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

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

**VERSUS**

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

**BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO**

**RULING**

**1. Application:**

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

a) The Respondents joint written statement of defence filed in  
25 HCCS No. 43 of 2020 be struck out on grounds that;

i. It is a perpetration of illegalities committed by the  
Respondents in illegally conducting financial institutions  
business without a licence and / or conducting financial  
institutions business in contravention of the Financial  
30 Institutions Act (2004) as amended.

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

**2. Grounds for this Application:**

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

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

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- 5 Respondent which by itself amounted the contravention of the  
Financial Institutions Act 2004 (as amended).
- iv. That the Respondents filed a joint written statement of defence  
pursuant to which the 2<sup>nd</sup> Respondent admitted to being a  
commercial bank licensed to operate in Kenya but which was  
10 conducting financial business in Uganda.
- v. That the 2<sup>nd</sup> Respondent was obliged by law to show that it was  
licensed to conduct financial institutions business in Uganda  
by the authority of both the Central Bank of Uganda and the  
Central Bank of Kenya but it did not.
- 15 vi. That the Respondents joint amended written statement of  
defence also admits that the 1<sup>st</sup> Respondent was the appointed  
agent of the 2<sup>nd</sup> Respondent in undertaking the impugned  
business in Uganda without a license.
- vii. That the Respondents were again obliged by law to show that  
20 the banking agency in (f) above was approved and authorized by  
both the Central Bank of Uganda and the Central Bank of Kenya  
but they did not.
- viii. That the Respondents joint amended written statement of  
defence is a perpetration of illegalities committed by the  
25 Respondents in Uganda and Kenya which defence is bad in law  
and ought not to be maintained or cordoned by this Honourable  
Court.
- ix. That the 1<sup>st</sup> Respondent by facilitating acts and omissions of  
aiding and abetting the commission of offences under the  
30 Financial Institutions Act 2004. (as amended) makes the 1<sup>st</sup>

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

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

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5 **xiv. Affidavits:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **3. Submissions:**

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

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**a. Applicants submissions:**

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

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

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

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

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

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

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

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

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

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

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

**b. Respondents submissions:**

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

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

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

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

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

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

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

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5      **4. Decision of Court:**

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

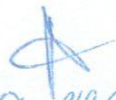
10      On the issue of whether the affidavit sworn by Allen Kagoya, an advocate is authorized and competent to support this application, I note that both parties relied on different authorities and came to differing conclusions. The fact of the matter, however is that Ms. Allen Kagoya swore an affidavit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

25      I note from the Affidavit of Ms. Kagoya that that these briefs entailed the provision of legal advice to the Applicants in regard to whether the actions of the parties or any of the parties contravened any of the provisions of the Financial Institutions Act, 2004 in relation to financial institutions business in Uganda.

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5 From the affidavit of Ms. Kagoya it is clear to me that she deposes  
same in support of this application on behalf of her clients as a legal  
practitioner being best suited to do so given her knowledge and skills  
on the laws of Uganda and given the fact that the matters deposed to  
in support of this application are technical in nature as they relate to  
10 whether the transaction between the Applicants and Defendants met  
the requirement of the Financial Institutions Act, Act 2 of 2004 As  
Amended I would concur with the submissions of counsels for the  
applicants that M/s Kagoya was competent to swear the affidavit in  
support of this application and not acted in contravention of any  
15 professional duties for her situation is very similar to that which the  
court faced in the case of **Collin Kasule vs Fina Bank and Another**  
**Civil Revision No. 5 of 2015** and after examining the nature of the  
brief of counsel came to the conclusion that counsel of an applicant  
was capable and acted in order by swearing an affidavit in support  
20 of an application made by parties only if to restate legal issues . I  
would find similarly so in this respect for the affidavit sworn here  
mainly relate to the interpretation of the law and not of facts which  
counsel for and applicant is by training and experience ought to be  
capable of doing so. This issue is thus answered in the affirmative.  
25 On the issue of whether the written statement of defence is a  
perpetration of illegalities committed by the Respondents in illegally  
conducting financial institution business without a license and / or  
in contravention of the **Financial Institutions Act (2004)** as  
amended. Reference is made to section 3 (k) of the Financial

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

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

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

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

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

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

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

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

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

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

**Section 117 of the Financial Institutions Act.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Paragraph 13 (k) of the Amended Plaint:**

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

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

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5 Paragraph 19 of the Written Statement of Defence:

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

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

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

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



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

15 The Respondents denied this assertion insisting that the 1<sup>st</sup> Respondent never became an agent of the 2<sup>nd</sup> Respondent in contravention of the law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) .....

(b) .....

(c) .....

25 (d).....; or

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

**(4) Any person who—**

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

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

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

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

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

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

**5: Orders:**

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

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

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

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

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

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

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

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

I so order.



.....  
Hon. Dr. Justice Henry Peter Adonyo  
Judge  
7<sup>th</sup> October 2020

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