.

14. Whether there is any credible evidence of any depositor and/or account holder at Charterhouse Bank being a criminal, whether involved in terrorism, drug trafficking, or money laundering, and if so, provide details of the same.

The Director of the Criminal Investigation Department appeared before the Committee accompanied by the Officer-in-charge, Anti-Narcotics; Officer-in-Charge, Anti-Terrorism Unit, and they all confirmed that there was no credible evidence either of the Bank or any of its directors or associates being involved in any drug trafficking, money laundering, or terrorism related activities.

15. Whether Charterhouse Bank was solvent at the time of being placed under statutory management?

The Governor of Central Bank confirmed that the Bank was solvent as at 23rd June 2006 when it was placed under statutory management.

16. Whether it is true that the Statutory Manager for the last four years has been using the depositors' deposits for the purpose of general expenditure, paying rent and other miscellaneous uses while the Bank remains closed.

The financial statements for the year 2006 to 2008 presented by the statutory manager before the Committee confirmed that there had been expenditure and payment.

17. Whether it is true that the Central Bank appointed the Statutory Manager for a period of one year and subsequently extended the period for another one year which ended on 22nd June 2008.

The evidence before the Committee by Central Bank of Kenya and the Statutory Manager and also by correspondence by the Attorney General confirmed that the statutory manager's period expired on the 22nd of June 2008.

18. Whether the Treasury has ever confirmed to any person that the Bank will never be re-opened.

The evidence before the Committee confirms that the Central Bank and the Director of Charterhouse Bank have entered into and executed a re-structuring agreement to re-open the Bank. A copy of the re-structuring agreement was presented before the Committee by the Governor. The evidence by the Minister for Finance was clear that the power to re-open or close the Bank is vested in Central Bank and not the Treasury.

19. Whether the Central Bank has been in possession of Charterhouse Bank and the petitioners' deposits without legal authority and just cause from 22nd June 2008 to-date.

The Governor of Central Bank and the Statutory Manager appeared before the Committee, where the Governor confirmed that the Statutory Manager is still at Charterhouse bank.

20. Whether it is true that the Statutory Manager is an employee of the Central Bank.

The evidence confirms that the Statutory Manager is also an employee of the Central Bank of Kenya.

21. Whether it is true that Charterhouse Bank was not involved in any criminal activity warranting the intervention of the Central Bank by appointment of a Statutory Manager.

The evidence before the Committee confirms that the Statutory Manager was appointed due to adverse publicity in order to prevent a run on the bank.

22. Whether it is true that Charterhouse Bank was placed under statutory management for not being involved in any criminal activity but due to adverse publicity.

The evidence confirms that Charterhouse Bank was placed under statutory management due to adverse publicity.

23. Whether there is any evidence or correspondence by any diplomat and/or development partner alleging that Charterhouse Bank was involved in money laundering or any other offences and if so, provide copies of the same.

Both the Attorney General and Kenya Anti-Corruption Commission confirmed having received such correspondence from the American Ambassador, which is attached as annexure herewith.

24. Whether the Central Bank has any justification to continue misusing the petitioners' funds and to continue denying the petitioners banking services and access to their deposits and title deeds.

The Chief Public Prosecutor informed the Committee that the alleged violations of the Banking Act are technical offenses which do not justify the closure of a bank.

25. Whether the Ministry of Foreign Affairs has any letters or evidence from any mission in respect of Charterhouse Bank.

No such evidence was adduced before the Committee.

26. Whether the Ministry of Internal Security has any credible evidence of any depositor, shareholder or director being involved in any criminal activity, i.e. money laundering, drug trafficking or terrorism.

No such credible evidence was adduced before the Committee.

27. Whether the Attorney General has any complaints or correspondence relating to Charterhouse Bank from any person, mission or development partner.

The Attorney General confirmed having received such correspondence from the American Ambassador, which is attached as annexure herewith.

The petitioners humbly beseech Parliament to consider the petition expeditiously and resolve the matter since the report of the Finance Committee of the 9th Parliament was tabled but was never debated, and therefore there was no resolution of Parliament to adopt or not to adopt the report.

The petitioners therefore, humbly pray that Parliament:-

1. Resolves that the implementation of the resolution of the Finance Committee of the 9th Parliament on Charterhouse Bank Limited be implemented immediately.
2. Carries out further investigations to establish whether Charterhouse Bank Limited was at any time involved in money laundering or tax evasion; or
3. Establishes whether any of its directors, shareholders, depositors, customers and/or associates were involved in trafficking of narcotics;

4. Establishes whether the allegations made against Charterhouse Bank were genuine and truthful;
5. Makes further findings and recommendations as outlined in the Petition;

PETITIONERS' PRAYER:

That if there is no genuine and justifiable reason to continue causing the petitioners grave hardship, psychological torture and degrading treatment by virtue of being denied access to their hard earned deposits and blocked from enjoying banking services which supports the petitioners means of livelihood, the petitioners petition that it is inhuman, illegal, unlawful and unfair to unjustly punish them for no apparent reason, save for malicious and false allegations and they seek intervention for justice to be restored and the rule of law to be applied by having the Bank restored to its original operating position where the petitioners will be allowed to freely access their deposits, their securities, their title deeds and banking services.

1.2 DELIBERATION ON THE PETITION & LIST OF WITNESSES

On 7th July 2010 the petition dated 5th July 2010 was tabled in Parliament by Hon. Charles Kilonzo, MP on behalf of thirty-five (35) Petitioners. The Petitioners state that they have been denied banking services and access to their deposits and continue to be subjected to continuous suffering due to the closure of Charterhouse Bank by the Central Bank of Kenya.

Following deliberations on the matter, the House committed the Petition to the Departmental Committee on Finance, Planning and Trade pursuant to Standing Order 210(1). The Committee is required under Standing Order 210(3) to respond to the Petitioners by way of a Report addressed to the Petitioners and laid on the Table of the House. **(Copy of the Petition Annex - 1).**

The Committee commenced its deliberation on the matter on 23rd August, 2010 and held twenty-three Sittings. The Committee invited the following persons who were responsible, concerned, and directly involved to appraise it on matters relating to the placement of Charterhouse Bank under statutory management, closure, and the denying of the petitioners access to banking services and their funds.

1. CENTRAL BANK OF KENYA (CBK)

Prof. Njuguna Ndung'u - Governor, Central Bank of Kenya

Mr. Gerald Nyaoma - Former, Director of Banking & Supervision

Ms Rose Detho - Former, Statutory Manager, Charterhouse Bank

Mr. George Oraro - Advocate, Central Bank of Kenya

2. CHARTERHOUSE BANK LIMITED

Ms Ruth Ngure - Statutory Manager, Charterhouse Bank

Mr. Jimmy Maina - Manager, "

Ms Mary Mwova - Assistant Manager, "

3. KENYA REVENUE AUTHORITY

Mr. Michael Waweru - Commissioner General

Mr. Joseph Nduati - Commissioner, Investigations

4. OFFICE OF THE DEPUTY PRIME MINISTER AND MINISTRY OF FINANCE

Hon. Uhuru Kenyatta, EGH, MP- Deputy Prime Minister/Minister
for Finance

Mr. Joseph Kinyua, CBS - Permanent Secretary

Mr. Justus Nyamunga - Director of Budget

Mr. Barrack Amollo - Deputy Secretary

5. KENYA ANTI-CORRUPTION COMMISSION (KACC)

Prof. PLO-Lumumba - Director

Dr. John Mutonyi - Deputy Director

Dr. Wilson Shollei - Assistant Director, Finance & Administration

Mr. Henry Mwaitha - Principal Officer

6. STATE LAW OFFICE

Mr. Keriako Tobiko - Chief Public Prosecutor

Ms Muthoni Kimani - Senior Deputy Director/Solicitor General

Mr. J. Mungai Warui - Principal State Counsel

7. FORMER MANAGEMENT OF CHARTERHOUSE BANK

Mr. Sanjay Shah - Former Managing Director

Mr. Denis Aroka - Former Company Secretary

Mr. Ken Odera - Lawyer, Charterhouse Bank

Mr. Maria Migiro - ”

Mr. Joseph Kioko - Human Resources Consultant

Mr. T. Mbugua, - Expert, Import Procedures

Mr. Clyde Mutsotso - Tax Consultant

Mr. P. Muhindi, - Consultant, Banking Violations

Mr. Boniface Karogo - IT Department

Mr. Anthony Ward - International Accounting Expert

Mr. Wambua Kituku - Advisor, Legal Affairs

8. CRIMINAL INVESTIGATION DEPARTMENT (CID)

Mr. Francis Ndegwa Muhoro - Director, CID

Mr. Mohammed Amin - Officer-in-charge, Investigation

Mr. Nicholas Kamwende - Officer-in-charge, Anti Terrorism

Ms Judith Odhiambo - Officer-in-charge, Anti Narcotics

Ms Lydia Ligami - Investigator, Banking Fraud Unit

9. INTERNATIONAL COMMISSION OF JURISTS (ICJ)

Mr. George Kegoro - Executive Director

Mr. Charles Wanguhu - Programme Officer, African Center for
Open Governance

Mr. James Wamugo - Programmer Officer, ”

10. PRICEWATERHOUSECOOPERS (PWC)

Mr. Richard Njoroge	-	Partner, PriceWaterHouseCoopers
Mr. Kuria Muchiri	-	Partner
Mr. Suraj Shah	-	Manager
Ms. Elizabeth Njendu	-	Manager
Mr. Peter Gachuhi	-	Advocate, Kaplan & Stratton

11. PETITIONERS

- ♦ Mr. Frank Kamau - Finance Manager C/o Tusker Mattresses
- ♦ Mr. Atul Shah - Managing Director C/o Nakumatt Holdings
- ♦ Mr. Mohammed Ashraf- Managing Director C/o
Crescent Construction Company

Mr. Speaker Sir,

It is my duty and pleasure to present to the House, the Committee's Report on the Petition on Charterhouse Bank Limited. May I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations.

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Hon. Chrysanthus Okemo, MP

Chairman

Departmental Committee on Finance, Planning & Trade

Date ...8/12/2010.....

2.0 EVIDENCE ON CHARTERHOUSE BANK

2.1 EVIDENCE BY CENTRAL BANK OF KENYA (CBK)

2.1.1 EVIDENCE BY PROF. NJUGUNA NDUNG'U, GOVERNOR OF CBK

The Governor of CBK appeared before the Committee on Monday 23rd August, 2010 and Friday 12th November, 2010 accompanied by CBK Advocate. He submitted a 32 point report to the Committee upon which he gave the following evidence:-

(a) CHRONOLOGY OF EVENTS ON CHARTERHOUSE BANK LIMITED.

The Governor of CBK gave the following chronology of events leading to the placement of Charterhouse Bank Ltd. under statutory management:-

- (i) Charterhouse Bank Ltd. was established in 1996 after taking over the operations of Middle East Finance Ltd. and subsequently converted to a fully fledged bank under the current name in 1998.
- (ii) CBK conducted a regular inspection of Charterhouse Bank in August 2004 in accordance with Section 32(1) of the Banking Act and the inspection findings highlighted some weakness and violations of the Banking Act and CBK levied a penalty on 19th January 2005.
- (iii) A follow up inspection was conducted in 10th February 2005 and established that remedial action had been taken, and that the Bank was generally in compliance with the provisions of the Banking Act. As a result CBK made recommendations to the Minister for Finance on 8th April, 2005 and the Bank's license was renewed.
- (iv) In October 2004, at the instance of the Governor of CBK, an inter-agency Taskforce was set up comprising:- Kenya Anti-Corruption Commission which provided the leadership; the

Attorney General represented by the then Director of Public Prosecutions; Kenya Revenue Authority; the then Ethics & Governance Permanent Secretary; and CBK represented by Mr. Melville Smith and Mr. Titus Mwirigi. The Taskforce was focusing on malpractices relating to tax evasion in the Bank.

- (v) Due to the confidentiality of the report, the Taskforce Interim Report was not widely shared although the outcome of the investigations by the Taskforce confirmed the suspicion that there was tax evasion taking place within the operations of Charterhouse Bank Ltd. Thereafter, CBK was not informed of the progress of the activities of the Taskforce and was not requested to provide further support to the Taskforce. **(Copy of the Taskforce Interim Report dated 12th November 2004 – Annex 2).**

- (vi) On 10th October 2005, CBK conducted another regular inspection of Charterhouse Bank for the year 30th September 2005 and granted the renewal of the license to the Bank for 2006 based on the CBK recommendations dated 13th January, 2006. The inspection report was forwarded to the Bank on 1st February 2006 and in a meeting held with the Bank's Board of Directors on 10th February 2006, the management accepted the findings of the report and undertook to address the violations. The inspection report highlighted weaknesses within the operations of the Charterhouse Bank including the non-compliance with the guidelines on classification of loans and advances, and "Know Your Customer" procedures (KYC)

(b) PLACEMENT OF CHARTERHOUSE BANK LTD. UNDER STATUTORY MANAGEMENT

The Governor of CBK informed the Committee that the decision to place Charterhouse Bank Ltd. under statutory management was based on the following:-

- (vii) Following media reports on 2nd April, 2006 highlighting the contents of a letter purportedly written by the CBK Governor to the Minister for Finance recommending the withdrawal of the Charterhouse Bank Ltd. license on account of allegations of tax evasion and money laundering, CBK conducted a preliminary review of the institution on 5th April, 2006 to determine the status and effects of the adverse publicity on its operations.
- (viii) The review established that the level of deposits for Charterhouse Bank had declined from Kshs 3.5 billion to Kshs 2.9 billion while the liquidity ratio had declined from 39% to 29% within the month. Simultaneously, both the American Express Bank and the Amalgamated Bank of South Africa (ABSA) had written to Charterhouse Bank Ltd. giving notice of their intention to terminate their correspondent relationship.
- (ix) CBK conducted another inspection of Charterhouse Bank on 18th April, 2006 to establish and confirm the compliance status of the institution. This particular inspection was recommended by the then Minister for Finance (Hon. Amos Kimunya, MP) and prompted by revelations in a letter by the then Governor (Dr. Andrew Mullei), recommending the withdrawal of Charterhouse Bank license. The inspection established that the Bank continued to be in violation of "Know Your Customer" requirements.
- (x) Following the tabling in Parliament of an alleged copy of the report of the Inter-Agency Taskforce on 21st June 2006 by Hon. Billow

Kerow, MP and in order to protect the interest of Charterhouse Bank Ltd. together with its depositors and creditors, CBK sought and received the approval of the then Minister for Finance (Hon. Amos Kimunya, MP) to place Charterhouse Bank under statutory management with effect from 23rd June, 2006. CBK appointed Rose Detho as the Statutory Manager, pursuant to Section 34 (1) (d) of the Banking Act which empowers the appointment of a Statutory Manager where circumstances in the opinion of the CBK warrants the exercise of that power in the interest of the institution.

- (xi) The three key issues outlined in the reports were:- *"Know Your Customer"* requirements; lending limits which are critical in terms of the way CBK supervise and inspect the banks; and suspicious activities in the Bank. These issues were being dealt with by the CBK until the matter was brought to Parliament and in an attempt to try to protect Charterhouse Bank from a run, CBK placed the Bank under statutory management.
- (xii) There were 45 accounts without sufficient account opening documentation and Charterhouse Bank had requested to be given three months to comply and CBK allowed the request. The CBK governor informed the Committee that nothing was spared in trying to protect the Bank. The appointment of the Statutory Manager was to try to protect the Bank and the depositors. However, other events came in that prevented the Statutory Manager from performing any specific action that she would have liked to do.
- (xiii) The CBK pointed out that when the Bank was put under Statutory Management, there were injunctions which he termed as gagging orders that prevented the Statutory Manager from performing her

duties. Mr. George Oraro explained that that the effect of the injunctive orders was that the statutory management did put Charterhouse Bank at a temporary freeze.

- (xiv) The Statutory Manager declared a moratorium and was to complete the work within 12 months subject to extension for another 12 months and at the end, to come up with a report determining whether the Bank should be given back to its owners or be placed under liquidation if insolvent. Under the circumstances, it had been impossible to finalize the statutory management because of the freezing orders which did put the Statutory Manager under contempt of court and whose effect, the Bank has remained as it was. In layman's language, Charterhouse Bank is closed but in legal terms it is under moratorium.
- (xv) The Governor informed the Committee that CBK had been fighting for the depositors to salvage the situation except that it has taken too much time and hoped that the Committee would appreciate it in the same light and perhaps endorse the CBK recommendations and beef them up.
- (xvi) The action taken by the CBK was aimed at forestalling a run on the institution following the negative publicity generated by the media and to safeguard the integrity of the financial sector, in accordance with Section 4(2) of the CBK Act which provides that, "the Bank shall foster the liquidity, solvency and proper functioning of a stable market-based financial system".

(c) EVENTS FOLLOWING THE PLACEMENT OF CHARTERHOUSE BANK UNDER STATUTORY MANAGEMENT

- (xvii) Based on the PriceWaterHouseCoopers audit report findings and the observations by the Statutory Manager, the then Minister for Finance (Hon. Amos Kimunya, MP) duly issued a Notice on 1st

December, 2006 to the Directors of Charterhouse Bank Ltd. for cancellation of the banking license within 28 days from the date of the Notice **(copy - Annex 3)**.

(xviii) The Directors of the Bank responded to the Minister's Notice and denied any wrong doing and alleged that the action instituted against the Bank was malicious and discriminatory.

(xix) The Statutory Manager was appointed on 23rd June 2006 under Section 34 of the Banking Act to serve for 12 months and the initial term expired on 22nd June, 2007 **(copy - Annex 4)** of the letter. Due to the gagging Court orders, the Manager had been unable to execute her statutory mandate and complete her work. Consequently, CBK applied for the extension of her term which the High Court granted for a further term of 12 months which expired in June, 2008.

(d) LEGAL PROCEEDINGS ON CHARTERHOUSE BANK LIMITED

(i) Upon placement of Charterhouse Bank under the statutory management, the Bank filed suit in the High Court HCCC No. 329 of 2006 and sought for orders to stay the statutory management pending the full hearing of the Application.

(ii) The suit was heard by Justice F. Azangalala inter-parties and a ruling delivered on 26th July 2006, dismissed the suit prompting the Bank to file an appeal in the Court of Appeal which was equally dismissed on 9th March, 2007 holding that the appointment of the Statutory Manager by CBK was within the law.

(iii) In September 2006, the High Court in Eldoret issued ex-parte orders in Eldoret High Court Misc. Civil Application No. 638 of 2006 that stayed all actions by the CBK and the Statutory Manager, over Charterhouse Bank Limited. In essence the orders barred the Statutory Manager from taking any decision, action,

investigation, demand audits or recommendations on the actions she must do to enable her discharge the statutory mandate.

- (iv) Similar stay orders were also subsequently issued ex-parte in 2006 in two Malindi court cases i.e. Malindi High Court Misc. Applications No. 97 and 98 of 2006 and also the Kitale High Court Misc. Application No. 105 of 2006. Although the CBK promptly appealed against these gagging orders issued ex-parte in the various Court matters and applications for their stay in the court of appeal, they have not been heard to-date despite the frantic efforts by the CBK and its lawyers to have the applications and appeals listed for urgent hearing.
- (v) CBK sought the assistance of the Attorney General at one point to have the various court matters consolidated and expeditiously heard in Nairobi and the Attorney General duly wrote to the Chief Justice on the issue. The Chief Justice subsequently called for the various courts filed and in December 2006, effected a shakeup of the judges who heard the matters and issued orders against the Statutory Manager and the Central Bank.
- (vi) Thereafter, the various high court matters countrywide involving Charterhouse Bank were mentioned before the Chief Justice who by a ruling dated 27th July 2007, surprisingly condemned the letter written to him by the Attorney General dated 6th December 2006 requesting the Chief Justice to exercise his administrative jurisdiction as the Chief Justice and issue appropriate directions on the hearing and expeditious disposal of various pending suits involving Charterhouse Bank, and accordingly proceeded to expunge the Attorney General's letter from the Court records. The Chief Justice did not however issue any directions on the hearing of the matters pending before the High Court.

