IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Audace Ngiye & Charles Nyachae, JJ)

APPLICATION NO. 14 OF 2019
(Arising from Reference No. 8 of 2017)

PONTRILAS INVESTMENTS LIMITED ..... APPLICANT

VERSUS

1. **THE CENTRAL BANK OF KENYA**
2. **THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ..... RESPONDENTS**

15TH JUNE, 2020

RULING OF THE COURT

INTRODUCTION

1. Imperial Bank Limited, a financial institution registered in the Republic of Kenya, was on 13th October 2015 put under receivership by the Central Bank of Kenya ('the First Respondent'), and placed under the supervision and management of the Kenyan Deposit Insurance Corporation (KDIC) for twelve (12) months. This action by the First Respondent was informed by allegations of fraudulent activities of substantial magnitude, as well as the misrepresentation of Imperial Bank's financial status. Despite repeated assurances by the First Respondent that the matter would be resolved in the interest of Imperial Bank's depositors; the Governor of the Central Bank did on 28th June 2017 intimate that the Bank was due to be sold or liquidated.

2. On 23rd August 2017, Pontrilas Investments Limited ('the Applicant') was assigned all the rights, title and interest of the Imperial Bank's depositors. It thereupon lodged **Reference No. 8 of 2017, Pontrilas Investments Limited vs. The Central Bank of Kenya & Another** in this Court, challenging the First Respondent's execution of its regulatory and bank supervisory function and seeking to hold both Respondents to account for allegedly abdicating their fiscal management responsibility with regard to the Imperial Bank Ltd (in receivership) issue, a purported contravention of the Treaty for the Establishment of the East African Community ('the Treaty') and the Protocol for the Establishment of the East African Community Monetary Union ('the Protocol').

3. On 18th November 2019, a Scheduling Conference was held in respect of the Reference pursuant to Rule 53 of the then applicable East African Court of Justice Rules of Procedure, 2013. It did transpire in the course of the Scheduling Conference that the Applicant intended to summon the Governor of the Central Bank of Kenya as a witness, a preposition that was vehemently opposed by both Respondents. This Court did rule at the time that the Applicant's oral request be presented formally, hence the present Application. However, in addition to the application for witness summons to issue in respect of the Central Bank

Governor, the Applicant now seeks a further amendment to the Amended Reference.

4. The Application is premised on the following grounds (paraphrased):

    a. As Governor of the Central Bank of Kenya and therefore Chief Executive Officer of the First Respondent, Dr. Patrick Njoroge's evidence would enable the Court to determine the issues before it in **Reference No. 8 of 2017**, particularly with regard to the discharge of the First Respondent's regulatory function over the Imperial Bank, the alleged failure of which is supposedly a breach of the Treaty.

    b. As Governor of the Central Bank of Kenya and Chief Executive Officer of the First Respondent, Dr. Njoroge has in his custody documents that are relevant to the matters before the Court in **Reference No. 8 of 2017**.

    c. It was the statements made by Dr. Njoroge in a meeting with Imperial Bank depositors on 28th June 2017, from which the depositors deduced their chances of recovering their deposits to be dismal, that gave rise to the cause of action in **Reference No. 8 of 2017**.

    d. The error sought to be rectified by the amendment of paragraph 65B of the Amended Reference (to read 28th June 2017 and not 27th June 2017) is typographical in nature and would not cause any prejudice to the Respondents.

5. The Application was supported by two (2) affidavits. Mr. Hugh Smith's affidavit essentially regurgitates the grounds of the Application as outlined above. On the other hand, Mr. Alastair Mark Cavenagh - an Imperial Bank depositor - attested to the depositors having been assured of a minimum pay off of 40% of their deposits but had in three (3) installments received only 10% thereof, with no hope of further payment after the 28th June meeting with the Governor, hence the assignment of his (and other depositors') right of action to the Applicant. He attributed the depositors' plight to the First Respondent's misfeasance, in collusion with the Imperial Bank's staff and former Chairman.