- (vii) The application for extension of the term of the Statutory Manager was heard by Justice Warsame of Milimani Commercial Courts in Nairobi and by his ruling delivered on 21st June 2007, observed that the Statutory Manager had not been able to execute her mandate due to the multiplicity of suits filed against her and the Central Bank which had the effect of staying and manacled her fulfilling the purpose and intention of her appointment. Consequently, Justice Warsame extended the term of Statutory Manager for a further 12 months with effect from 22nd June 2007.
- (ix) The extended term expired on 22nd June 2008 and after several adjournments lasting one year, the High Court on 25th June 2009 stood over generally CBK's application for the extension of the term of the Statutory Manager yet again on the basis that she had not managed to discharge her mandate. There are 26 pending court cases involving the Charterhouse and the Central Bank and the legal bill on the part of Central Bank for these cases is enormous.

(e) CHARTERHOUSE BANK LTD FINANCIAL POSITION

The Statutory Manager informed the Committee that:-

- (x) Charterhouse Bank had interest income of Kshs 226 million and interest expense of Kshs 84 million as at 23rd June 2006, when the Bank was placed under statutory management. The current financial position of the Bank reflects interest income amounting to Kshs 294 million.
- (xi) The Bank's total assets were Kshs 3.8 billion in 2002 and 4.4 billion in 2010. The total liabilities was Kshs 3.2 billion in 2006 and Kshs 3.7 billion in 2010

(f) CENTRAL BANK OF KENYA POSITION ON THE RE-OPENING OF CHARTERHOUSE BANK LIMITED

The Governor of CBK informed the Committee that:-

- (xii) The various injunctive Court orders issued against the Statutory Manager by various courts countrywide are still in place and the respective cases are pending hearing and determination.
- (xiii) Charterhouse Bank issue involves substantial and grave policy consideration for the banking industry and therefore CBK has been reluctant to arrive at any resolution which does not involve wider consultations within the government and the banking industry.
- (xiv) Consequently, CBK has offered the following two alternatives and entered into agreement with a view to resolving the issue.
 - (i) A voluntary winding up of the Bank with the consent and cooperation of its shareholders so long as it is acceptable in principle that banking license ought not to be renewed based on various findings outlined above.
 - (ii) A restructuring of the Bank in respect of which without prejudice negotiations have been carried out and a Restructuring Agreement agreed upon in consultations with Treasury and the Attorney General leading to the execution of the Agreement of 31st August, 2009.

The Governor of the Central Bank in his evidence presented to the Committee the various documents and correspondences.

1. List of the financial institutions fined from December 2003/2004/2005/2006 – **(Annex 5)**
2. CBK Governor (Dr. Mulei) letter of 23/09/2004 to Minister for Finance (Hon. Mwiraria, MP) proposing for assistance of Banking Fraud Unit in investigations on the Bank **(Annex 6)**

3. CBK Governor (Dr. Mullei) letter dated 29/10/2004 to Minister for Finance (Hon. Mwiraria, MP) on the formation of Inter-agency Taskforce – **(Annex 7)**
4. Charterhouse Bank application and approval for renewal of banking license on 25/01/2006 - **(Annex 8)**
5. Inspection Report on Charterhouse Bank as at 30th September, 2005 –**(Annex- 9)**
6. CBK Governor (Dr. Mullei) letter to Finance Minister (Hon. Amos Kimunya) dated 20/03/2006 recommending the withdrawal of Charterhouse banking license –**(Annex 10)**
7. Charterhouse response on 27/12/2006 to the Minister for Finance on the Notice of revocation of banking license – **(Annex 11)**
8. Permanent Secretary/Treasury letter to CBK dated 12/03/2007 to act on Charterhouse without further delay – **(Annex 12)**
9. CBK Governor letter of 21/03/2007 to Minister for Finance (Hon. Kimunya), response to letter of 12/03/2007 – **(Annex 13)**
10. Head of Public Service letter dated 17/05/2007 to Chief Justice to fast-track the court cases on the Bank – **(Annex 14)**
11. CBK Governor letter of 23/03/09 to the Minister for Finance proposing re-structuring or liquidation of the Bank – **(Annex 15)**
12. CBK Governor's letter of 20/05/2009 to Minister for Finance on the extension of Statutory Manager's term – **(Annex 16)**
13. Attorney General letter of 21/7/09 advising the CBK Governor to act due to no legal impediment – **(Annex 17)**
14. CBK Governor letter of 24/7/09 to the Minister for Finance on advice by both the Attorney General and CBK lawyers on the way forward on Charterhouse – **(Annex 18)**
15. CBK Governor letter of 7/9/2009 to the Minister for Finance on the execution of the Restructuring Agreement – **(Annex 19)**

2.1.2 EVIDENCE BY MS ROSE DETHO, FORMER STATUTORY MANAGER OF CHARTERHOUSE BANK LIMITED

The former Statutory Manager of Charterhouse Bank Ltd. currently the Director of Deposit Protection Fund appeared before the Committee on Friday 12th November, 2010 and gave evidence that:-

- (i) CBK has gone through certain phases in trying to streamline, regulate and supervise the banking sector, and that there was a period when CBK did not have penalties and this was introduced much later. Prior to that, CBK would inspect institutions and find violations which would be repeated from time to time and that is why CBK introduced the penalties to deter recurrence.
- (ii) Pursuant to Section 33(4) (b) of the Banking Act, CBK issued Prudential Guideline CBK/PG/08 on Proceeds of Crime and Money Laundering (Prevention) to provide guidance regarding the prevention, detection and the control of possible money laundering activities.
- (iii) The guideline applies to all institutions and the banks are expected to maintain proper identification of customers wishing to open accounts or make transactions. Banks are further required to report suspicious transactions which include large frequent and unusual deposits.
- (iv) Government formed a national task force on anti-money laundering and combating terrorism financing. Members of the taskforce comprised of CBK, Ministry of Finance, and Kenya Revenue Authority.
- (v) Charterhouse Bank was placed under statutory management following the tabling of an alleged copy of the report of the Inter-Agency Taskforce on 21st June 2006. In order to protect the interest of Charterhouse Bank, its depositors and other creditors, the CBK

Governor after due consultations and considerations, received the approval of the then Minister for Finance (Hon. Amos Kimunya, MP) to place Charterhouse Bank under statutory management.

- (vi) The placement of Charterhouse Bank under statutory management was aimed at forestalling a run on the institution following the negative publicity generated through the media. Therefore, the action was deemed necessary in order to protect the interest of the depositors, creditors and other stakeholders which was consistent with the provisions of the Banking Act.
- (vii) The Statutory Manager took over the management of the Bank on the 23 of June 2006 and declared a moratorium on the institution's liability under the powers conferred by section 36 of the Banking Act. This was also in the spirit of forestalling a deposit run in case the depositors would want to be paid.
- (viii) The Clearing-House provides that membership shall be withdrawn if a bank is placed under Statutory Management and Charterhouse Bank was locked out of the clearing-house in accordance with this rule. The Statutory Manager requested the CBK Director of Banking Department on 29th June to enter into a clearing arrangement with Charterhouse Bank where the former would clear business on behalf of the latter. The CBK Banking Department acceded to the request on 30th June, 2006 and this arrangement has run smoothly.
- (ix) When Charterhouse Bank was placed under statutory management, Mr. Jap Lugick, a representative of the American Express Bank called the Statutory Manager and his team and insisted that their account with Charterhouse Bank be closed and directed where to transfer the proceeds of the account. The team pleaded with the officials of Amex Bank who were a correspondent Bank of Charterhouse Bank, to suspend the intended action until further

notice. The request was accepted and this allowed operation under trade financing on behalf of clients of the bank to progress without interruption.

- (x) Upon taking over the management of the Bank, the team examined the external auditors report by Deloitte and Touché for the period ending December 2005 and the Bank's own internal auditors report. To verify the allegations leveled against Charterhouse Bank and its directors and the anomalies raised, the Statutory Manager engaged PriceWaterHouseCoopers Ltd. on 12th July to carry out an in-depth audit of the Bank's business as a an independent third party to review the operations of the Bank and give its findings.
- (xi) With assistance of Bank Fraud Investigation Unit, all documents were availed for audit inspection except vouchers up to June 2004 which were reported as having been destroyed by a fire on in a go-down on 20th September 2004. Despite the request, the management failed to provide the relevant information such as the inventory at the go-downs, police report, insurance report, necessary application for insurance compensation and the Board did not discuss the fire occurrence. Therefore it was difficult to ascertain whether there was fire.
- (xii) The Bank core system experienced downtime which resulted to disconnecting external connection to the branches to ease the interruptions. Effectively all the Bank branches were cut off and all branches transactions were brought to the Head Office for manual posting.
- (xiii) After the end of financial year 2006, KPMG was engaged to carry out the statutory audit of the Bank for the financial period ending 31st December 2006 because it was not appropriate for

PriceWaterHouseCoopers to undertake the audit. KPMG carried out the audit again for the period ending 31st December 2007.

- (xiv) Section 10 of the Banking Act requires that a Bank must not grant any person in excess of 25% of its core capital and the exposure to Charterhouse Bank with regards to one client was 67% of the core capital while the other was 32.5% of the core capital.
- (xv) In order to safeguard the interest of the depositors the statutory management continued to collect funds from the Bank's clients and invested the same in government securities. This information is critical because the Manager has been accused of closing the Bank. Even though there were no operations, the Manager continued to deal with the Bank's clients as they brought funds to the Bank.
- (xvi) The Statutory Manager was not meant to be at Charterhouse Bank for more than 12 months and was supposed to have made decision by then but this did not happen due to the gagging orders which were issued. At one time the Manager was cited for contempt of court proceedings and warrants of arrest were issued against the manager hence could not make any decision. The gagging orders meant that the CBK, Statutory Manager and even the Ministry of Finance could not make any decision on the way forward for the Bank and therefore the depositors have continued to suffer.
- (xvii) The audit by the PriceWaterHouseCoopers and other findings by the statutory management revealed that the former management of the Bank conducted the affairs of the Bank in contravention of the Banking Act and CBK Guidelines and Regulations. The findings also concluded that Charterhouse Bank and its directors engaged in malpractices including activities that portend money laundering and tax evasion.

- (xviii) The Bank's business was large and characterized by frequent large cash deposits and withdrawals which were made repeatedly during the day like one customer going to the Bank four or five times in a day withdrawing Kshs. 4 or 5 million each time. The management failed to report such activities to the Central Bank as defined by prudential guidelines since this were highly suspicious and portend to money laundering activities.
- (xix) The tax evasion mechanism entailed foreign companies providing undervalued pro-forma invoices as well as blank invoices to insert discounted values of imported goods for the purpose of import declaration forms. Many times the descriptions of these goods would be distorted to take advantage of lower tariffs.
- (xx) Mr. Oraro stated that over six cases were filed in respect of the matter regarding Charterhouse Bank in Kitale, Eldoret, Nairobi, Malindi, Mombasa and in all those applications, injunctions were granted against CBK and the Statutory Manager and the Minister for Finance from interfering in the Bank in any way. Therefore, taking any action would have been contrary to the injunction orders and both the Court in Eldoret and Malindi proceeded to issue order of committal against the Statutory Manager. Therefore, Statutory Manager had to be flown out of the country as CBK went to the Court of Appeal which stayed, but did not set aside those orders as they still remain.
- (xxi) The Statutory Manager explored the option to re-structure management and/or reconstitute the Board of Directors of Charterhouse Bank but after due consideration, found that this could be merely a cosmetic measure given that the shareholders who would be vested with the responsibility of appointing the Board and overseeing management restructuring are the same parties.

- (xxii) In view of the foregoing and in order to uphold the integrity of the financial sector, the Statutory Manager recommended to the Minister for Finance to revoke the banking license for Charterhouse Bank as provided under section 6 of the Banking Act and thereafter the Bank would be liquidated. Given these recommendations, the Minister for Finance gave a 28 days notice to the directors and shareholders of the Bank to revoke the license but soon thereafter, these gagging orders were issued and even the Minister for Finance could not take any further decision.

2.1.3 EVIDENCE BY MR. GERALD NYAOMA, FORMER DIRECTOR OF BANKING & SUPERVISION DEPARTMENT, CBK

The former Director of Banking & Supervision Department appeared before the Committee on Friday 12th November, 2010 and gave evidence that:-

1. CBK conducted further inspection of Charterhouse Bank Ltd. on 18th April, 2006 to establish and confirm the compliance status of the Bank. This particular inspection was recommended by the Minister for Finance and prompted by publication in the media of a letter by the then Governor of CBK recommending the withdrawal of Charterhouse Bank license.
2. The inspection established that the Bank continued to be in violation of critical operational requirements relating to "*Know Your Customer*", where *inter alia*:-
 - (i) Account-opening forms for 45 suspect customers transaction accounts were not available and thirty-six (36) of these accounts had since been closed. Earlier inspections conducted by CBK in August, 2004 had identified a total 223 account-opening forms as missing. The Bank therefore, remained largely non-compliant to the CBK Prudential

Guideline, CBK/PG/O8, which requires the Banks to obtain and maintain proper identification of customer details.

- (ii) Section 4 of CBK Guideline on Foreign Exchange Transactions, requires Banks to report any transaction above US\$10,000 and to retain documentary evidence for such transactions.

- ♦ There were numerous instances of splitting transactions below US\$10,000 by a single customer to a single beneficiary in order to avoid maintenance of records for reporting transactions above US\$50,000 to CBK.

- ♦ Specifically, the Bank failed to provide relevant and supporting documents with respect to two accounts which were used to receive, split and move huge transactions from a trading company and transfer the same abroad.

- (iii) Prudential Guideline CBK/PG/O8 requires institutions to report suspicious activities that portend to money laundering and proceeds of crime operations. The Bank was found to be involved in malpractices relating to payments to suppliers of products and cheques drawn on customers' accounts being cleared through a lawyer's client account. Such transactions were rampant in the Bank but the management failed to report such activities to CBK as they were perpetrated by persons who were shareholders and directors of the Bank.

- (iv) The draft inspection Report documenting the above findings was forwarded to Charterhouse Bank on 21st June, 2006 for review and feedback by 4th July, 2006. Follow-up inspection of Charterhouse Bank revealed repeated violations and other problems that warranted the closure of Charterhouse Bank

Ltd. According to CBK regulations, violations of banking regulations are penalisable but must be rectified.

2.2 EVIDENCE BY KENYA REVENUE AUTHORITY (KRA)

Mr. Michael Waweru, Commissioner General of KRA and Mr. Joseph Nduati, Commissioner in charge of Investigation and Enforcement, appeared before the Committee on Monday 30th August, 2010 and gave evidence that:-

- (i) KRA as invited in 2006 by the Inter-agency Taskforce investigating Charterhouse Bank to assist with tax evasion aspect of the investigation and the Taskforce members were CBK, KACC, and the State Law Office.
- (ii) KRA investigated all major customers who held accounts in Charterhouse Bank to evaluate their balances and also the transactions against the respective tax returns, focusing mainly on Income Tax and VAT returns as a routine procedure for processing information received by the KRA.
- (iii) KRA gave assessment for taxes and levied penalties where taxes were found due, in accordance with the relevant legislation. Any tax payer is entitled to dispute the assessment when not satisfied with the computation. KRA was therefore not involved in the tax assessment of Charterhouse Bank or its shareholders *per se*, but the focus was on its customers suspected of tax evasion.
- (iv) Charterhouse Bank is registered for corporation tax under PIN No. P000595708D and the current status of the Bank reflects that the Bank has been filing self-assessment tax returns until 2008 and PAYE returns on a monthly basis up to May 2010 according to the tax ledgers.
- (v) The Daily Nation report of 17th October, 2007 alleging unavailability of information on the directorship of Nakumatt

holdings in KRA records was misleading because KRA was not investigating the tax status of the directors and shareholders of the Bank. However, KRA did state that Nakumatt Holdings Limited had 25% shareholding in Charterhouse Bank Ltd as alleged in the media.

- (vi). In regard to KRA position on the re-opening of the bank, the Commissioner General stated that KRA as a revenue agency, is mandated to collect and account for government revenue under the Revenue Authority Act Chapter 469 of the laws of Kenya. Therefore, placing banks and financial institutions under statutory management is under the Banking Act and KRA has no jurisdiction, as the decision to place the Bank under statutory management was not based on the revenue Act.
- (vii) The Commissioner General stated that every bank has customers involved in tax evasion and are usually dealt with in accordance with the revenue Act. Therefore, tax evasion by a customer cannot constitute a reason for closing a bank, and that every bank would be closed today if that was the case. The Commissioner General confirmed that KRA had no pending tax issue with Charterhouse Bank as the Bank had been paying taxes and filing returns timely and could provide tax compliance certificate to Charterhouse Bank if requested.

2.3 EVIDENCE BY KENYA ANTI-CORRUPTION COMMISSION

2.3.1 EVIDENCE BY DR. JOHN MUTONYI, DEPUTY DIRECTOR OF KACC

The Deputy Director of KACC appeared before the Committee on Tuesday 2nd September, 2010 and Thursday 28th October, 2010 and gave evidence that:-

- (i) KACC was not and has not been investigating Charterhouse Bank but was only involved in investigating documents and records in

Charterhouse Bank relating to three companies as a result of allegations of malpractices that had been unearthed by CBK in its routine audit inspection of the Bank and reported to the Minister for Finance who constituted an inter-agency investigation team comprising of three agencies:- KACC, KRA and CBK. This investigation started in 2004.

- (ii) The objective of the investigation was to utilize the respective mandates of the three agencies to:-
 - (a) Investigate suspected tax evasion on undeclared income by traders who were using the Charterhouse Bank Ltd. to hide their business operations from KRA.
 - (b) Investigate violation of banking laws and regulations and take necessary action.
 - (c) Investigate any incidental malpractices by the Bank such as money laundering.
- (iii) With the combined mandate of the three institutions, it was envisaged that in the event that:-
 - (a) Tax evasion is established, KRA would move to recover while KACC would compile evidence on the tax evasion for possible prosecution under Anti-corruption and Economic Crimes Act for failure to pay necessary tax to KRA.
 - (b) Banking laws and regulations were breached, CBK would take the necessary action as provided for under the banking laws to discipline Charterhouse Bank including placing it under statutory management.
- (iv) The joint investigation team obtained warrants to investigate accounts and/or search premises and served them on

Charterhouse Bank to collect documents and provide information on the following three trading firms.

- ♦ Tusker Mattresses
- ♦ W. E. Tilley
- ♦ Creative Innovations

- (v) Bank account and financial records for the three companies were obtained from Charterhouse Bank and the trading firm's premises using the warrants. A tax audit based on the documents was carried out by KRA officials who came up with provisional tax assessments for the three firms.
- (vi) Under the circumstances, it was necessary for KRA to serve the tax assessment to the firms and demand for their response or payment. Investigation by KACC could only ensue once KRA had determined whether there was indeed undeclared tax by the three firms and that it was evaded.
- (vii) Tax laws also provide for a dispute resolution mechanism where the assessed firms have recourse to dispute the computation of the tax assessment. The mechanism has to be exhausted before the final tax figure owed can be determined and recovery effected by KRA and necessary criminal investigations conducted by KACC. The tax assessment computed by KRA was disputed by the three firms causing KRA to pursue and exhaust the dispute resolution mechanisms with the firms as provided for in the tax laws.
- (viii) Consequently, KACC could not proceed with any investigations before the outcome of the dispute entered into by KRA and the subject firms and there has been no communication from KRA since then. In the meantime, CBK was to pursue the Bank with regard to violations of the banking laws and regulations. To-date KACC has not been advised whether the KRA exhausted the

dispute resolution mechanism. Where payments are made on the assessed taxes, no action or prosecution is undertaken by KACC.

- (ix) KACC role in the investigation was therefore only confined to the initial search and seizure of documents at the Bank's premises in relation to the three companies which had accounts in Charterhouse Bank. There was no tax evasion allegation against Charterhouse Bank but against the companies which had accounts with the Bank and that why KACC was investigating only the three companies. KACC had neither powers nor mandate to investigate money laundering against the Bank because there was no law at that time against money laundering.
- (x) KACC did not participate in the closure of Charterhouse Bank and has no file pending against the Bank since KACC was not investigating the Bank and is equally puzzled that it has taken rather long to conclude the investigations on the Bank.
- (xi) On allegations of economic crime, KACC would only have participated in one crime and that is tax evasion which it had mandate to investigate because it had no mandate to investigate money laundering. Money laundering was not an offense by that time and even now when it is an offense; it is another agency that would be involved and not KACC.
- (xii) There was no allegation that Charterhouse Bank was involved in tax evasion and the investigation was only on the three companies that had accounts in Charterhouse Bank and that is why KACC accessed and obtained documents from Charterhouse Bank but had no issue with Charterhouse Bank.

2.3.2 EVIDENCE BY PROF. PLO-LUMUMBA, DIRECTOR OF KACC

The Director of KACC appeared before the Committee on Thursday 28th October, 2010 accompanied by Dr. Mutonyi who had previously

appeared before the Committee and gave following evidence:-

- (i) Dr. Mutonyi confirmed to the committee that the Inter-agency Taskforce did not record any minutes of its meetings and that KACC could not have conducted investigations on Charterhouse Bank because the allegations made against the Bank relating to money laundering, siphoning of money, and fictitious accounts were not within KACC mandate. Therefore, KACC did not carry any investigation on the Bank as a suspect then and even at present.
- (ii) The Director clarified that he had received two fresh complaints on Charterhouse Bank. One from anonymous person via e-mail and one formal from the Ambassador of the United States of America to Kenya to KACC on 28th September 2010. **(copy – Annex 20)**. The Director acknowledge receipt vide a letter dated 28th September, 2010 **(copy – Annex 21)**. The information submitted by the Ambassador was being analyzed by KACC with a view to establishing whether any offense known to law had been committed and instituting further investigation on the matter.
- (iii) The Director also clarified that it is not the mandate or prerogative of the KACC to decide whether any bank including Charterhouse Bank should be opened or closed but it is within the mandate of the KACC to receive legitimate complaints and act on them. He stated that under Section 47 (a) of the Anti-Corruption and Economic Crimes Act, it is possible for KACC to re-open an investigation that has gone cold in light of new evidence.
- (iv) The Director further clarified that on receipt of the complaints, KACC deemed it necessary to inform the public through a press statement that it had received fresh information from highly placed sources on alleged activities of Charterhouse Bank Ltd which is being examined with a view to establishing whether there

has been a violation of the law. KACC has since written to both Central Bank and Kenya Revenue Authority seeking for information regarding Charterhouse Bank and is still awaiting for response from the said institutions.

2.4 EVIDENCE BY STATE LAW OFFICE

2.4.1 EVIDENCE BY MS MUTHONI KIMANI

The Senior Deputy Director/Solicitor General in the office of the Attorney General appeared before the Committee on Tuesday 2nd September, 2010 and Friday 29th October, 2010 and gave evidence that:-

- (i) The Attorney General's Office was not involved when the investigations on Charterhouse Bank began in 2004. The Office was only involved in 2009 in the litigation aspect of Charterhouse Bank after CBK sought legal advice from the Office on 15th December, 2009 regarding the injunctive orders. The office of the Attorney General was clearly aware of the litigations relating to the Central Bank because the office had been representing the Minister for Finance.
- (ii) The involvement of the Attorney General in the matter regarding Charterhouse Bank was based on CBK request for a legal advice vide the letter dated 17th June 2009 (**copy Annex - 22**) whereby CBK requested for the Attorney General's legal advice regarding a settlement that CBK had entered into to re-open Charterhouse Bank. Prior to that, the Attorney General had been involved only in litigation that culminated in the request for legal action.
- (iii) The cases by depositors of Charterhouse Bank involve the following multiple litigations that were filed at the High Court and the Attorney General was involved in representing the Minister for Finance. The first case No. HCCC 329 of 2006 by Charterhouse Bank did not involve the Attorney General and it was seeking a

temporary injunction to restrain the CBK from appointing a Statutory Manager and this was dismissed by the High Court on 26 July 2006.

- (iv) Secondly, Eldoret High Court case Miscellaneous civil application No. 638 of 2006 where the parties were Ratlal Automobile Limited and three others versus the Ministry of Finance, Central Bank, Statutory Manager and Charterhouse Bank. The High Court sitting in Eldoret on 15th September, 2006 granted the applicants leave for judicial review, to review the decision, of Central Bank's appointed Statutory Manager's decision to close Charterhouse Bank and not to conduct the banking business of the institution. The leave was granted which was to operate as a stay.
- (v) The interpretation of the granted order was that Charterhouse Bank could operate upon failure by the Central Bank to hand over the management to Charterhouse Bank. The management applied for contempt against the Statutory Manager and the application for contempt was granted by the High court in Eldoret resulting in the Central Bank and the Statutory Manager making an application on appeal to stay the orders granted by the High Court against the Statutory Manager. There has been a lot of litigation arising from that matter and the high court granted the stay of the contempt order.
- (vi) Thirdly, Kitale High Court application No 105 of 2006 by a depositor, Mr. Mohammed Asham Ali, verses the Central Bank and the Minister for Finance. The High Court again sitting in Kitale on 19th September, 2006 granted the applicant leave to apply for judicial review to review the decision of the Central Bank's appointed Statutory Manager's decision to close the bank and to refuse to conduct banking business, which was against the interest of the depositors. The High Court granted the leave which

was also to act as a stay of the decision. The applicant in that matter was a businessman in Kitale who had an account at Charterhouse Bank based in Kitale and his assertion was that his business was adversely affected by the closure of the Bank and he was entitled to apply to the High Court to review the decision. That application is still pending.

- (vii) Fourthly, Malindi Miscellaneous application No. 97 of 2006 where again another depositor filed an application against the Central Bank, the Minister for Finance, and the Statutory manager challenging the decision of the Statutory Manager to close the Bank and of refusing to conduct the banking business. The High Court sitting in Malindi granted the applicant's leave to apply for judicial review on 9th October 2006 and the leave was also granted to act as a stay.
- (viii) Fifth, Malindi High court Miscellaneous application No 98 of 2006 also filed by a depositor against the Central Bank, Minister of Finance, and the Statutory Manager seeking leave to apply for judicial review against the Statutory Manager's decision to close the Bank and to deny them banking services. The High Court again granted the applicant leave which was to operate as a stay.
- (ix) The office of the Attorney General was involved in the above stated cases in which the office was instructed by the Minister for Finance to represent it in the judicial review proceedings and the Attorney General's office filed a replying affidavit sworn on 12th and 13th October, 2006.
- (x) The Minister's Affidavit stated that the appointment of a Statutory Manager by the Central Bank received his approval in line with provisions of the Banking Act. The reasons given by the Minister for approval was that, there had been adverse publicity on the

Bank and there was fear on a run on the Bank which would have affected the business of the Bank.

- (xi) The Statutory Manager was to serve for one year and subsequently, there has been one extension granted by the court because the Statutory Manager who was also working at the Central Bank claimed that she was unable to execute her mandate due to the gagging court orders.
- (xii) Subsequently this matter was brought to the attention of the 9th Parliament and the Departmental Committee on Finance, Planning & Trade recommended for the re-opening of the Bank in its report but CBK has not complied to-date. CBK reverted to the Attorney General vide letter dated 17th June, 2009 seeking legal interpretation of the Banking Act and whether there was any legal adversity or impediment that would stop the re-opening of Charterhouse Bank. The Attorney General upon reviewing the pending cases, gave his opinion to CBK vide letter dated 21st July, 2009 **(copy Annex - 23)** that there was no legal impediment to the re-opening of Charterhouse Bank. There has been no further communication on the same from CBK.
- (xiii) Under the provisions of the Banking Act, a bank may be closed when it is under liquidation and it was the understanding of the Attorney General's office that Central Bank was trying to protect Charterhouse Bank and was therefore supposed to follow the law. Having not complied with the law, CBK should initiate action to resolve the impasse and negotiate with the Bank on the terms for re-opening the Bank since there is no credible evidence to confirm that there was a run on the Bank and there is no legal basis upon which the Statutory Manager would still be in the Bank when the term has expired and there is no further extension.

- (xiv) The Solicitor General confirmed that she has not been in communication with foreign embassies or any other institutions but had seen a letter from the American Embassy addressed to the Attorney General raising concern about Charterhouse Bank and noted that the communication was rather unusual since this is not a matter of mutual legal assistance.
- (xv) CBK is empowered under Section 34 of the Banking Act to intervene in the management of a bank to protect it from collapsing and the intension is like a receiver manager in a company, who is supposed to bring sound business practices into the company and ensure that it is back on its feet.
- (xvi) The Minister was convinced to allow Central Bank to appoint the Statutory Manager under Section 34 (1) and (2) (a) of the Banking Act but the facts that have emerged after the closure of the Bank, appears to have been different from the facts that caused the Minister to allow the placement of the Bank under statutory management. Apparently, there was no full disclosure of the reasons and the basis on which the Bank was placed under statutory management.
- (xvii) The Attorney General on the request of the Central Bank had on the 21st of July 2009 advised that there was no legal impediment to the execution of the restructuring agreement. Following this confirmation, there was no further communication from the Central Bank and it was assumed that the Attorney General's advise was adhered to.

2.4.2 EVIDENCE BY MR. KERIAKO TOBIKO, CHIEF PUBLIC PROSECUTOR REPRESENTING THE ATTORNEY GENERAL

The Chief Public Prosecutor appeared before the Committee on Friday 29th October, 2010 accompanied by Ms Muthoni Kimani (Senior Deputy

Director/Solicitor General) Mr. James Warui Mungai (Principal State Counsel) representing the Attorney General and gave evidence that:-

1. Criminal investigations on Charterhouse Bank Ltd. was initiated by the CBK through the Banking Fraud Investigations Unit (BFIU) and the Office of the Attorney General got involved when the investigation file was forwarded to the Office by the BFIU on 6th September, 2007 with recommendations that Charterhouse Bank Directors should be charged with various offences of violations of the Banking Act.
2. Since there was no legal requirement for the Attorney General to give consent to charge the Directors with the offences recommended, the involvement of the Office of the Attorney General was only limited to approving that there was sufficient evidence to sustain the proposed charges.
3. Upon perusal of the file by the Office of the Attorney General, it was found that there was sufficient evidence to charge Mr. Sanjay Shah, Managing Director and all other Directors of the Bank as recommended by the Police. The Attorney General directed vide his letter dated 25th February, 2008 (**copy Annex - 24**) that the said Directors should be arrested and arraigned in court for the afore-mentioned offences.
4. The Attorney General directed the Police to draw the appropriate charges and forward the same to the Attorney General's Office for perusal before registering the same in court. Additionally, the Police was requested to confirm the Directors of Charterhouse Bank with the Registrar of Companies.
5. On 29th February 2008, the Investigation Officer namely Chief Inspector Lydia Ligami of BFIU hand delivered to the Attorney General's Office, the draft charge sheet which was discussed and

the Investigating Officer left with the draft charge sheet to prepare the final copy of the charge sheet in the usual Police format. The Police have not reverted to the Office of the Attorney General since then.

6. Separately, the Attorney General received a letter dated 14th February 2008 (**copy Annex - 25**), from Mr. Michael Ranneberger, the Ambassador of the United States of America expressing concern about the status and future handling of the Charterhouse Bank Ltd.
7. The Attorney General responded to the Ambassador vide his letter dated 21st February, 2008 (**copy Annex - 26**) confirming that he had given appropriate directions on the matter and that investigations relating to tax evasion and proceeds of crime were being handled by KRA and KACC respectively and that the said institutions had not submitted their files to the Office of the Attorney General.
8. In addition, the Office of the Attorney General received a letter dated 5th March, 2008 (**copy Annex -27**) from the advocates acting for some Directors of Charterhouse Bank Ltd. complaining that their clients were discriminated against in that other banks who had committed similar violations of the Banking Act were dealt with by CBK by way of monetary penalties as provided for by Regulations contained in Legal Notice Nos. 77 and 164 of 1999 - **Annex - 28**) and not by way of criminal prosecution.
9. Consequently the Attorney General wrote to the Governor of CBK on 6th March, 2008 (**copy Annex - 29**) seeking his response on the allegations of discriminatory treatment by the advocates. He sought the clarification to enable him respond appropriately in the

event that those issues were raised in court to challenge the prosecution which he had already ordered.

10. The Governor responded on 25th March, 2008 (**copy Annex -30**) and stated that CBK can institute criminal prosecutions against the culprits in addition to levying penalties depending on the nature and gravity of the violations and gave the example of Eurobank Limited.
11. The position was that the intended prosecution was discriminatory as the attached list contains is a list of banks that had committed similar offenses and had actually been penalized by the Central Bank of Kenya in accordance with regulations published by the Minister for Finance in Legal Notice Nos. 77 and 164 of 1999 as regulations on monetary penalty. A similar list was also submitted later to the Committee by the Governor of Central Bank of Kenya
12. The contention was that other banks that had committed similar violations, had been penalized in accordance with the rules and regulations by the Minister for Finance yet in the case of Charterhouse Bank, the directors are charged or proposed to be charged hence the discriminatory treatment. The Attorney General as the principal advisor of the government has the obligation in law to ensure that the rule of law and due process is followed and to advise the government institution and public offices to operate within the confines of the law.
13. The Chief Public Prosecutor maintained that even if the charges the Attorney General had endorsed materialized for prosecution, that would still not be a ground in law upon which to close Charterhouse Bank or to appoint a Statutory Manager. Therefore, charging the directors of the Bank with technical breaches of the Banking Act would not justify necessarily or lead to the closure of

the Bank or lead to the appointment of a Statutory Manager as not every breach of the law necessarily entails criminal culpability.

14. The PriceWaterHouseCoopers Ltd report that was in the Police file was only in relation to the violations of the Banking Act in respect to sections 10, 11 and 50 and the Prudential Guidelines and Regulations but did not mention money laundering, tax evasion or any other allegations which later featured in the media. The charges were based essentially on prudential guidelines and regulations which are not law. The investigation was opened by CBK and conducted by police officers who were attached to CBK. Rose Detho was the complainant as well as an employee of CBK who was the investigator and ultimately she would have become the prosecutor.
15. The issue of fairness, impartiality and equality before the law in the new constitutional dispensation is very important to ensure that the government is not accused of having treated Charterhouse Bank limited without justification, in contravention of the constitution which provides for equality before the law and due process. From the record available it would appear that there was no fairness and equality of treatment of the violators.

2.5 EVIDENCE BY THE DEPUTY PRIME MINISTER AND MINISTER FOR FINANCE - HON. UHURU KENYATTA, MP

The Deputy Prime Minister and Minister for Finance appeared before Committee on Tuesday 28th September, 2010 accompanied by Mr. Joseph Kinyua (Permanent Secretary) Mr. J. Nyamunga (Director, of Economic Affairs Department), Mr. B. Amolo (Deputy Secretary), and gave evidence that:-

- (i) The regulation of the banking business including licensing is the mandate of the Central Bank of Kenya as provided for under Section 5 & 6 of the Banking Act.

- (ii) The powers to intervene in the management of a bank are vested with Central Bank of Kenya under Section 34 of the Banking Act. and the powers to terminate the appointment of Statutory Manager also vests with the Central Bank of Kenya. Therefore, it the duty of the Central Bank of Kenya to make a decision on the matter of Charterhouse Bank.
- (iii) Given that the Central Bank of Kenya is the authority mandated under the law to regulate banking business, it is not prudent for the Minister for Finance to take a position on the matter of Charterhouse Bank which is currently under statutory management. Even under the previous law, the Minister for Finance could only act on the recommendation of CBK.
- (iv) In response to guidance sought by CBK on Charterhouse Bank, the Minister for Finance responded to CBK on 15th June, 2009 that:-

"We refer to your letters to us dated 23rd of March 2009 and 20th of May 2009, on the above subject matter. In the letters under reference, you are seeking my comments, guidance and advise on action to be taken on Charterhouse Bank ltd. Having reviewed the relevant legislation, we recognize that the responsibility of making the decision as to whether to liquidate or restructure the bank lies solely with the CBK and we, therefore, urge you to make a decision on this matter without any further delay, guided by the forensic findings and the law that governs the banking business. However, we recognize that the case in question is complicated by various pending court cases and, therefore, wish to request that you consult the office of the Attorney General in making your decision". (copy Annex- 31)

That remains the position of the Minister for Finance and indeed the Treasury.

- (v) The Minister for Finance only acts on the recommendation of the Central Bank, especially with regard to matters of banking supervision and the Ministry of Finance does not direct. This is what informed the amendment of the Banking Act to what it is currently where that recommendation lies solely with the CBK as the recommending entity. This applies to other regulatory bodies like the Capital Market Authority on issuance of licenses to operate under the capital market and such bodies or agencies have clear mandates and they exercise independence in exercising their functions. In this regard, the role of the Minister for Finance or Treasury would be to communicate the decision of CBK to the Committee or Parliament on behalf of CBK.
- (vi) Parliament in its own wisdom amended the Banking Act after what transpired about the Exchange Bank and many other banks was viewed as interference by the Ministry of Finance in the management of those institutions which affected the financial system.
- (vii) The Minister for Finance advised CBK to be guided by the Attorney General on how to deal with the legal hurdles involving Charterhouse and informed the Committee that if the Governor does not perform his functions, then there would need to make a recommendation to H.E. the President and thereafter as required by law, to set a tribunal to review the matter on his replacement.

2.6 EVIDENCE BY HON. AMOS KIMUNYA, MP (FORMER MINISTER FOR FINANCE)

Hon. Amos Kimunya, MP appeared before the Committee on Thursday 7th October, 2010 and gave evidence that the decision to place

Charterhouse Bank under statutory management during his tenure as the Minister for Finance was informed by the following:-

- (i) The adverse publicity on Charterhouse Bank in the media and the matter having been officially brought in Parliament, caused jittery among international corresponding banks.
- (ii) The perceived risk on the stressed Charterhouse Bank Ltd. that would trigger off effects on other commercial banks hence the need to avert a run on other banks and restore confidence in the banking industry.
- (iii) Recommendations by CBK as the regulator to safeguard the interest of depositors, shareholders and the banking industry following its inspections audit reports on Charterhouse Bank Ltd.

2.7 EVIDENCE BY THE DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT, MR. NDEGWA MUHORO

The Director of Criminal Investigation Department (CID) appeared before the Committee on Tuesday 12th October, 2010 accompanied by Mr. Mohammed Ali, (officer-in-Charge, investigations) Mr. Nicholas Omwende (officer-in-Charge, Anti-terrorism Unit) Miss. Judy Adhiambo (Officer-in-Charge, Anti-narcotic Unit) and Miss Lydia Liganye (Banking Fraud Investigation Unit) and gave the following evidence:-

1 CHRONOLOGY OF INVESTIGATION ON CHARTERHOUSE BANK BY CRIMINAL INVESTIGATION DEPARTMENT

- (i) The Director of the CID informed the Committee that the only allegation made against Charterhouse Bank by Ms Rose Detho, the Statutory Manager, related to the violation of the Banking Act. and that the case was reported to the Banking Fraud Investigation Unit by the Statutory Manager in earlier December, 2006.

- (ii) Ms Rose Ndetho stated that after her appointment as a Statutory Manager, she invited PriceWaterHouseCoopers Ltd. to do an audit on Charterhouse Bank and a file was opened based on the PriceWaterHouseCoopers report where a number of violations were identified.
- (iii) Violation of the Banking Act involved the granting and permitting of credit facilities, financial guarantees and other liabilities to persons and associates such that the total advances exceeded 25% of the Bank's core capital of Kshs 593 million which was contrary to Section 10 of the Banking Act and the CBK Prudential Guidelines.
- (iv) A preliminary investigation was carried out by the Banking Fraud Investigation Unit and the file forwarded to the Attorney General's Office vide a letter ref: CID/BFI/SEC/4/4/VOL.111 dated 9th December, 2006 **(copy Annex - 32)**.
- (iv) On receipt of the file, the Attorney General wrote back to the Banking Fraud Investigation Unit in a letter dated 9th December, 2006 expressing concern that the matter was at initial stages as no statements had been recorded from Central Bank of Kenya officials such as the Statutory Manager.
- (v) The Attorney General advised that further investigations be carried out before any charges could be preferred on any persons as the matter was of great importance.
- (vi) Charterhouse Bank Ltd. had been placed under statutory management by then with effect from 23rd June 2006 and forensic audit had been conducted by PriceWaterhouseCoopers (PWC) Ltd.

- (vii) The Banking Fraud Investigation Unit launched an inquiry No. 53/07 into the matter and recorded statements from Ms Rose Detho who gave an insight of her complaint as the Statutory Manager and officers from PWC also recorded statements.
- (viii) The findings of the investigation based on the audit report revealed the violation of the Banking Act and the CBK Prudential Regulations by Charterhouse Bank Ltd. Ms Rose Detho provided documents to support the anomalies which together with e-mail correspondence, proved communication between Mr. Sanjay Shah, one of the Bank Directors and other individuals.
- (ix) The then Officer-in-charge of the Banking Fraud Unit forwarded the compiled file of inquiry to the Attorney General vide a letter ref: CID/BFI/SEC/4/4/VOL.124/13 dated 6th September 2007, (**copy Annex 33**) to the attention of Mr. James Mungai Warui, a State Counsel who was dealing with the matter.
- (x) On behalf of the Attorney General, the said State Counsel wrote back vide letter ref: AG/CR/2053/1323 dated 25th February 2008, (**copy Annex -34**) and stated that there was sufficient evidence based on the evidence in the inquiry file, to charge the suspects with various offences for contravening provisions of the Banking Act.
- (xi) Consequently, the Attorney General directed that:-
 - (a) Mr. Sanjay Shah, Managing Director of Charterhouse Bank Ltd and all other Bank Directors be arrested and arraigned in Court.

- (b) The Banking Fraud Unit to draw up appropriate charges and forward them back to the Attorney General and also to confirm the directorship of the Bank with the Registrar of Companies.
- (xii) The Banking Fraud Unit wrote to the Registrar of Companies, in the Attorney General's Office to confirm the directorship of the Bank vide letter ref: CID/BFI/SEC/2/1/11/VOL.2/126 dated 26th February, 2008 (**copy Annex - 35**) and also forwarded a proposed charge sheet which was received by Mr. James Mungai Warui, the State Counsel.
- (xiii) The Attorney General has never communicated back to the Banking Fraud Investigation Unit on the way forward and the duplicate file remains with the Attorney General's Office.

2. VIOLATIONS OF THE BANKING ACT AND CBK REGULATIONS

The Director of CID informed the Committee that the findings of the investigations based on the audit report revealed that the following sections were violated by Charterhouse Bank Limited.

- (i) Section 10 of the Banking Act & CBK Prudential Guideline/07,3.1 on advances, credit facilities and financial guarantees extended by the Bank equivalent to 40.5 % of the Bank's core capital.
- (ii) Section 11(1)(f) of the Banking Act & CBK Prudential Guideline/07,3.2 on advances, credit facilities and financial guarantees extended by the Bank to Sanjay Shah and his associate companies and to Mr. P. J. Mwangi, a member of staff, equivalent to 40.8 % of the Bank's core capital.

- (iii) Section 11(1)(c and d) of the Banking Act & CBK Prudential Guideline/07,3.2.2 on unsecured advances, loans or credit facilities granted by the Bank to Mr. Sanjay Shah and associate companies.
- (iv) Section 11(1)(h) of the Banking Act & CBK Prudential Guideline/07,3.2 on conducting transactions and business in a fraudulent manner including:-
 - (a) Granting of a fictitious deposit of Kshs 10 million unsupported by the Bank's funds to a friend of Mr. Sanjay Shah.
 - (b) Hurried and irregular payment of Kshs 40 million to Sirikwa Hotel by the Bank out of a cheque of Kshs 52 million before the cheque had cleared and notwithstanding a court order.
 - (c) Granting a loan of US\$60,000 by the Bank to Tradex SRI Co. and the funds released without the Bank maintaining any records on the loan.
 - (d) Payment of US\$30,200 and US\$100,000 to third parties without instructions from the client – trustees of the account holder.
 - (e) Various large payments made to personal accounts of Mr. Sanal Devan from the account of Triton Petroleum Ltd. without appropriate mandates.
- (v) Section 11(1)(e) of the Banking Act & CBK Prudential Guideline/07, 3.2.2. on failure to disclose to the CBK or furnish Board's approvals for the following:-

- (a) 5 facilities granted by the Bank to Creative Innovations Ltd. associated with the Mr. Sanjay Shah totalling Kshs 97,776,360.00 as at 23rd June, 2006.
 - (b) Advances to Nu Metro (K) Ltd.; Cottex Manufacturers and M.R. & S. R. all associated with Sanjay Shah amounting to Kshs 21,126,669.00 as at 23rd June, 2006.
 - (c) Advances to Jamachar (K) and Kings Investment, companies associated with directors of the Bank amounting Kshs 34,498,201.00 as at 23rd June 2006.
- (vi) Section 13 (1) of the Banking Act & CBK Prudential Guideline/07,3.5 by permitting Mr. Sanjay Shah shareholding of 25.36% in the Bank directly or through holding companies which was 0.36% above the prescribed 25% legally declared by CBK.
- (vii) Section 13(3) of the Banking Act on failure to disclose to CBK full particulars of the ultimate owners of the shares of the Bank held by companies or by nominees.
- (viii) Section 13(4) of the Banking Act by transferring more than 5% of the Bank's share capital to Mr. Sanjay Shah and Mr. Munish Shah through Ram Trust Ltd. without CBK approval.
- (ix) Section 50(1) (a and b) of the Banking Act & CBK Prudential Guidelines 4 & 5 by:-
- (a) Submitting incorrect information on Foreign Exchange Transactions to CBK.
 - (b) Failure to obtain and retain appropriate documents for all foreign currency transactions above US\$10,000 and

failure to report to CBK daily summaries of major foreign exchange payment above US\$50,000.

- (x) CBK Prudential Guidelines/08,4.1 by failing to submit to CBK reports of any suspicious transactions or activities that may indicate money laundering or attempts to conceal the true identity of customers or owners of assets. :-
- (xi) The preferred charges were not prosecuted on the basis that the Attorney General wrote to the Central Bank pointing out that he had received a petition from the directors of Charterhouse Bank complaining that they were being treated in a discriminatory manner as similar violations by other banks attracted monetary penalty as per legal notice No. 77 of 1999 and therefore, selectively charging the directors of Charterhouse Bank would be challenged before the court as being discriminatory.
- (xii) The CID Director confirmed that the department did not and has never investigated Charterhouse Bank for anything related to drug trafficking or terrorism.

2.8 EVIDENCE MR. GEORGE KEGORO, EXECUTIVE DIRECTOR, INTERNATIONAL COMMISSION OF JURISTS (ICJ)

The Executive Director of ICJ appeared before the Committee on Tuesday 2nd November, 2010 and gave evidence that:-

- (i) His organization has interest in Charterhouse Bank due to the control of money laundering in Kenya and his interest in the Bank dates back 2001 when US\$25 million was transferred to Crucial Properties account from a European bank. Charterhouse Bank reported the transaction as

required by CBK immediately the money was received in the account of Crucial Properties.

- (ii) Following this notification, the CBK Banking Fraud Investigation Unit applied for a magistrate's order to freeze the account of the Company and for warrants of search to enable CBK to investigate the account. CBK also stated in its application for freezing orders that it believed that the money was proceeds of a theft.
- (ii) The Company's account was frozen and CBK wrote to Charterhouse Bank Ltd. requesting to be furnished with all information relating to the transactions that had taken place through the account. The Bank declined the request on grounds that it had no legal obligation to co-operate with CBK without a valid court order, because it could allow the tampering with a customer's account yet the Bank was bound by the requirement to keep its customers' affairs confidential.
- (iii) Notwithstanding this setback, CBK continued with its investigation which established that:-
 - ♦ Crucial Properties Ltd. had been incorporated in Kenya in May 1998 with two directors.
 - ♦ In December 2000, the Company legitimately opened a foreign currency account at Charterhouse Bank and passed a resolution to introduce Mr. Humphrey Kariuki as an additional director.
 - ♦ The money was remitted into the Company's account and a receipt of money by Charterhouse Bank Ltd was reported to the Central Bank as required by the banking law.

- (iv) CBK claimed that the account holder had failed to provide a proper explanation as to the source of money. CBK however, asserted that the source of money was not Jersey as claimed but Liechtenstein in Europe.
- (v) Crucial Properties made an application in the High Court for the lifting of the magistrate's order freezing its account but the application was never heard as CBK voluntarily discharged the order and applied to the High Court for an order to restrain the money under Narcotic Drugs and Psychotropic Substance Act, which the Court granted.
- (vi) CBK claimed to be investigating the offence of money laundering and realized the legal deficiency since there was no law on money laundering in Kenya at the time when the money was received. Therefore, CBK sought to address this through a Legal Notice.
- (vii) The Attorney General's belated Legal Notice specifying money laundering as an offence was declared a nullity by the High Court on grounds that it amounted to retrospective application of the criminal law.
- (viii) CBK had assumed that Jersey, the claimed source of the money, was the same as New Jersey in the United States hence directed its investigations to the United States.
- (ix) The High Court became impatient over the failure by CBK to substantiate its claim that the source of the money was Liechtenstein. Consequently, the High Court ordered the money to be released to Crucial Properties Ltd. and CBK apparently had no strong incentive to continue with the investigations after the money was released.

- (x) The ICJ Director maintained that it is not possible to have a logical conclusion on the investigations on Charterhouse Bank Ltd. because some of the records were destroyed while in the custody of the Bank by fire that burnt the Bank's premises in September, 2004. The Director confirmed that he had not been involved in analysis of any other bank other than Charterhouse Bank and that he is only a whistleblower.

2.9 EVIDENCE BY PRICEWATERHOUSECOOPERS (PWC) LTD.

The Country Senior Partner of PriceWaterHouseCoopers Ltd. Mr. Kuria Muchiru, accompanied by Richard Njoroge, Peter Gachuhi, Suraj Shah, and Miss Elizabeth Njendu appeared before the Committee on Tuesday 2nd November, 2010 and gave the following evidence:-

1. Terms of Reference

On 5th July 2006, the Statutory Manager, Rose Detho requested the PWC Ltd. to submit a proposal to CBK to carry out a special audit on banking activities of Charterhouse Bank (**copy Annex- 36**). The Statutory Manager notified PWC Ltd that their proposal had been accepted and wrote a letter of engagement with the CBK dated 12th July, 2006 (**copy Annex - 37**) to carry out in-depth audit under the following Terms of Reference:-

- (i) Review transactions that Charterhouse Bank Ltd. had recorded in clients' accounts with special focus on insider and group-related client accounts;
- (ii) Determine if there were any indications of irregularities, such as illegal transactions or criminal offences, fraud or dishonesty committed in the course of conducting business;
- (iii) Establish if further work would need to be carried out to provide evidence of any irregularities committed, or provide any other relevant recommendations;

- (iv) Determine the status of Charterhouse Bank Ltd. compliance with and prudence in following “*Know Your Customer (KYC)*” best banking procedures through review of the appropriateness of the institution’s KYC policy and its application on all targeted accounts.
- (v) Determine whether there was any material breach of the Banking Act, the CBK Act and the CBK regulations guidelines.

2. The scope of the investigation

- The scope of investigations by PWC was strictly limited to reviewing information available within Charterhouse Bank Ltd. and therefore did not involve interviewing customers or other third parties or reviewing the records or information held by customers or third parties.
- Consequently, the ability of the audit to reveal criminal or illegal transactions committed by customers was limited. The audit however, revealed irregular transactions but it was difficult to ascertain whether criminal or illegal activities had occurred by merely reviewing Bank records alone.
- PWC Ltd. moved in when the Statutory Manager had already taken over the running of Charterhouse Bank and the directors of the Bank had automatically stepped aside hence PWC Ltd. team did not interact with the directors as the expectation was that the Statutory Manager would take up any issues that the audit team came up with, and follow up with the directors.

3. Information flow and availability

The Committee was informed that PWC faced the following challenges which impeded the progress of PWC audit:-

- (i) General unwillingness and minimal cooperation among the Bank staff to provide PWC with information requested for.
- (ii) The Bank's General Manager proceeded on leave without notice at the beginning of the exercise thereby rendering information flow difficult.
- (iii) Documents for transactions prior to June 2004 could not be obtained as the Bank claimed that the documents had been destroyed by fire at the Company's archives in September, 2004.
- (iv) The Bank's core system, Equinox was down most of the time and was never fully functional. Efforts to get Equinox vendors to resolve the problem were fruitless in the first two weeks of the assignment. Thereafter, the system was intermittently down and some of the functionalities could not be utilized.

4. Key findings by PWC Ltd. (**Report Annex- 38**)

- (i) There was breach of the Banking Act and CBK Prudential Guidelines and general failure by the Bank to follow accepted "*know your customer procedure*". The Bank had its own policies that if followed, would have complied with Central Bank's requirements but those procedures were ignored or overridden.
- (ii) There were violations to single borrower's limit where the borrowing limit was exceeded. Insider lending also exceeded the limit allowed by the Banking Act and there instances where lending to insiders was not fully secured.
- (iii) Reporting to CBK was inaccurate especially in cases of foreign currency transactions over US\$50,000 and record

keeping for transactions over US\$10,000. This s requirement was not complied with in some instance and the transactions were deliberately split in such a way to avoid such reporting according to the CBK Act and CBK regulation.

- (iv) PWC identified some suspicious or unusual transactions some of which could point to possible criminal or money laundering. Since the scope of the investigation was limited to reviewing the information within the Bank, PWC recommended in its report that further investigation be done on those transactions because it was difficult to establish criminal activity by merely reviewing the records within the Bank without interviewing the customers or extending the investigation outside the Bank.
- (v) Violation of the Banking Act or various requirements of Prudential Guidelines are common in banks but the extent of the violations varies from bank to bank and the CBK deals with them differently depending on the extent and magnitude of the violation. CBK can impose either administrative sanctions or monetary penalties.
- (vi) Various unusual transactions by customers of Charterhouse Bank and not the Bank that pointed to possible money laundering and tax evasion or other irregularities were identified but there was no evidence to prove criminal activity.
- (vii) PWC Ltd. moved in when Charterhouse Bank had already been closed and PWC terms of reference did not include recommending whether the Bank should be re-opened or remain closed. Therefore, PWC did not give any

recommendation on that direction as it was a matter for the Central Bank of Kenya to deal with.

- (viii) PWC held a meeting on 30th August, 2006 with the Minister for Finance at Treasury Building where the findings of PWC were discussed and the report was finalized the next day. The following were present during the meeting:- KACC Director, KRA Commissioner General, CBK Governor, the Statutory Manager, and the Permanent Secretary, Ministry of Finance. PWC report was only meant for CBK and the Statutory Manager which contracted the firm.
- (ix) PWC draft report was discussed with the directors of the Bank to the best knowledge of PWC because there were issues raised and the Statutory Manager sought for clarification and documentations from PWC team to support the issues raised in their report which she claimed to have been disputed by the directors of the Bank.

2.10 EVIDENCE BY MR. SANJAY SHAH, FORMER MANAGING DIRECTOR OF CHARTERHOUSE BANK LIMITED

The former Managing Director appeared before the Committee on Friday 3rd September, 2010 accompanied by Mr. Ken Odera, Maria Migiro, and Dennis Aroka, and gave evidence that:-

- (i) On 25th January 2006, the Minister for Finance, Permanent Secretary, Governor of Central Bank and the Director of Financial Institutions supervision Department in response to Charterhouse Bank application for the renewal of its banking license for the year 2006, issued a certificate of recommendation confirming that;

"The banks overall financial condition was rated satisfactory as at 30th -09-2005. The institution had maintained a sound

financial condition over the years and is in compliance with the Banking Act and the CBK prudential regulations. Therefore recommended that approval be granted for the renewal of the institutions banking license for the year, 2006 as required under section 5 of the banking act”.

- (ii) It is therefore a fact that the Charterhouse Bank license for the year 2006 was renewed on recommendation that the Bank was compliant over the years. Due to compliance, on 7th March 2006, authority to publish the Bank's audited accounts as at 31st December 2005 was granted and was signed by Rose Detho who later became the Statutory Manager. This authority is granted only upon compliance with the provisions of the Banking Act.
- (iii) The Central Bank has maintained that Charterhouse Bank was found non-compliance as a result of inspection conducted under section 32 of the Banking Act. The Charterhouse Bank maintains that the provisions of section 32 (3) requires that the person making the inspection shall submit the report to the Central Bank, and the report shall draw attention to any breaches or non observance of requirements of the banking regulations made there under. The person making the inspection is required to provide remedial measures. This has never happened to Charterhouse Bank and the Bank has never refused to act on any remedial measure.
- (iv) The Central Bank has portrayed Charterhouse Bank as a repeat offender. Charterhouse Bank denies this allegation because the banking law does not allow room for repeat violation or non compliance because in such occasion, the remedy is provided for under section 33 of the Banking Act which specifically gives the Central Bank power to appoint a qualified person into any bank to

perform any action, take any measure, in order to implement and improve management of an institution. This has never happened to Charterhouse Bank.

- (v) The adverse publicity was not caused by Charterhouse Bank, but by the letter written to the Minister of Finance by the Governor dated 20th March 2006 and other documents including the report dated 21st June 2006 tabled in Parliament on 21st June 2006 by Hon. Billow Kerrow, which appears to have been intentionally leaked and/or given to third parties in order to cause adverse publicity against Charterhouse Bank in the media. The documents that caused adverse publicity were apparently from the CBK since CBK has never condemned them or denied them or investigated anything relating to them.
- (vi) The draft inspection report on Charterhouse Bank dated 21st June 2006 and marked "draft" on all pages was delivered to Charterhouse Bank for response after 4 p.m. on that day. Surprisingly, a report, which was not a draft was tabled before the National Assembly before 4 O'clock on the same day. The decision by the Central Bank to give this report to unauthorized persons for it to be tabled before the National Assembly is what constitutes conspiracy and malice against Charterhouse Bank.
- (vii) On 23rd June 2006, the CBK exercised its powers to intervene on Charterhouse Bank under section 34 (1) (d) to protect the interest of the institution, its depositors and creditors. Subsequently the CBK appointed Ms Rose Detho as a Statutory Manager under Section 34 (2) (a) which empowered her to assume the management, control and the conduct of the Charterhouse Banks business. Instead of complying with the law, she closed the Bank and directed the Kenya Bankers Association to remove the Bank

from the Clearing-House. Section 34 of the Banking Act does not empower the Statutory Manager to close the bank and even if there is such power, it would not authorize the closure of all branches but only the branch found with violations.

- (viii) On 12th of July 2006, the Statutory Manager appointed PriceWaterHouseCoopers Ltd. (PWC) to carry out an audit on Charterhouse Bank. In her report of September 2006, the Statutory Manager recommended to the Minister for Finance to revoke the banking license of Charterhouse Bank and thereafter place it into liquidation. This action and recommendations are outside the powers of a Statutory Manager under section 34 of the Banking Act as the power is to intervene but no power to close the Bank.
- (ix) In the letter dated 20th March 2006, (**Annex – S1**), the Governor purported to accuse Charterhouse Bank of money laundering and tax evasion. The Governor had no mandate to make such allegations and accusations because as of 23rd March 2006, there was no anti-money laundering legislation and the tax matters are outside the jurisdiction of the Governor hence Charterhouse maintains that the Governor's actions were based on malice.
- (x) In the said letter, the Governor alleged that W.E Tilley of Muthaiga was involved in money laundering by exporting goods worth Kshs. 1.35 billion and the receipts were Kshs 5.89 billion. The statement of this company indicates that the total turnover of this company does not exceed Kshs. 500,000,000 since the account was opened hence Charterhouse Bank is not aware of the receipts of Kshs. 5.89 billion as alleged by the Governor.
- (xi) The CBK directed Charterhouse Bank in 2003 to employ an internal/compliance officer. Mr. Peter George Odhiambo who had

worked for Barclays Bank was recommended by the official of CBK and was employed by Charterhouse Bank as Internal/Compliance Officer. Charterhouse Bank had also employed Mr. Joseph Maina Gachari as an archivist, Mr. Joseph Chege as in charge of FOREX Department and Mr. Lameck Wagumba as the Computer Manager. Later on, Charterhouse Bank discovered that all these people were stealing documents from Charterhouse Bank and taking them to the CBK only for the CBK to ask for the same documents that they very well knew where they were. These employees of Charterhouse Bank were being paid US\$300 per day by CBK and they later resigned in a huff and were employed by the CBK at a hefty salary **(A copy of the employees PAYE Annex - S3).**

- (xii) When the CBK and the Statutory Manager closed Charterhouse Bank, the depositors whose lives and business productivity depend on having operational banking services, felt aggrieved and instituted judicial review proceedings where they requested the courts to restrain by way of an injunction, the CBK, the Minister for Finance and the Statutory Manager from closing the bank thereby, denying them banking services contrary to the law. The court granted the injunction and the judges who delivered the rulings in the various courts countrywide on interim orders restraining the Statutory Manager and ordering for the re-opening of Charterhouse Bank Ltd. were transferred immediately.
- (xiii) The Statutory Manager and the CBK did not discuss either the draft or the final PWC report with the directors of Charterhouse Bank. In addition, they did not seek the directors' comment or response on the report and has never given them a copy to-date. Surprisingly the email and other correspondences by Richard Cox from the British High Commission indicated that the High Commission had a copy of the PWC report yet CBK and the

Statutory Manager could not give the Bank directors a copy and this is what the directors of the Bank view as malice and conspiracy.

- (ix) It was stated in the e-mail that the Statutory Manager had declared that Charterhouse Bank was facilitating money laundering and tax evasion and was in violation of the Banking Act and Prudential Regulations. Therefore, she recommended to the Minister of Finance to revoke the Bank's license and the Permanent Secretary, Ministry of Finance gave an assurance to act within the week. It is also alleged in the e-mail that Members of Parliament and Members of Finance Committee of the Ninth Parliament were bribed over Charterhouse Bank saga (**copy of the e-mail Annex - S4**).
- (x) The inspection team was required to determine the status of Charterhouse Banks compliance with regard to "*Know Your Customer (KYC)*" through the records. However, KYC is not intended to be justified by the number of documentation that a bank keeps but the requirement is that the bank knows its customers such that it can be able to point out the customer, his businesses, and the banking activities. Nobody asked the directors of Charterhouse Bank about any customer and they found the customer to be unknown to the Bank.
- (xiii) Charterhouse Bank has never been involved in any money laundering at all, and there is no credible evidence from anyone showing any customer of the Bank and his account, as having been involved in money laundering. The directors are not aware of any proceeds of crime coming into Charterhouse Bank or any money withdrawn from the Bank for financing of drug trafficking or terrorism.

- (xiv) Charterhouse Bank has paid its taxes to-date and has never had any tax dispute, tax liability outstanding between itself and the Kenya Revenue Authority. Therefore, any accusation that Charterhouse Bank is involved in tax evasion is false and untrue.
- (xv) Upon inspection, Charterhouse Bank was found to have violated, the usual technical sections of the Banking Act, which are generally violated by every other bank and the punishment is by way of monetary penalty. These sections are not really mandatory, because, some of the banks are exempt or have been exempted by the Finance Minister from complying with sections 10, 11, 12 and 13 of the Banking Act to operate without observing them. **(copy of gazette notices by the Minister Annex- S5).**
- (xvi) The Central Bank, the Statutory Manager and PWC Ltd accused Charterhouse Bank of violating sections 10, 11, and 50 of the Banking Act and Prudential Guidelines. However, these violations are subjected to a monetary penalty and not the closure of a bank. These violations existed in other banks before Charterhouse Bank was placed under Statutory Management and even after the Bank was closed other banks still violated them. It is evident that other banks have always been penalized for the same violation and that 22 banks were insolvent as per the Governor's letter of 21st July, 2004 **(copy Annex - S6)** and yet there were not closed hence the discriminatory practices against Charterhouse Bank.
- (xvii) The only violation that the CBK and the Statutory Manager have repeatedly mentioned is that of "*Know Your Customer*" relating to the 45 accounts which had been found to have some missing documents in 2004. However, the issue relating to the said accounts was discussed and resolved after the report of 30th

September, 2005. The draft report of 21st June 2006 also indicated that the issue was re-visited and had actually been resolved.

- (xviii) The Statutory Manager had a conflict of interest based on the fact that she was performing the regulatory duty at the Central Bank, as Director of Banking Supervision Department and at the same time acting as the Statutory Manager of Charterhouse Bank Ltd. This is evidenced by the sample of her reports dated 21st December 2007, 22nd January 2008, 22nd February 2008 and 1st April 2008 where she was penalizing other banks for having violated the same section 10, 11 and 50 and prudential guidelines under the Banking Act. (**copies Annex - S7**).
- (xix) Prior to appointing a Statutory Manager, there were several legal provisions that were overlooked by the CBK, specifically Section 33 that requires the CBK to give advice under Section 33 (b) (1) and also make recommendations to the institution in the areas of its business conduct that are of concern including advice on directions on what measures a bank should take to remedy the situation.
- (xx) Further, Section 33 envisages instances where malpractices persist and empowers the Central Bank of Kenya, to appoint a person who is suitably qualified and competent to advice and assist the Institution for purposes of implementing the directions given earlier. In the case of Charterhouse Bank, this did not happen and instead there was a direct leap to Section 34 (1) (d) of the Banking Act by placing the Bank under Statutory Management.
- (xxi) The re-alignment of the Bank's shareholding by its Directors was underway in June 2006 before the Statutory Manager took over. The Statutory Manager recommended the following on Charterhouse Bank Ltd.:-

- ♦ The revocation of the Bank's license as if the Manager could not resuscitate the Bank.
- ♦ Liquidation of the Bank yet there was no provision in law for that by then.

Charterhouse Bank pointed that these actions taken early on at the commencement of the Statutory Management indicated that the CBK was not willing to fulfill its obligations under Section 34 of the Banking Act and furthermore sought to delay the re-opening of the institution indefinitely.

- (xxii) CBK introduced an amendment to the CBK Act to provide for voluntary liquidation which was passed by Parliament but the move appears suspect and apparently targeting Charterhouse Bank Ltd. This is because Charterhouse Bank did not have any liquidity problems and was not insolvent. Under the law, it is not possible for the CBK to compel a solvent institution to be liquidated. The amendment providing for a voluntary element therefore provides the Central Bank with an opening through which to realize its original intention.
- (xxiii) The Statutory Manager was appointed for a period of 12 months and the period expired on 22nd June 2007 but and was extended by a court order for a further 12 months which ended on the 22nd of June 2008. However, the Statutory Manager has remained at Charterhouse Bank unlawfully after the expiry in 2008 to-date in violation of the Banking Act and the Constitution of Kenya.
- (xxiv) The Central Bank, the Finance Minister and the Statutory Manager, have maintained that they are unable to take any decision or take any action because they are injected or gagged yet the audited accounts for the years 2006 to 2009 clearly shows that the Statutory Manager has taken action i.e. paying salaries and

utilities, discharging property and conducting selective activities save for those allowing access to banking services to the depositors hence the allegations of being unable to perform the statutory duties due to gagging orders cannot be justified. It is also evident that CBK was able to change the original Statutory Manager Ms Rose Detho and appoint the current Statutory Manager Ms Ruth Ngunjiri in 2008 and therefore it is not true, that they have been respecting the court order.

(xxv) The inter-agency report indicates customers bank account documents were collected from Charterhouse Bank by the Taskforce and the report and findings had nothing to do with Charterhouse Bank because it is either offense to be disclosed in section of 45 of the Anti-corruption and Economic Crimes Act which relates to failure to pay tax or allegations of anti-money laundering all of which have nothing to do with Charterhouse Bank hence Charterhouse Bank remain closed for matters that do not concern it.

2.10.1 FURTHER EVIDENCE BY FORMER MANAGEMENT OF CHARTERHOUSE BANK LIMITED

Mr. Sanjay Shah, former Managing Director of Charterhouse Bank re-appeared before the Committee on Tuesday 23rd and Wednesday 24th November 2010, accompanied by Joseph Kioko, T. Mbugua, Clyde Mutsotso, P. Muhindi, Boniface Karogo, Anthony Ward, Wambua Kituku, Kennedy Odera and gave further evidence as follows:-

2.10.2 EVIDENCE BY MR. JOSEPH KIOKO

He was responsible for Human Resource at Charterhouse Bank. He presented to the Committee a written submission (annexed) and gave evidence that:-

- (i) Pursuant to regulatory advice and directions by CBK to hire a qualified internal auditor and archivist, Charterhouse Bank hired Mr. Peter George Odhiambo as Internal Auditor/Compliance Officer and Mr. Joseph Maina Gachari as an Archivist in 2003. The duties of Mr. Peter George Odhiambo were auditing and verifying all Bank's transactions and documents on a real time basis and to ensure correctness and compliance with the Banking Act. The Internal Auditor/Compliance Officer was to report only to the Chairman of the Board of Directors and not to the management or the Managing Director. The duties of Mr. Joseph Maina Gachari, included the re-verification of the documents, their correctness and compliance, filing, binding, security and the storage of the above documents.
- (ii) In 2004, the Bank received information about alleged sensitive documents being removed from the Bank and upon engaging the services of a private investigator, Mr. Peter Mugweru of M/s Pnames General Agencies, Charterhouse Bank discovered that Mr. Peter George Odhiambo was responsible for the removal and passage of the documents to un-authorized third parties. (**copy Annex K-1**). Efforts to have Peter George Odhiambo arrested for this were futile as he resigned and fled together with two other senior employees, i.e. Mr. Joseph Chege (in Charge of Foreign exchange department) and Mr. Lameck Wagumba (Computer Manager).
- (iii) The CBK sent an Inspection Team to the Bank thereafter to conduct an inspection pursuant to Section 32 (1) of the Banking Act. The team comprised of Mr. Melville Smith and Mr. Silla Mullei (son of the then Governor of CBK), and both were not employees of the Central Bank. The Team demanded for specific account

opening documents, documents relating to specific companies and access to the Bank's data to carry away. The Managing Director denied the Team access to the Bank and the data as this was contrary to the Banking Act. This prompted the personal intervention of the Director of Banking Supervision, Mr. Gerald Nyaoma.

- (iv) Mr. Joseph Maina Gachari, the Archivist responsible for safeguarding the documents was charged with the responsibility of producing them and upon failing to do so, was served with a suspension letter and thereafter resigned. The data mining was being financed by USAID where Melville Smith, Titus Mwirigi and the others were supposed to download the bank's data and have unfettered access to all bank records and management. They quoted a letter by the Governor dated July 21st 2004 and authority to mine the data granted by the Minister on 6th September 2004 (**Annex K-1a**) Still the Managing director was convinced that these activities were contrary to the banking act and the refusal to grant these access has been the main problem for the bank.
- (v) In October 2004, the Bank was surprise when CBK alleged that there were 223 accounts of the Bank without account opening forms. The Bank suspected that the account opening forms could have been part of the documents carried from the Bank by the KACC team and officers from the Banking Fraud Investigations Department. The Bank subsequently paid a fine of Kshs. 1 Million for the violation. (**copy Annex K-2**).
- (vi) Upon verification, it was discovered that the documents had actually been plucked out intentionally and the account holders were requested to submit the missing information and the Bank had fully complied by 2006.

- (vii) In May 2006, Charterhouse Bank discovered a letter dated the 4th of November, 2004 written to the Governor of the Central Bank by Mr. Titus Mwirigi (consultant) marked "Strictly Confidential" which included Mr. Joseph Maina Gachari's suspension letter, memoranda of meetings in support of fee notes by Titus Mwirigi and a confidential schedule of meetings. The letter alleged that Mr. Joseph Maina Gachari was "a very useful source in revealing the economic crimes under investigation" and that "his livelihood had been jeopardized as a result of leakage".
- (viii) On the part of memoranda of meetings in support of the fee notes, Titus Mwirigi indicated that numerous meetings were held including one dated 30th October 2004, whose description was "Meeting with Charterhouse Bank employees to obtain information for the Taskforce -Titus Mwirigi, Maina Gachari, Peter Odhiambo and Joseph Chege". Another meeting was held on 1st November 2004 with a brief of "Meeting at KACC to debrief employees of Charterhouse Bank and assist in preparing for a visit at the bank by KACC Team - T.Mwirigi and P. Odhiambo".

The Third document entitled "Confidential Schedule of Meetings" confirms that employees Peter George Odhiambo, Joseph Maina Gachari and Lameck Wagumba had been recruited by the Central Bank of Kenya under contract to steal documents from Charterhouse Bank for the Central Bank at a contract fee of US\$300 per day. **(copy Annex K-3).**

- (ix) While analysing Mr. Peter George Odhiambo employment details/forms and with special emphasis on personal referees, it was discovered that Mr. Peter George Odhiambo and Mr. Titus Mwirigi were friends, since Titus Mwirigi had acted as his referee. **(copy Annex K-4).**

- (x) That the involvement of the Central Bank in the conspiracy against Charterhouse Bank is confirmed by a letter dated 25th of May, 2006 to the Public Prosecutor, under paragraph 3, which confirmed the existence of memoranda/confidential schedule of meetings by Mr. Titus Mwirigi which confirmed that Mr. Lameck Wagumba and Mr. Peter George Odhiambo were indeed agents of the Central Bank during their period of employment at Charthouse Bank. **(copy Annex K-5).**
- (xi) Paragraph 5 of the same letter dated 25th of May 2006, from Mullei's lawyer, confirms that computer print-outs were indeed stolen from Charterhouse Bank by Mr. Titus Mwirigi for use by the Central Bank, while Paragraph 7 of the same letter confirms industrial espionage activities by the Central Bank of stealing and installing Charterhouse Bank's software at the Central Bank during the period of 2003 and 2004.
- (xii) Mr. Peter George Odhiambo, by his own letter to the then Hon. Minister for Justice, dated 1st July 2006, at the last paragraph of page 1 admits and confirms that he had stolen the whole database and documents of Charterhouse Bank in his capacity as the Internal Auditor at Charterhouse Bank and handed it to others. **(copy Annex K-6).**
- (xiii) The Bank discovered later that, apart from the employees of Charterhouse Bank being paid US\$300 per day for stealing documents from Charterhouse Bank, they had also been promised permanent employment at the Central Bank and it was confirmed that these people were employed at the Central Bank. An example confirming this in respect of Peter George Odhiambo is indicated in the **(copy Annex K-7).**

- (xiv) Even though the Central Bank was aware that Mr. Peter George Odhiambo while working for Barclays Bank in 1999, was arrested and charged by the Banking Fraud Investigations Unit of the Central Bank for making false documents in an attempt to obtain a visa to go to America, he was still recommended by Central Bank to work for the Charterhouse Bank as the Internal Auditor/Compliance Officer. **(copy Annex K-8).**
- (xv) The letter by the Governor to the Minister for Finance dated 20th of March, 2006 must have been leaked to the media intentionally by the Central Bank, because in his submission to the Finance Committee, the Minister for Finance denied that the source of the letter tabled before the National Assembly was from the Treasury. He explained to the National Assembly that once he received the letter from Dr. Mullei, he stamped his copy on all pages with the Minister for Finance Stamp and which would then be later placed in the safe. **(Hansard copy Annex K9-A).** Since the one tabled before Parliament did not have the Ministry for Finance stamp, then it must have been leaked by the Central Bank. **(copy Annex K9-B1 and B2).**
- (xvi) Most of the documents that the Central Bank alleges were missing were collected by the Banking Fraud Investigation Unit while others were collected by the officers of the Task Force, who to-date have never returned them to the Bank, as confirmed by the Interim Report of the Taskforce at page 2, Item 1.9. **(copy Annex K-10).**
- (xvii) The allegations contained in the letter by the Central Bank to the Minister recommending the withdrawal of Charterhouse Bank's license are allegations that do not relate to and/or involve Charterhouse Bank as they are allegations of Tax Evasion not by Charterhouse Bank but by other companies. E.g W. E. Tilley (Muthaiga) Ltd, suspected of money laundering since sales were

Kshs 1.35 Billion and the receipts amounted to Kshs 5.89 Billion. This is incorrect because from the time the account of this company was opened, to 30th June 2006, the total turnover of that account was below Kshs 500,000,000. **(copy Annex K-11).**

- (xviii) The activities relating to theft of documents from Charterhouse Bank are confirmed by the then Governor as evidenced by his published brief on his website titled *Court Case 2006*, at page 3, paragraph 1 of the subject titled "Events leading to the hiring of Titus Mwirigi". **(copy Annex K-12** wherein he Asserts that, "the consultants needed were to be outsourced under the legal authority provided in Sections 32(1), 32(2)(c) and 33(1)(b)(iv) of the Banking Act. However in recognition of regulation 3(2) of the Exchequer and Audit (Public Procurement Act) Regulation 2001, he consulted the Minister for Finance who accepted his proposal to engage external consultants as part of the Central Bank in-house supervision team".
- (xix) Central Bank by its own code of conduct dated April 1998 at page 18 binds the Central Bank and all its employees to play by the rules, abide by, enforce, apply and respect the law to the letter. They have not done this on matters relating to Charterhouse Bank. **(copy Annex K-13).**
- (xx) The consultant that the Central Bank hired, Mr. Titus Mwirigi is not a university graduate yet consultants should possess at least a minimum Masters Degree. Further, Mr. Titus Mwirigi could not have been a consultant and the Central Bank was aware that he had never consulted before unless this particular consultancy was the first one. In the payment voucher titled Payment for Technical Assistance, the Director of Banking Supervision, Mr. Gerald

Nyaoma clearly indicated that Mr. Mwirigi was not a registered VAT payer as indicated in Memo (**copy Annex K-14**).

2.10.3 EVIDENCE BY MR. TITUS K. MBUGUA

He responded to matters relating to trade documentation and procedures. He presented to the Committee a written submission (annexed) and gave evidence that;--

- (i) Charterhouse Bank was not involved in the importation of any trading goods or products. Though there have been allegations that customers of the bank were involved in tax evasion in collusion with the bank, there is no way in which a bank can collude with any person to evade tax.
- (ii) Banks are not customs staff and/or clearing and forwarding agents and therefore would not be able to collude with any importer to evade taxes. The Statutory Manager purported that she found emails in the Bank in which goods had been undervalued and that this amounted to tax evasion. This allegation seems to have been made out of ignorance of the importation procedures, the duties and the responsibilities of the Customs Department, of the Kenya Revenue Authority and the functions of the Kenya Bureau of Standards, before any cargo is shipped from the country of origin and what happens at the point of entry.
- (iii) Duty payable on imports is neither determined by the importer's pro-forma invoices nor the Commissioner of Customs bound by the importer's invoices in determining the duty payable. In determining the Customs Value for the purpose of levying ad valorem duties, the Commissioner of Customs is guided by section 127 of the Customs & Excise Act (Cap 472), as read with the Seventh Schedule of the said Act. Currently this aspect is covered by section 122 and the Fourth Schedule of the East African Community Customs Management Act, 2005. (**Annex - TM1**)

- (iv) Clearance of goods at the port of importation is done by a Customs Agent on behalf of the importer (buyer) and the bank plays no role here. The agent has the onus to declare the goods in accordance with the law and the importer has to pay the appropriate taxes.
- (v) The Commissioner's role is to counter-check the authenticity of the declaration to ascertain the correct value and the revenue payable. Submitted documents may be accepted or rejected and the Commissioner of Customs will not release goods based on doubtful or wrong declarations.
- (vi) Remarks about invoices were made out of ignorance because the government has established agencies under section 127(d) of the Customs Act, whose duty is to pre-inspect goods at the country of origin before shipment and the person carrying out the pre-shipment inspection is required to personally seal the container after loading. (**Annex - TM2**)
- (vii) Under section 127(d)(6) it is clear that the expression "pre-shipment inspection" means the examination of imported goods prior to shipment in order to ascertain the description, quality, quantity and the value of such goods. Therefore this definition makes it clear that the Commissioner of Customs is not bound by the importer's invoice.
- (viii) The pre-shipment agent is supposed to provide a certificate of conformity which ascertains in actual fact the value of the imported goods by them from the country of export and not from the importer.

- (ix) Under Regulation 264 of the Customs and Excise Act, the importer and not his bank has to make a declaration of the Customs Value of the consignment in a prescribed Form titled C52. (**Annex - TM3**).
- (x) All above stated notwithstanding, the Commissioner of Customs under section 127(b) of the Customs and Excise Act is empowered to appraise and/or cause to be appraised the imported goods in accordance with the seventh schedule. (**Annex - TM4**).
- (xi) It is important to note that not all goods whose duty is computed is by way of invoice. There are other ways of computing duty i.e.
- Section 129 provides for goods whose duty will be computed on the gross weight of the package in certain cases.
 - Section 130 provides for goods whose duty will be computed on reputed quantity in certain cases.
 - Section 131 empowers the Commissioner to fix a litre equivalent of other liquid measurement for goods imported of this nature.
- (xii) Equally important to note is that, it is not mandatory that there must be documents to import the goods because if for any reason an importer or the owner of goods does not have sufficient documentation, such goods are allowed to be entered for home use in the absence of documents as provided for by section 30 of the Customs and Excise Act. The Customs may also value imported goods using unit prices of similar or identical goods accessible from the customs data bank.
- (xiii) In the circumstances it is a matter of law and fact, that Charterhouse Bank, could not collude with its customers or importer, on any matter relating to importation or documentation to help them to evade tax.

2.10.4 EVIDENCE BY MR. CLYDE MUTSOTSO

He responded on matters relating banking and procedures. He presented to the Committee a written submission (annexed) and gave evidence that:-

- (i) Ordinary people who are depositors and investors of Charterhouse Bank have been subjected to extreme hardship and inhuman treatment which is a violation of their constitutional rights, right to property and equal treatment.
- (ii) The American Ambassador has repeatedly lobbied through the media, that Charterhouse Bank should not be re-opened on the unfounded and generalised allegations that it was involved in money laundering, tax evasion, drug trafficking and the violation of the Banking Act.
- (iii) The Ambassador and those lobbying for Charterhouse Bank not to be reopened are acting in utmost dishonesty because that is not what happens in their countries. For Example, both the American Ambassador and the British High Commission as well as the development partners are aware that all the banks which have been found in their countries by the regulatory authority to have been involved in money laundering, drug trafficking and violations of the banking laws and regulations are not punished by way of closure but are subjected to fines and monetary penalties, and there are many examples.
- (iv) In Kenya, the Banks are regulated by the Central Bank of Kenya while in the United States of America the Banks are regulated by the Controller of the Currency, and in Britain, by the Financial Services Authority. The difference with Kenya is due to lack of transparency because the Central Bank purports that violations and penalties issued by them to individual banks are confidential,

with the exception of Charterhouse Bank where it was considered okay by the Central Bank to release information relating to Charterhouse Bank to unauthorised third party persons contrary to the Banking Law.

- (v) In other jurisdictions, the information relating to banking violations and fines imposed is freely available and is published and posted on the internet, and that is the case in both the Controller of the Currency in the United States and the Financial Services Authority in Britain. To prove this point, a simple search on the website of the Office of the Controller of the Currency of the USA (www.occ.treas.gov) will display all the banks which have been subjected to Civil Penalties as a result of their violations.
- (vi) The following are cases of a few banks that have been subjected to civil monetary penalties (**printout marked Enforcement Actions - Annex SP1, SP2, SP3 and SP4**). An example is **Riggs Bank National Association** No. 143, which was subjected to Congressional Investigations in the USA and was found to be involved in Money Laundering and at page 81, it indicates that funds used for 9/11 had come from that bank. A copy of the Congressional Report and a copy of the enforcement order by the Office of the Controller of the Currency confirm this.
- (vii) Despite the seriousness of the violations by this bank, which is one of the biggest and oldest in America, where every president has banked money, this Bank was not closed but subjected to a monetary penalty. Ambassador Michael Ranneberger must be aware of this fact and while he is lobbying for Charterhouse Bank to be closed, he is not lobbying for Riggs Bank or any other bank in America to be closed. Violations are violations whether here in Kenya or in the USA.

Examples are from 206 banks which were recently fined;

Arab Bank Plc. \$ 24 Million 17 -8-2005
Banco de Chile \$ 3 Million 11-10-2005
Bank of China \$ 10 Million 17-1-2002
Riggs Bank National Association- Money Laundering -Fined \$ 25 million 13-5-2004
National Bank NA-Fined \$ 750,000 30th-4-1998
Metropolitan Bank & Trust Company- \$ 150,000 24-3-2006
The First National Bank-\$ 50,000 11-10-2005
US Bank National Association-\$125,000 18-10-2006
Union Bank of California-\$ 10 Million 14-09-2007
Union Bank for Africa PLC-\$ 500,000 2-05-2007
Union Bank for Africa PLC - \$15 Million 22-4-2008
Wachovia Bank-\$ 10 Million 24-4-2008
Wachovia National Bank-\$ 50 Million 12-3-2010
Webster Bank-\$125,000 16-1-2007
Whitney National-\$125,000 12-2-2010
Woodforest National Bank-\$ 1,000,000 7-10-2010
Intercredit Bank-\$200,000 21-6-2010
Intercredit Bank-\$250,000 12-2-2007
ABN-Amro \$ 6,250,000 30-12-2005
Lasalle Bank Midwest \$125,000 5-1-2007
Marshall Bank \$350,000 9-11-2009
City National Bank \$750,000 23-2-2005

- (viii) He maintained that the American Ambassador has been perpetuating malice against the depositors of Charterhouse Bank and the management produced printing out some of the banks which have been subjected to enforcement actions and have either been fined or let off with a warning to desist. This is contained in a 56 page document showing 1,574 Banks. A classic example of banks cited for money laundering in the US include, Bank of America North Carolina, First National Bank of Omaha, Omaha, Nebraska First National Bank of Platterville, First National Bank of the Rockies, Colorado, Albany Bank & Trust, N.A (n/k/a AB&T National Bank) Albany Georgia, Bank of New York, Wachovia Bank, National Association, Charlotte, North Carolina, City National Bank, Los Angeles California, Doha Bank, New York,

Great Plains National Bank Elk City Oklahoma, and Lloyds TSB Bank (**Copy of the charges and fines Annexes SP 4-A**)

(ix) The attached list shows that for the violations in 2010, the banks have been subjected to monetary penalties. For Example,

- **Goldman Sachs** (Fined £17.5 Million in September, 2010 for Money laundering and for weaknesses in controls resulting in failure to provide the financial services authority with appropriate information).
- **J.P. Morgan** (Fined £33.32 million in June, 2010 for money laundering, and for client money breaches).
- **Commerzbank** (fined £595, 000 in April, 2010 for breach of money laundering regulations and failures in transaction reporting). (**Annex - SP5, SP6 and SP7**)
- Examples of two repeat offenders are:-
 - **Toronto Dominion Bank** (the most recent fine was in November 2007 where they were fined £490,000 for breach of money laundering regulations and for systems and control failings relating to one of its trading books)
 - **Royal Bank of Scotland** was fined £1.25 million in January 2004 for money laundering breaches. (**Annex - SP8 and SP9**).

(x) Evidenced attached also include one time offenders of the British anti-money laundering and anti fraud rules.

- **BNPP Private Bank** was fined £350,000 for breach of money laundering rules and weak anti-fraud controls in May 2007 (**Annex SP10**)

- **Bank of Ireland** was fined £375,000 pounds offense is breaches of anti-money laundering requirements in September 2004 (**Annex SP11**)

- **Raiffeisen Zentralbank Sterreich's London "RZB"** London was fined £150,000 for money laundering rule breaches in April 2004 (-**Annex - SP12**)

- **Nothern Bank**, was fined £1.25 million for money laundering control failings fine in August 2003 - (**Annex - SP13**)

- (xi) Also included in the is a thorough detailed list of banks that have violated the banking regulations in the United Kingdom, chronologically arranged, from 2009 downwards, (**Annex SP14 to SP25**).
- (xii) The judgement issued by the High Court of Justice, Queens Bench Division Case No. CO/1567/2007, dated the 10th of April, 2008, relating to **BAE Systems Plc** does confirm that acts of massive corruption, money laundering and arms trade were carried out by this company and none of the banks associated with this British company was closed (**Annex - SP26**).
- (xiii) Therefore, it is very wrong for foreigners to tell Kenya and to force the Governor of the Central Bank and our courts to do what they do not do in their countries. The perception created that Charterhouse Bank was involved in money laundering or tax evasion or drug trafficking is false and manufactured solely to malign the bank. Even where such offences are committed, it is the individual accounts which are frozen but the bank is not closed.
- (xiv) Directors of the Charterhouse Bank are not aware of any money laundering or tax evasion or drug trafficking attributable to Charterhouse Bank and nobody has reported any case of such a

nature to the Bank. If the Bank was aware of any such circumstances, it would have reported the matter to the police to take appropriate action.

2.10.5 EVIDENCE BY MR. BONIFACE KAROGO

He responded on matters relating to Charterhouse IT system. He presented to the Committee a written submission (annex) and gave evidence that:-

- (i) The draft report was delivered to the Charterhouse Bank just after 4 pm on 21st June 2006 , while the actual report had been given earlier to unauthorised third parties by the Central Bank contrary to the Banking Act in order to create adverse publicity against the Charterhouse Bank. What should be noted is that the statement by Richard Githinji who is a director of PWC Limited at the paragraph titled background stated that the audit contract prior to awarding was discussed with the statutory manager and the Central Bank and the purported violations at Charterhouse bank are clearly stated as Section 10, 11 and 50 of the Banking Act and Prudential Guidelines. This therefore would not be a reason to have the bank closed. This PWC report would not be a genuine reason to close the Bank as previously touted. The actual report was tabled before the National Assembly before 4 pm. **(Annex - RK1)**
- (ii) The effective date of the Central Bank's Prudential Guidelines including those relating to "*Know Your Customers*" that Charterhouse Bank is accused of having failed to observe was 1st of January 2006, and the copies of those prudential guidelines were made available to Charterhouse Bank on the 2nd of May, 2006. Therefore, the timeframe between 2nd of May and the 21st of June was not sufficient time for Charterhouse Bank to have committed those alleged violations. **(Annex - RK2).**

- (iii) The Statutory Manager's report by Rose Detho and the Central Bank accused the Charterhouse Bank of having violated section 10, 11 and 50 of the Banking Act which the Bank denied. The report on those violations were made and published by the Central Bank and the Statutory Manager without getting comments and/or explanations from the directors of the Bank to clarify the facts hence apparent conspiracy by the Central Bank to continue keeping the Statutory Manager in Charterhouse Bank.
- (iv) The allegation that Charterhouse Bank was in violation of section 10 is denied, on the fact that Kshs 73,000,000/= belonging to Kingsway and Kshs 18,000,000/- ascribed to Creative Innovations was against Cash Deposits of Kshs 92 Million and not against exposure of the core capital or assets of the Bank, hence there is no violation of section 10 of the Banking Act, and in the circumstances, section 11 of the Banking Act follows suit.
- (v) There was allegation of the violation of section 50(1)(b) of the Banking Act by Charterhouse Bank failing to submit correct information to the regulator about the ownership of the Bank and that there was individual shareholding of 25.36% instead of 25%. The Central Bank created a perceived violation by purporting that the shareholding was above the statutory 25% with 0.36%. It is important to note that 0.36% is not a unit and cannot therefore create a violation.
- (vi) On 20th of September 2004, at about 11 am, a block of go-downs in industrial area belonging to different owners caught fire and goods and property worth several millions of shillings were destroyed, including documents belonging to Charterhouse Bank. Rose Detho, in her evidence before the Committee, gave the

impression that the fire that destroyed the Charterhouse Bank's documents was imaginary. The burnt documents had little or no value to be insured and therefore no insurance claim was lodged by Charterhouse Bank but the matter was reported to the police.

- (vii) There is evidence of those other tenants whose insurable goods had been destroyed in the fire of having made claims and the insurance companies instituted a comprehensive investigation into the cause of the fire which was established to have been caused by an electrical fault. Claim reports attached as **(Annex – RK4A & RK4B)**, where the tenant lost books worth in excess of Kshs 20,000,000/- and this is a further demonstration of clear evidence of the manifested malice of the Central Bank and the Statutory Manager of attempting to portray Charterhouse Bank negatively so that the bank remains closed.
- (viii) Appendix 13 of the Statutory Manager's report, where she accuses Charterhouse Bank of having 839 accounts without account opening forms among them is Shawaz Textile Mills Limited which is alleged to have had 247 accounts without account opening forms and yet the key clearly indicates that those are not accounts but local bills discounted. This accusation appears to have been made out of ignorance by the CBK on the use of the Bills Discounting procedure in trade. Further, a casual perusal and comparison of the Statutory Manager's appendix 13 against Appendix II of the PwC Ltd's report shows clearly that what the Statutory Manager published is false, because by comparing these two documents, the PWC Ltd confirms that the forms were properly signed by the account holders. **(Annex – RK5)**
- (ix) Nakumatt Holdings Ltd, which owns the chain of supermarkets is not a director of Charterhouse Bank as had been portrayed and no director has ever borrowed money without adequate security

or without properly accounting for it or without being able to pay the money back. Charterhouse Bank has never diverted and/or stashed money in any foreign country which has ended up in the pockets of the directors. The Charterhouse Bank received US\$ 749,965 in the account of Themis Investments for the purchase of ammunition from Kenya by the Malawi Defence Forces, and this payment was officially reported to the Central Bank as required.

2.10.6 EVIDENCE BY MR. ANTHONY WARD

He responded to matters in relation to accounting procedures and presented a written submission to the Committee (Annexed) and gave evidence that:-

- (i) Charterhouse Bank received US\$25 Million in the account of Crucial Properties Ltd in January 2000 and both Mr. Kegoro of International Commission of Jurists, and a Mr. Warutere, working in one of the development partners have written extensively about the transaction and creating the perception that the money was proceeds of crime, with a view of portraying themselves to the donor community as experts in anti- money laundering in order to win favour in donations for the their NGO's.
- (ii) The account holder approached Charterhouse Bank in September 2000 and informed the Bank that they were negotiating for funds from Europe for investment in low cost property development in Kenya and possibly Southern Sudan, and wanted to know whether there were any specific requirements by the Central Bank to allow them to include them in their negotiation.
- (iii) The Charterhouse Bank enquired from the CBK on the matter and the CBK reiterated by confirming that foreign currency in Kenya was already liberalised and the company was at liberty to bring

any amount of money into the country on condition that once the funds had been wired to the account, then Charterhouse Bank would inform the CBK of that major Foreign Exchange receipt, and that was all that the Bank was supposed to do.

- (iv) The funds were transferred from a bank in Europe (Liechtenstein) where anti-money laundering laws had been in force since 1996. Therefore the funds in that bank had been subjected to anti-money laundering due diligence. As such it could not have been drug money or proceeds of crime, and any queries relating to those funds, would have been directed to the transmitting bank and not to Charterhouse Bank. Both Mr. George Kegoro and Mr. Warutere have never taken the trouble to interview the Charterhouse Bank or the account holder regarding that transaction.
- (v) Immediately the funds were wired and received to the account of Crucial Properties, Charterhouse Bank notified the CBK on the 18th of January, 2001 of that major Foreign Exchange receipt and the CBK confirmed the receipt of the report on the 22nd of January, 2001. This is the only requirement that the Charterhouse Bank was supposed to fulfil (**Annex - AW1**).
- (vi) These funds were wired from a bank to a bank and it would be naive for a person to suggest that when the funds are in a European bank, they are okay, but when they come to a bank in Kenya, and it is US\$25 million, then it must be dirty money. Charterhouse Bank was not the originator of the funds as the funds originated from a disclosed European Bank.
- (vii) Money laundering is cleaning proceeds of crime by introducing those proceeds into the banking system and/or removing money from the banking system to finance criminal activity. Charterhouse Bank did not introduce any proceeds of crime into the banking

system and none of its customers removed any money from the Bank to finance criminal activity.

- (viii) American Ambassador and the British High Commissioner and any other development partner in Kenya are aware of the International Letters Rogatory resulting from the proceeding No. P/12983/1999 issued by the Geneva Court in respect of money laundering against Mr. Abacha Abdulkadir, which was written to the Attorney General of the Republic of Kenya indicating banks which were involved in that laundering and in their respective countries. The list is long and includes London Banks, American Banks, etc, and none of those banks were closed (**Annex - AW2**). Charterhouse Bank has never been involved in money laundering activities and Kenya did not have any anti-money laundering legislation until the 28th of June, 2010, when Proceeds of Crime and Anti Money Laundering Act became effective.
- (ix) Charterhouse Bank is not aware of any suspicious activity or any activities of money laundering by any of its customers, and if there is any person who is aware of any customer of the bank who is involved in any illegal activity, that person should report that to the police so as to allow the rule of law to take effect. Further, it is that person's account at the bank that should be frozen and not Charterhouse Bank as a whole.
- (x) Payment of taxes is a personal and private matter between the taxpayer and the revenue collecting authority. Therefore there is no way that a bank can help its customer evade paying tax and there is nowhere in the world where a bank is held responsible on matters relating to the payment of taxes by its customers. It would therefore be wrong, unlawful and illegal for the Central Bank to purport to close the Charterhouse Bank on allegations that some

of its customers were not paying taxes. Such action would be in excess of the Central Bank's powers and would be contrary to the Banking Act because the Central Bank does not have any jurisdiction on enforcement matters relating to tax collection. Similarly, if a bank would engage in the activities of interfering in the tax matters of its customers, it would be acting outside the provisions of the Banking Act.

- (xi) Charterhouse Bank has never been involved in any activities of siphoning money anywhere, except money that is legitimately transferred overseas and is transferred on the express instructions of the account holder legitimately. The trail of these transactions cannot be erased and therefore anybody making allegations of siphoning money should have brought credible evidence to show how much and from what account in Charterhouse Bank and to which account at the foreign bank. Such evidence hasn't been brought before the Committee.
- (xii) Two emails written from the British High Commission office here in Nairobi, authored by one Richard Cox, on Wednesday 25th October, 2006, and were circulated to various parts of the world about Charterhouse Bank and confirms the depth of conspiracy against Charterhouse Bank. The first email from the British High Commission by Richard Cox to Mr. Mark Harding and others confirms that he had just read the PWC report commissioned by the Statutory Manager, and the Statutory Manager's report, 300 pages in total. He had the report and he was inviting others to have a look at the said reports. Although the summary alleges secretive funds transfer, money laundering and tax evasion, he did not give details of such violations other than to make these statements to scandalise Charterhouse Bank (**Annex - AW3**).

- (xiii) The only information provided was the alleged contravention of section 10, 11 and section 50 of the Banking Act and the Central Bank's Prudential Guidelines and on these violations the remedial measures provided for the violations of these sections is a maximum fine of Kshs. 1 Million as indicated under Regulation 77 of 1999 (**Annex - AW4**).
- (xiv) The directors of Charterhouse Bank were denied copies of the PWC report, the Statutory Manager's report and the Central Bank as well as the Ministry of Finance were already distributing the report to the foreign embassies and others contrary to the Banking Act. The second e-mail from the British High Commission by Richard Cox stated in paragraph 3 that the PWC reports and the Statutory Manager's report wasn't in the public domain, but they were actually inviting others to read the same reports, which is contrary to the Banking Act. It further stated that Permanent Secretary, Ministry of Finance had given assurance that the Minister for Finance would revoke Charterhouse's licence that week. (**Annex-AW5**).
- (xv) The British High Commissioner alleged in paragraph 4 that several judges in Kenya were persuaded despite all the evidence. The British High Commissioner should produce any other evidence in their possession against Charterhouse Bank to root out their impunity delivered by this statement, which is a great disrespect to the judges and Kenya's judicial system as a whole. CBK also refused to comply with the court orders and would rather be cited for contempt of court as confirmed by the evidence by their lawyer Mr Oraro that CBK had to send Ms Rose Detho overseas using Kenyan taxpayers money in order to circumvent the rule of law.
- (xvi) Paragraph 5 of the e-mail by the British High Commissioner alleged that the Finance Committee of the 9th Parliament which

dealt with this matter and recommended the re-opening of the Bank, were corrupt and that a highly corrupt MP who is a drug trafficker confronted the Chair of the Finance Committee who promised to amend the report in light of the PWC report. The British High Commissioner sarcastically stated that "(We shall see)" and one wonders where the country's sovereignty is and if any Ambassador of Kenya can make the same derogatory remarks about a British Member of Parliament or Committee or Kenya's Ambassador in Washington can make the same remarks against a Congressman or a Senator in the US.

- (xvii) The British High Commission confirms in paragraph 7 that they had engaged the BBC TV and radio to produce a package to show the seriousness and that local media had drawn attention that following an interview with the American Drug Enforcement Agent, 3 Kenyan whistle-blowers had been given asylum in the USA. This shows that the American Ambassador was seriously involved in this matter.
- (xviii) Comments on paragraph 8 of the British High Commission e-mail confirms that Bland and Fish of DFID called on Hon. Amos Kimunya, MP where they made it clear to him that his reputation depended on decisive action against Charterhouse Bank and that the IMF Representative in Kenya was following the event closely and may intervene if there is any further delay.
- (xix) The Minister for Finance, the Permanent Secretary, the Governor of the Central Bank, the British High Commissioner. Richard Cox, Bland and Fish, the American Ambassador and the IMF, has never contacted the Directors or depositors of Charterhouse Bank to respond to any of the allegations as of the date of the email of 25th of October, 2006. Therefore their acts are based in bad faith and

against the rules of natural justice. As one cannot be condemned to this level without affording them an opportunity to be heard.

- (xx) The petitioners are gravely aggrieved by the action and participation of these foreign envoys and development partners of scandalising, abusing and maligning members of the National Assembly without justification thereby lowering the dignity of the National Assembly of Kenya, and their continued lobbying to cause hardship and torture to the petitioners and other depositors of Charterhouse Bank.

2.10.7 EVIDENCE BY MR. WAMBUA KITUKU

He responded on legal matters and presented to the Committee a written submission (annexed) accompanied upon which he gave evidence that:-

- (i) The Statutory Manager, Central Bank and Finance Minister persistently misapplied and disregarded the law and that their treatment of Charterhouse was discriminatory, disproportionate, unreasonable and accentuated by malice thereby having serious consequences on the fundamental rights of the petitioners and other stakeholders.
- (ii) Charterhouse Bank was placed under statutory management under section 34(1)(d) of the Banking Act as communicated by a letter from the CBK (**Annex WK-1**). Through a ministerial statement, the then Finance Minister explained that Charterhouse Bank was placed under statutory management after reports and other correspondences deemed as confidential under Section 32(2) (c) of the Banking Act were leaked and tabled before parliament thereby generating adverse publicity. The leakage of the said report was in violation of section 32(2) (c) of the Banking Act and neither the CBK nor the Finance Minister had condemned the said leakage or brought the persons responsible for the same to book.

- (iii) One of the leaked reports was the *Interim Report by the Task Force Investigating Economic Crimes by Charterhouse Bank and Related Companies* (**Annex WK-2a- also produced as annex in Governor's evidence**). The authors of the report were not recognizable under any law and they never interviewed the management and directors of Charterhouse Bank or others adversely mentioned in the said report. Such a biased report, could not have formed the basis of a decision to place Charterhouse Bank under Statutory Management and that the offences referred to therein fell under Section 45 of the Anti-Corruption and Economic Crimes Act and not under the Banking Act and that had nothing at all to do with Charterhouse Bank.
- (iv) The second document among the leaked reports was the *Inspection Report by CBK (covering the period commencing on 1st October 2005 to 31st March 2006 and a period prior to September 2005 (Annex WK- 2a & 2b)*. A copy of this report marked "draft" on all pages was delivered to the offices of Charterhouse Bank on 21st June 2006 after 4:00pm, with the CBK asking the management of the Bank to respond to issues raised therein before 4th July that year. Shockingly however, a final version of the same document had been tabled in Parliament earlier before 4 PM on the afternoon of the same day. The "final version" of the said report was not marked "draft" on its pages and lacked any input whatsoever from the management of Charterhouse Bank. The report tabled before the House was clearly intended to generate adverse publicity against Charterhouse Bank in order to use the same to condemn the Bank unheard to the fate of statutory management.
- (v) Whereas the gazette notice that contained Rose Detho's appointment (No 4936 of 2006) refers to her as the Statutory

Manager, another gazette notice (No 4395) on moratorium on withdrawals refers to her as the Statutory Liquidator (**Annex WK-3**).¹ Therefore, it is evident from this later notice that the appointment of Rose Detho as a “Statutory Manager” was actually aimed at ultimately liquidating Charterhouse Bank as this was the real intention and mind set of the Central Bank.

- (vi) Owing to the broad management powers conferred upon the Statutory Manager under Section 32(2)(a), there was a legitimate expectation from Charterhouse and its stakeholders that the Statutory Manager would take all necessary and reasonable steps to deal with the initial concerns emanating from the adverse publicity and safeguard the interests of depositors creditors and owners of the bank. The Statutory Manager or CBK did not come out at all to refute the adverse publicity generated from the leaked documents from the Central Bank. This should be contrasted with the quick reaction which CBK has traditionally made in response to adverse publicity generated against other banks (*an example was given where the Governor swiftly went on record, assuring the public and stakeholders through the press that National Bank and Equity Bank were indeed solvent and there was nothing to worry about such publicity*). The CBK and the Statutory Manager therefore deliberately breached this legitimate expectation by failing to act appropriately under the circumstances.
- (vii) Within 4 days of her appointment as Statutory Manager, Ms Detho wrote to the Kenya Bankers Association (KBA), asking that Charterhouse be withdrawn from the Clearing-House (**Annex WK-4**). This request was granted and in effect, paralyzed the operations of the Bank. Through this action, the Statutory Manager breached the statutory duty imposed on her under Section 34 of the Banking Act i.e. “to ensure continuous operation of

the bank in order to ensure depositors access banking services while at the same time preventing a run on the deposits” and hence acted *ultra vires*. The reason given for withdrawing Charterhouse Bank from the Clearing-House was untrue since the constitution of KBA only provided for voluntary withdrawal of a member. The Statutory Manager acted contrary to the requirement that she should have acted professionally and prudently in managing the Bank, as per Section 34(1 (d), (2 (a) and (4) of the Banking Act.

- (viii) On 12th July 2006, the Statutory Manager appointed PriceWaterHouseCoopers (PWC) Ltd. to carry out a special audit in order to verify the allegations that were contained in the Inspection Report of 2006. The findings of the PWC report (**Annex WK-5**) were used as the basis of the recommendations by the Statutory Manager to the Finance Minister, calling for the Minister to revoke the Charterhouse Bank license in preparation for subsequent liquidation. Amazingly, the appointment of PWC Ltd as auditors contravened Section 24 of the Banking Act, which required auditors to be appointed in line with Section 161 of the Companies Act. The fact that PWC Ltd was not qualified to be appointed as per Section 161 (2) (b) of the Companies Act, as it is a limited liability company and therefore a body corporate, and hence the audit report it produced thereafter contrary to the Banking Act was illegal *ab initio* and therefore null and void.
- (ix) The Statutory Manager acted *ultra vires* in appointing PWC Ltd as auditors contrary to the law and it followed that any decision taken by the Statutory Manager, Central Bank of Kenya and Finance Minister on the basis of PWC report was illegal and therefore null and void. The appointment of PWC Ltd as auditors was done to ensure that no one takes personal and professional responsibility for contents of the resultant report which were untruthful,

inaccurate and misleading. PWC Ltd ought to have declined taking instructions from the Statutory Manager, knowing very well the meaning of Section 161 of the Companies Act and the requirement of Section 24 of the Banking Act.

- (x) Notwithstanding the irregular appointment of PWC Ltd as auditors, the audit report was biased as the adversely named persons therein were never interviewed or given a chance to defend themselves and by acting on such a report, the Statutory Manager and CBK breached the rules of natural justice. The scope of the audit included inquiry into alleged criminal activity, which is the preserve of the mandate of the Kenya Police Service as per Section 14 of the Police Act, or other investigatory agencies which PWC Ltd. is not. The purported audit therefore was a usurpation of police powers and commissioned with the ulterior motive of fishing out and manufacturing information that would implicate the Charterhouse Bank and hence justify its pre-conceived closure.
- (xi) On 1st December 2006, the then Finance Minister issued a letter to Charterhouse Bank, giving an impending 28-day notice of revocation of the Bank's license as per Section 6 of the Banking Act (**copy Annex WK-6**). The wording of the Minister's letter was meant to inform Charterhouse Bank of its imminent closure, rather than giving notice of the same. The letter also did not invite the Bank to give representations to the Minister as per Section 6 (1)(b)(i) of the Banking Act and therefore the Minister breached this particular provision. The same letter was leaked to unauthorized third parties, thereby aggravating the already "manufactured" adverse publicity against the Bank. The letter did not accompany the annexes that were alluded therein-i.e. the PWC Ltd Report and Interim Report of 2004-and this denied the Bank the opportunity to defend itself against the accusations contained therein.

- (xii) The effect of the decision contained in the Finance Minister's letter was to place the Bank under liquidation as per section 35 of the Banking Act, even though Charterhouse Bank was not insolvent. In any case, not all insolvent banks are eventually liquidated by CBK. A letter from CBK to the Finance Minister showed that as at 21st July 2004, a total of 22 banks were found to have been insolvent (and Charterhouse Bank was not one of them **(Copy Annex WK-7)** However, none of the said banks had their licenses revoked or placed under liquidation. Therefore, the Minister's decision against Charterhouse Bank which was solvent was discriminatory, arbitrary and unfair.
- (xiii) One of the violations allegedly committed by Charterhouse Bank as alluded to in the Minister's decision was CBK Prudential Regulation No. 10 and 12 purported in respect of the inspection report delivered to the Bank on 1st of February, 2006 is not true. However, in a letter issued to the Minister of Finance, confirming that the bank had written to the 45 account holders where adequate details had not been obtained. This means that the bank had not violated *Know Your Customer* (KYC) guidelines as alleged by the CBK, the breach was deemed as insignificant and that the appropriate monetary penalty had been levied against the bank. **(copy thereof produced as Annex WK-8).**
- (xiv) As for the allegation that the Bank was complicit to money laundering, it is evident that there existed no such crime as money laundering in Kenya's penal statutes and that Section 77(4) of the Constitution of Kenya in force at the time prohibited investigations and prosecutions of persons on the basis of crimes that were legally non-existent.

- (xv) Rather than impose monetary penalties or prosecute culpable officers of the Bank as per sections 49 and 50 of the Banking Act respectively, the Minister's decision to liquidate the Charterhouse Bank was too drastic and disproportionate. In the minutes of a CBK Board Meeting dated 10th September 2004 (**copy of the Minutes Annex WK-9**) penalties amounting to Kshs 95 Million were levied against the National Bank of Kenya for breaching banking laws. Considering that a breach attracts a maximum fine of Ksh1million, it follows then that the National Bank must have committed at least 95 breaches in that period. Rather than close the National Bank of Kenya, CBK decided to assist the Bank to ensure future compliance. The treatment of Charterhouse Bank under the circumstance was discriminatory and disproportionately punitive.
- (xvi) In arriving at his decision, the Minister overlooked the provisions of Section 33A of the Banking Act which require the CBK to adopt measures contained therein to ensure that an offending bank is brought to compliance following an inspection. However, the decision to close the bank was not provided for under the said section 33A. Similarly, the inspection reports by CBK which formed the basis of the Minister's decision lacked remedial measures as required under Section 32(3) of the Banking Act. The Minister did not quote/disclose all laws he relied on and hence he denied Charterhouse Bank an opportunity to defend itself from the said accusations.
- (xvii) The notice of revocation by the Minister was issued while there were injunctions from valid Court Orders in force. To this extent therefore, the Minister acted in contempt of the Court and with utter impunity. Whereas the CBK alleged that it had presented various options to Charterhouse Bank as a way out of the current

quagmire, Charterhouse is however aware of only one option which was communicated to the directors by a letter dated 28/08/09 **(copy Annex WK-10)** entailing restructuring the Board of the Bank. An agreement on the same was signed by the directors and CBK but before it could be implemented, the CBK apparently junked it following objections to the same by the US Ambassador. Charterhouse views the interference by the US Ambassador as a breach of Kenya's sovereignty which parliament has a duty to uphold and hence protect the interests of the depositors, creditors and owners of the bank.

2.11 EVIDENCE BY PETITIONERS

2.11.1. MR. MOHAMMED ASHRAF – PETITIONER (C/o CRESCENT CONSTRUCTION COMPANY LTD)

Mr. Mohammed Ashraf appeared before the Committee on Monday 30th August, 2010 and gave evidence that:-

- (i) The petitioner is engaged in road construction industry mostly doing work for the government. The Company opened an account at Charterhouse Bank in 2004 and signed two contracts with the government of Kenya in 2005 to build roads in Ukambani, i.e. Masii-kitui and the second contract was to build a road in Meru. The company was unable to fulfill these contracts because of the closure of Charterhouse Bank.
- (ii) Crescent Construction Company Ltd. is a customer/depositor with Charterhouse Bank Ltd. and a signatory party of the petitioners for the re-opening of the Bank. The company is still waiting for the bank to be re-opened to offer it banking services or to withdraw its funds
- (iii) The Company as a petitioner has suffered very heavy losses because the same government which shut down the Charterhouse

Bank, terminated the Company's contract for non-performance because the Company was unable to access its funds in order to operate and also because its securities were locked up at Charterhouse Bank.

- (iv) The Company is unable to borrow money from any other bank due to lack of collateral which were locked up and is still being withheld by the Statutory Manager. Other banks too would not understand why the Company could not get its securities from Charterhouse Bank as in their view; Charterhouse Bank was not closed but was supposed to remain open but operated by the Statutory Manager.
- (v) The Company has Kshs 172 million locked in Charterhouse Bank and due to the Bank's closure, the Company's business has collapsed and forced to lay off a huge workforce since it is unable to use its securities whose value is close to Kshs 600 million.
- (vi) The Company has had a lot of difficulty after its contracts were terminated by the government and the relevant ministries were reluctant to deal with the Company as result of a fault which is not theirs. Consequently, the board of directors decided to sue Central Bank and the Minister for Finance.
- (vii) The Company has been in business since 1961 undertaking projects in Kenya, Uganda and Tanzania and this was the first time that its contract had been terminated by the government without notice due to the closure of Charterhouse Bank.
- (viii) Among the prayers sought by the Company in the petition are orders for payment of damages by the Minister for Finance, the Governor of CBK, and the Statutory Manager.

(ix) The petition is based on the following grounds:-

- (a) Charterhouse Bank Ltd. was not insolvent at the time of its closure but was put under statutory management because of adverse publicity.
- (b) Crescent Construction Company was neither named as an accomplice or as a person privy to any illegal activity.
- (c) The Statutory Manager has assumed the role of a liquidator and continues to hold the Bank and its depositors unlawfully.

(x) The Petition's submissions are:-

Financial losses

Crescent Construction Company had accounts with Charterhouse Bank holding deposits totaling Kshs 172 million. The effect of the closure of the Bank is that the Company has been crippled financially and its operations severely disrupted to the extent that it has sustained damages and losses in excess of Kshs 2.7 billion on account of termination of its construction contracts. Construction being an expensive business, such disruptions triggers effects that spiral collateral losses.

Misapplication of the law

Contrary to the direct provisions of the law, the Statutory Manager assumed the position of a receiver (which is legally untenable) and closed down the Bank notwithstanding the interest of the depositors. The Statutory Manager was supposed to assume the management, control and conduct of the affairs and business of the Bank in a bid to provide for business as usual situation as far as the third parties are concerned.

(xi) The petitioner's prayer is that:-

- (a) Charterhouse Bank be re-opened immediately to bring an end to the continuous losses being sustained by the tax paying petitioner and the Bank.
- (b) Negotiations be initiated immediately in a bid to amicably agree on a formula under which to compensate the customers/depositors.
- (c) The individual responsible for the closure of the Bank be surcharged under the Fiscal Management Act for the losses incurred by the applicant.

2.11.2 EVIDENCE BY MR. ATUL SHAH- PETITIONER

(C/o NAKUMATT HOLDINGS LTD)

Mr. Atul Shah appeared before the Committee on Monday 30th August, 2010 both as the Managing Director of Nakumatt Holdings Ltd and a Director of Charterhouse Bank and gave evidence that:-

- (i) He is a Director of Charterhouse Bank by virtue of being a Director of Nakumatt Investment Ltd. which owns 10% shares and that Nakumatt Holdings Ltd. is not a director of Charterhouse Bank. Nakumatt Holdings has never been involved in money laundering or tax evasion as has been alleged in the media.
- (ii) Nakumatt Holdings has been banking with Charterhouse Bank Ltd. and operates numerous other accounts with other commercial banks until 23rd June 2006 when Charterhouse Bank was closed.
- (iii) Nakumatt Holdings had deposits in excess of Kshs 75 million in Charterhouse Bank Ltd. and a facility of Kshs 100 million resulting in working capital of Kshs 175 million by 23rd June, 2006. Since then, the Statutory Manager has denied Nakumatt Holdings access to its deposits despite various complaint letters to the Manager, CBK, and Minister for Finance.

- (iv) Nakumatt Holdings as a petitioner has received no explanation as to why the bank was closed and attempts by Bank's customers to seek legal redress have been met by a cold shoulder. Nakumatt is not clear about the status of the Bank and no answers have been forthcoming apart from the information that appears in the media regarding the matter.
- (v) Nakumatt Holdings deposit in the Bank were monies intended to pay its suppliers and therefore Nakumatt has suffered financial distress by borrowing money elsewhere to pay its suppliers, having been denied access to its funds.
- (vi) The Company prayer is for Charterhouse Bank to be re-opened to enable the Company access its funds for normal trading operations and expansion. The Bank was closed when liquid and had assets and money which was greater than the core capital of the Bank.
- (vii) Nakumatt Holdings is up-to-date with tax payment and has no dispute with Kenya Revenue Authority on taxation. The allegations in the media against Nakumatt on tax evasion has tarnished the reputation and integrity of the company and as a consequent, the equity partners attracted by the Company have been discouraged from investing in the Company.
- (viii) The success of Nakumatt Holdings has attracted animosity and that is the reason why there have been all these accusations which has resulted in the company being treated wrongly by many public bodies, a fact that is not new to the Company.
- (ix) Nakumatt Holdings should not be subjected to the suffering which it has undergone for the last four years if the company has not done anything wrong. All the accusations against the Company appear in the media but nobody has come forward to enquire from

the Company about the true position of the allegations yet it is a reputable Company.

- (x) Borrowing more than 25% above the statutory requirement by associate companies is not a constant borrowing but a phenomenon that happens sometimes because of the trading nature and the volume of people and/or suppliers to be paid in a day by Nakumatt. Therefore, the cheques deposited vis-à-vis cheques paid out could result in an automatic overdraft in a day. This is what resulted in allegations of over borrowing which happened when the company did not have a direct credit with the bank.
- (xi) The Company's cheques are computer generated to keep track record of the payments. When the computer system had serious problem and in order to avoid any dispute with the suppliers, the Company engaged the firm of M/s Kariuki Muigua to handle all the verification and correctness of the suppliers claim and to legally document the confirmation of payment to avoid future litigation. There was nothing wrong with this instruction for it is like instructing a lawyer to verify purchase of property and to confirm that all the transactions are properly entered and documented in the books of account of Nakumatt and tax paid appropriately where due.

2.3.3 EVIDENCE BY MR. FRANK KAMAU - PETITIONER

(C/o TUSKER MATTRESSES)

Mr. Frank Kamau appeared before the Committee on Monday 30th August, 2010 and gave evidence that:-

- (i) Tusker Mattresses has 25 branches in Kenya and four in Uganda and employs about 4000 people. The Company banked with other

commercial banks including Equity Bank, Diamond Trust Bank, KCB, Barclays Bank and Charterhouse Bank before its closure.

- (ii) Tusker Mattresses opened a bank account with Charterhouse Bank Ltd. in 2001 and had Kshs 250 million in deposits by the time the Bank was closed in June 2006. The Statutory Manager has denied the Company access to its deposits and banking services since then.
- (iii) The closure of the Bank has hindered the company's ability to fulfill its expansion strategy and to contribute effectively to the economy by opening more branches and employing more workers. The Company has continuously been denied access to banking services and its deposits at Charterhouse Bank for reasons it cannot understand and that is why the company petitioned Parliament in order to assist in unlocking the funds.

3.0 COMMITTEE'S OBSERVATIONS

3.1 Statutory Management

(a) The placing of the Bank under statutory management

1. The Bank was placed under statutory management on 23rd June 2006 following the tabling, in Parliament by Hon. Billow Kerow, MP of papers relating to the Bank (**Annex - 39**). The Governor of the Central Bank, in his evidence before the Committee, informed the Committee that the decision to place the Bank under statutory management was taken in order to avert a run on the Bank as a result of negative publicity. The statutory basis for this action was stated to be section 34(1)(d) of the Banking Act, a provision that allows the Central Bank to exercise the power of placing an institution under statutory management where it becomes aware of a

fact or circumstance which, in the opinion of the Central Bank, warrants the exercise of the relevant power in the interests of the institution in question or its depositors or other creditors.

2. Section 34(1) of the Banking Act (Cap. 488) provides that-

This section applies, and the powers conferred by subsection (2) may be exercised in the following circumstances:

(d) if the Central Bank discovers (whether on an inspection or otherwise) or becomes aware of any fact or circumstance which, in the opinion of the Central Bank, warrants the exercise of the relevant power in the interests of the institution or its depositors or other creditors.

3. In the letter by Acting Governor Jacinta Mwatela dated 23rd June 2006 by which Charterhouse Bank was placed under statutory management, the Acting Governor stated that the statutory manager was to operate in accordance with sections 34(2) (a) "appoint any person (in this Act referred to as "a manager") to assume the management, control and conduct of the affairs and business of an institution to exercise all the powers of the institution to the exclusion of its board of directors including the use of its corporate seal" and (6) of the Banking Act (**Annex - 40**). In particular, section 34(6) of the Banking Act conferred on the statutory manager the power to declare a moratorium, which was done by Gazette Notice Number 4935 of 30th June 2006. The declaration of the

moratorium provided, amongst other things, that “no depositors on any types of accounts operated by Charterhouse Bank Limited shall be paid nor shall any claims by any other class of creditors be met” (**Annex – gazette notices - 41**).

(b) The period of statutory management

4. Concerning the period of statutory management the Banking Act at section 34(3) requires that *“the appointment of a manager shall be for such period, not exceeding twelve months, as the Central Bank shall specify in the instrument of appointment and may be extended by the High Court, upon the application of the Central Bank, if such extension appears to the Court to be justified”*.
5. Charterhouse Bank was initially placed under statutory management for twelve months. This period was extended through a High Court order for a further 12 months with effect from 22nd June 2007. The term, as extended, expired on 22nd June 2008. A further application for extension of the term of the statutory manager was then filed. This application for further extension was stood over generally by the High Court on 25th June 2009. This remains the position to date.
6. On the period of statutory management, the Committee further notes that statutory management, as conceptualized under the Banking Act, is intended to be a temporary or interim action, a holding situation pending decisive action on an institution. The Committee therefore observes, with

concern, that in the case of Charterhouse Bank, the Bank has been under statutory management for more than four years. Sadly, in this inordinately long period, no clear direction has been given on the future of Charterhouse Bank. As a result, the petitioners and indeed all depositors and creditors of the Bank continue to suffer without any end in sight.

7. Further, a reading of section 34(1)(d) of the Banking Act, the provision by which Charterhouse Bank was placed under statutory management, indicates that statutory management is intended to protect an institution, its depositors and its creditors. The converse is true in the case of Charterhouse Bank. The lengthy period of statutory management has worked against the interests of the institution, the depositors and the creditors who continue to be held in abeyance without any indication as to the future of the institution and in the case of the depositors, the fate of their deposits. This prevailing scenario is totally at variance with the intention of section 34(1)(d) of the Banking Act.
8. The statutory duty of a manager, is required to be performed as provided for under Section 34 (2) (a) and (4) of the Banking Act. The Statutory manager is thus required to assume the management, control and the conduct of the business of the institution in the manner prescribed under 34 (4) which requires that “ *a manager shall, upon assuming the management, control and conduct of the affairs and business of an institution, discharge his duties with diligence and in*

accordance with sound banking and financial principles and, in particular, with due regard to the interests of the institution, its depositors and other creditors”.

9. The committee observes that, after the statutory manager was appointed on 23rd June 2006 closed down Charterhouse bank and all its branches throughout the country. On 12th July 2006, appointed PriceWaterhouseCoopers Limited to carry out an in-depth audit of Charterhouse bank which resulted in the Statutory manager’s report dated September 2006 wherein the statutory manager, recommended that the Minister revokes the Charterhouse bank license. This action, decision and recommendation by the Statutory manager, aggrieved some of the depositors, as it denied them access to banking services, their deposits and securities resulting in court case that sought to compel the Statutory Manager to conduct the banking business of the institution to the interest of the institution, its depositors and creditors (copy of the Governor’s letter to Minister for Finance dated 21st March, 2007 – **Annex 42**).

3.2 Pending Court Cases

10. The attention of the Committee was drawn to a number of cases which were filed by the depositors against the Minister for Finance, Central Bank and the Statutory Manager. In each of these cases, orders to stay the decision of the statutory manager to deny the depositors access to banking services and/or to take decisions which are adverse against the depositors, the institution and other creditors were issued. The cases are as follows-

- (i) Eldoret High Court Misc. Civil Application No. 638 of 2006 (Ratilal Automobile Ltd and 3 Others vs. Charterhouse Bank Ltd);
- (ii) Malindi High Court Misc. Civil Application No. 97 of 2006 (Ahmed Nassir vs. CBK and Ministry of Finance);
- (iii) Malindi High Court Misc. Civil Application No. No. 98 of 2006 (Hidaya Mohammed Loo vs. CBK and Minister for Finance); and
- (iv) Kitale High Court Misc. Civil Application No. 105 of 2006 (Mohammed Hasham Ali Mohammed vs. CBK and Minister for Finance). (Muthoni Kimani submission on court cases - **Annex 43**)

11. The Minister of Finance, the Central Bank and the Statutory Manager contend that she is gagged and manacled by these orders which were issued in September, 2006 from taking any decision or action as Statutory Manager. However, after, evaluating the evidence, the committee noted from the financial statements presented before the committee from 2006 to 2009 that the statutory manager has been taking actions and making decisions. Further that the Minister of Finance on 1st December 2006 wrote a letter to the directors of Charterhouse bank purporting to cancel their license, and the Governor Central Bank removed Ms Rose Detho as a statutory manager and replaced her with Ms Ruth Ngure as a statutory manager. All these are actions and decisions made and taken while the same gagging and manacled injunction court orders were still in force.

12. The Committee further observes, with concern, that the court cases in respect of which orders of stay were issued have not been active. In particular, from the evidence given, there was no indication of any hearing dates having been taken in the recent past in any of these cases. There do not appear to have been any attempts by the parties to the suits to prosecute the cases to completion. This situation has not in any way served the interests of the depositors, the creditors or the statutory manager. In particular, the Committee observed that the Central Bank had not been proactive in seeking a resolution of this matter, save for the re-structuring agreement entered into and executed by the Central Bank and Charterhouse bank in 2009 which has yet to be implemented.

13. It is however important to observe that in her evidence before the Committee, Ms. Muthoni Kimani, the Senior Deputy Director/Solicitor-General, indicated that although the injunctive orders are still in force, these would not be a legal impediment to the re-opening of the Bank. This was the same advice given to the Central Bank by the Attorney-General in a letter dated 21st July 2009 (**Annex - 44**).

3.3 The Status of Criminal Investigations Relating to Charterhouse Bank

14. The Committee sought information from the authority responsible for tax matters, the Kenya Revenue Authority on the status of Charterhouse Bank, its directors and shareholders as regards payment of taxes. The Commissioner of the Kenya Revenue Authority, in giving evidence before the Committee

informed the Committee that Charterhouse Bank is registered for corporation tax matters under PIN P000595708D and that the Bank had been filing tax returns until 2008 and PAYE returns on a monthly basis until May 2010 (**Commissioner General, KRA submission – Annex 45**).

15. At the next appearance by the Commission, Dr. Lumumba, the Director of the Kenya Anti-Corruption Commission informed the Committee that the Commission had received “new evidence” regarding the matter of Charterhouse Bank and that investigations were ongoing. The Director shared with the Committee a copy of a bundle of documents received from the United States Ambassador which he stated to be “fresh” information. A further bundle of documents forwarded to the Commission by the United States Ambassador was subsequently forwarded to the Committee by the Director).

16. Concerning the alleged violations of the Banking Act and the Prudential Guidelines by Charterhouse Bank, a schedule of violations by various banks and the attendant penalties was presented to the Committee by both the Central Bank of Kenya and the Chief Public Prosecutor. From the schedule of violations and from the evidence that was given, the Committee noted that aside from Charterhouse Bank, there were other banks that had violated the Banking Act and the Prudential Guidelines and, in the case of some banks, there had been repeated violations. Yet, even in the cases of repeat offenders, the banks had been fined for the violations. The Committee observed that although the offences by Charterhouse Bank were similar or less serious than those of other

banks, the Central Bank had recommended much stiffer penalties including withdrawal of the banking license. The Committee therefore observes that fairness and equality of treatment are important principles that should be seen to be applied by the Central Bank as they discharge their mandate of regulating the banking industry.

3.4 Allegations against Charterhouse Bank

17. The petitioners in their petition stated that there had been several allegations concerning Charterhouse Bank and that they had petitioned the Committee to address itself to these matters. The allegations stated are-

- (a) tax evasion;
- (b) money laundering;
- (c) siphoning of money to off-shore accounts;
- (d) drug trafficking; and
- (e) violations of the Banking Act and the Prudential Guidelines.

(a) Tax evasion

18. The term "tax evasion" is not defined in our statutes. However, the Income Tax Act (Cap. 470) specifies various acts of tax evasion, including incorrect returns of income and fraudulent returns of income.

19. The Committee sought information from the authority responsible for tax matters, the Kenya Revenue Authority on the status of Charterhouse Bank, its directors and shareholders as regards payment of taxes. The Commissioner of the Kenya Revenue Authority, in giving evidence before the Committee informed the Committee that Charterhouse Bank is registered for

corporation tax matters under PIN P000595708D and that the Bank had been filing tax returns until 2008 and PAYE returns on a monthly basis until May 2010.

20. Regarding the customers of the bank, the Commissioner-General informed the Committee that Kenya Revenue Authority had “investigated all major customers of the bank to evaluate the balances that they held in those accounts and the transactions vis-à-vis the returns that they were sending to the Kenya Revenue Authority”. He further stated that having concluded these investigations, some of the tax payers had been able to pay their taxes while others were still in the process of making payment. Some taxpayers were also at various stages of discussions with Kenya Revenue Authority concerning assessments made by Kenya Revenue Authority.

21. On the whole, the Commissioner-General in his evidence stated that Kenya Revenue Authority had no issues of tax evasion with Charterhouse Bank, thus absolving Charterhouse Bank of tax evasion.

(b) Money laundering

22. The Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009) provides for the crime of money laundering which is defined as being the offences under sections 3, 4 and 7 of the Act. These sections provide as follows-

Section 3

A person who knows or ought to reasonably have known that property is or forms part of the proceeds of crime and-

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to-
- (i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
 - (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or
 - (iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.

Section 4

A person who-

(a) acquires;

(b) uses; or

(c) has possession of,

property and who at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of crime committed by another person, commits an offence.

Section 7

A person who, knowingly, transports, transmits, transfers or receives or attempts to transport, transmit or transfer or receive a

monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.

23. The Committee observed that the Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009) came into force on 28th June 2010 by Legal Notice No. 89. Article 50(2)(n) of the Constitution provides for the rights of an accused person which include the right “not to be convicted for an act or omission that at the time it was committed or omitted was not-

- (i) an offence in Kenya; or
- (ii) a crime under international law”.

24. Consequently, it being that the crime of money-laundering was not a crime in Kenya at the time that the alleged offences took place, it would not be legally possible to profer charges based on this statute.

25. The statutory manager made reference to activities at the Bank which she found to be akin to money-laundering. The statutory manager was of the view that although the Proceeds of Crime and Anti-Money Laundering legislation was not in place at the material time, some of the activities breached the provisions of the Prudential Guidelines. However, as noted earlier, that the anti-money laundering laws were enacted and became effective as from 28th June 2010, prudential guidelines could not have constituted criminal laws.

(c) Siphoning of money to off-shore accounts

26. The CBK Governor and the Statutory Manager having been in control of Charterhouse Bank for the last 4 years did not present

before the Committee any credible evidence of money siphoned from any account from Charterhouse Bank to any account in foreign countries.

(d) Drug trafficking

27. The Committee sought information from the Criminal Investigations Department on the allegations of drug trafficking leveled against Charterhouse Bank. The Director of the Criminal Investigations Department who was accompanied by amongst others the Officer-in-Charge, Anti-Narcotics when he appeared before the Committee he confirmed that the CID department did not and had never investigated the Bank on anything related to drugs.

(e) Violations of the Banking Act and Prudential Guidelines

28. The Committee received evidence on alleged violations of the Banking Act and the Prudential Guidelines from the Central Bank, the statutory manager. The management of Charterhouse, in their evidence, submitted that they had already been punished for these violations in their response to these allegations. The Committee observes that the matter relating to these violations were considered in the executed re-structuring agreement by both the Central Bank and Charterhouse bank and that should be able to put the matter to rest.

3.5 The PriceWaterhouseCoopers Report

29. The statutory manager, in her evidence, indicated that PriceWaterhouseCoopers Limited was engaged on 12th July 2006 to carry out an independent and in-depth examination of the institution's business operations. The statutory manager explained

that the firm was engaged in order to verify the allegations against the institution and its clients and to respond to anomalies raised by various reports including the Central Bank inspection findings.

30. Charterhouse Bank contends that Statutory duty of a statutory manager was not to carry out investigations but to assume the management, control and conduct of the banking business of the institution with a view of protecting the interest of the institution, depositors and other creditors and criminal investigation is not for such benefit. Charterhouse Bank In addition, the appointment of PriceWaterhouseCoopers Limited by the statutory manager to carry out an in-depth audit against Charterhouse Bank was in violation of Section 24 of the banking Act as PricewaterhouseCoopers limited is not qualified to be appointed as auditor as provided under section 161 of the companies act. Further that PricewaterhouseCoopers limited is a limited liability company and not an auditing firm. However, he Committee observes that a perusal of the instrument by which PriceWaterhouseCoopers was appointed indicates that the appointment was not an appointment of an auditor in the usual terms of the Companies Act but the appointment of a firm required to perform tasks as specified in the appointing instrument.

3.6 The Conduct of Various Government Agencies and Institutions in the Matter of Charterhouse Bank

31. The Committee observes as follows regarding the conduct of the executive arm in the matter of Charterhouse Bank-

(a) The Ministry of Finance

The Ministry of Finance is the ministry responsible for developing and maintaining sound fiscal and monetary policies that facilitate socio-economic development and for the regulation of the financial sector which is central to the development of the country and on which all other sectors depend. As the ministry responsible for the financial sector, the Ministry of Finance cannot therefore exonerate itself from responsibility regarding the matter of Charterhouse Bank. The Committee therefore observes that the Ministry ought to have taken decisive action since 2006 when Charterhouse Bank was placed under statutory management. Instead, it appears that the Ministry has opted to be a by-stander.

(b) The Central Bank of Kenya

The Central Bank of Kenya is vested with the power to intervene in the management of an institution in the circumstances specified in section 34(1) of the Banking Act and even then only as an interim measure. In the more than four years since the placing of Charterhouse Bank under statutory management, although there has been some effort on the part of the Central Bank to resolve the impasse of Charterhouse Bank, the Committee observes that lack of action on the part of Central Bank has, over the years, complicated the matter even further.

(c) The Kenya Anti-Corruption Commission, the Criminal Investigations Department and the Attorney-General's Office, the Kenya Revenue Authority

The committee has perused the inter-agency task force report which was forwarded to the Governor by the Kenya Anti-Corruption Commission, where the findings were that the offense likely to be disclosed is that of "failure to pay taxes contrary to section 45 (1) (d) of the Anti-corruption and Economics Crimes Act of 2003" which would have nothing to do with Charterhouse bank. The Kenya Revenue Authority as the body responsible for tax matters has, on its part, absolved Charterhouse Bank of tax evasion.

32. The Committee finds that these government agencies and institutions, and in particular the Central Bank of Kenya and the Ministry of Finance, have failed to provide clear direction on the matter of Charterhouse Bank. The executive has opted to play the role of an observer in a situation where the executive should have been at the forefront as the lead player in ensuring the protection of the economy and the safe-guarding of the interests of the depositors and creditors of Charterhouse Bank and of Kenyans at large.

3.7. Interventions by officials of the Governments of the United States and the United Kingdom

33. The Committee, in the course of considering the petition for the re-opening of Charterhouse Bank, has received documentation which is said to have emanated from officials of the Governments of both the United States and the United Kingdom from various witnesses. The Committee has reviewed these documents and observes that they are basically the same documents already presented before the Committee as evidence.

34. The Committee however observes, with concern, certain accusations made by officials of the Governments of both the United States and the United Kingdom that have cast aspersions on the integrity and the conduct of Kenya's judiciary, members of the executive arm of Government, Members of Parliament and, in particular, Members of the Departmental Committee on Finance Planning and Trade of the 9th Parliament who deliberated on the Charterhouse bank matter. The Committee observes that these statements, which touch on key institutions and persons in the Government of Kenya, have not been substantiated.

35. The Committee having considered the evidence adduced by the witnesses who appeared before it and further having carefully considered the submissions thereon on and also having considered various proposals and suggestion on the way forward by, amongst others, the petitioners, the Ministry of Finance, the Central Bank, the statutory manager and the Directors of Charterhouse Bank, the Committee considers the following;

36. The attention of the Committee was drawn to section 33 of Banking Act which gives the Central Bank of Kenya the power to advise and direct an institution. Section 33(1) provides as follows-

If at any time, the Central Bank has reason to believe that-

(a) the business of an institution is being conducted in a manner contrary to or not in compliance with the requirements of this Act or of any regulations made thereunder or in any manner detrimental to or not in the best interests of its depositors or members of the public; or

(b) an institution, any of its officers or other person participating in the general management of the institution is engaged in any practice likely to occasion a contravention of any of the

provisions of this Act or any regulations made thereunder, the Central Bank may-

- (i) give advice and make recommendations to the institution with regard to the conduct of its business generally;
- (ii) issue directions regarding measures to be taken to improve the management or business methods of the institution or to secure or improve compliance with the requirements of this Act, any regulations made thereunder or any other written law or regulations;
- (iii) in any case to which paragraph (b) applies, issue directions to the institution, officer or other person to cease such practice;
- (iv) appoint a person, suitably qualified and competent in the opinion of the Central Bank, to advise and assist the institution generally or for the purposes of implementing any directions under subparagraphs (ii) and (iii) and the advice of a person so appointed shall have the same force and effect as a direction made under subparagraphs (ii) and (iii) and shall be deemed to be a direction of the Central Bank under this section.

37. In view of the provisions of section 33 of the Banking Act, the Committee observed that even where there is a repeated violation or the bank is unable to comply with the advice, direction or the provisions of the banking act, the central bank is mandated to appoint a person suitably qualified and competent in the opinion of the Central bank to advise and assist the institution generally for the purpose of implementing those requirements and that person shall be deemed and his actions shall be deemed to be direction of the Central bank.

38. The Committee urges the Central Bank of Kenya and the former management of Charterhouse Bank to expeditiously