6. The Application was opposed by both Respondents, who each filed Affidavits in Reply to that effect. In a nutshell, Mr. Kennedy Kaunda Abuga deposed as follows on behalf of the First Respondent. The management of Imperial Bank Limited (in Receivership) having been placed under KDIC, all the Bank's records were now in its custody and possession therefore Dr. Njoroge would not be in a position to either produce the documents sought by the Applicant or attest to issues pertaining to the receivership process, it too being overseen by KDIC. Further, other departments of the First Respondent (such as the Bank Supervisory Department) might be better placed to testify on the matters presently before the Court but, in any event, the list of required documents as reflected in Schedule A to Mr. Smith's affidavit offended Rule 56(2) of the then applicable Court Rules with regard to the need for the documents to be accurately described. In the same vein, in an Affidavit of Reply in support of the Second Respondent, Mr. Charles Mutinda maintained that KDIC was an independent legal entity that was not subject to the direction of either Respondent; re-echoed the First Respondent's complaint with regard to the non-specificity of either the documents sought or the purpose for which they were so required, and averred that the Application appeared to be an avenue for the Applicant to fish for information from the Respondents. Both deponents contested the sought amendment to the Reference for being time barred.

7. At the hearing, the Applicant was represented by Prof. Edward Ssempebwa; the First Respondent by Mr. James Ochieng Oduol and Ms. Noreen Kidunduhu, while Ms. Schola Mbilo and Ms. Mercy Kinyuwa appeared for the Second Respondent.

APPLICANT'S SUBMISSIONS

8. Prof. Ssempebwa relied upon written submissions, as well as oral highlights thereof. On the question of the witness summons, it was opined in the written brief that Dr. Njoroge's evidence was required to shed light on the proposals made to the Bank's shareholders that would have supposedly enabled the re-opening of Imperial Bank Ltd; to explain the results of a forensic audit and other investigations on the allegedly fraudulent activities in Imperial Bank's operations, and clarify the First Respondent's supervisory role over Imperial Bank's

operations between 2000 - 2016, as well as the possibility of the Bank's depositors recovering their monies. It was proposed that the judicial discretion exercised under Rule 56(1) was guided by the following principles: the relevance of the proposed witness' evidence to the issues for determination; the documents sought to be produced should be demonstrably within the proposed witness' possession or control; they should be succinctly described to ease their production but need not be admissible in evidence, and it must be fair and just to compel the attendance of the witness and/ or production of the documents.

9. With regard to the relevance principle, it was opined that Dr. Njoroge was a relevant witness given the numerous actions that he *'and/ or'* other *'servants/ agents'* of the First Respondent had undertaken in relation to the Central Bank's regulatory function over Imperial Bank. In oral submissions, Prof. Ssempebwa clarified that the Applicant did not fault the receivership process, as appeared to be the thrust of the Respondents' Affidavits in Reply, but rather sought to hold the First Respondent culpable for abdicating its regulatory function over Imperial Bank Ltd. He further argued that the Central Bank of Kenya Act explicitly designated the Governor as the Bank's Chief Executive Officer and its principal representative therefore he was a relevant witness and the Applicant was not obliged to seek out other Central Bank officials to give evidence.

10. On the question of possession, it was argued that Hugh Smith's affidavit had sufficiently demonstrated that the requisite documents were indeed in Dr. Njoroge's possession,[1] not to mention the numerous communications and reports within the First Respondent's possession on account of its regulatory role. On the other hand, in terms of specificity of description, it was the contention that whereas the pleadings referred to the documents expressly or by necessary implication, Schedule A to Mr. Smith's Affidavit did describe them in a specific manner. To that extent, and in deference to the decision in **The Motor Mart & Exchange Ltd. vs. The Standard General Insurance Company Ltd (1960) 1 EA 616**, it was Prof. Ssempebwa's contention that all the documents sought were easily ascertainable. He did also refer to the case of **Wendy vs. IL Ngwesi Company Ltd (2005) 1 EA 382** to portend that the said documents need not be

[1] See paragraph 5 of Hugh Smith's affidavit in support of the Motion.

admissible in evidence, it being sufficient if they were relevant for purposes of elucidating the matters in contention. In his view, it was fair and just to compel Dr. Njoroge to appear as a witness and produce the requisite documents.

11. Finally, Rule 49(1) of the EACJ's now defunct Rules was invoked to augment the contention that the Court was vested with the discretion to grant leave for the amendment of pleadings where (as presumably is the case presently) it was in the interests of justice and no prejudice would be visited upon the opposite party.

FIRST RESPONDENT'S SUBMISSIONS

12. Counsel for the First Respondent faulted the Applicant for seeking to use the present Application to circumvent the defences advanced by his client in response to the Reference. He cited lack of jurisdiction, time limitation, the *sub judice* rule, the illegality of the claim and the absence of a cause of action against his client as defences that had been raised by the First Respondent; and questioned the propriety of the opposite party seeking to determine what witnesses his client called in an adversarial system. Mr. Ochieng Oduol argued that the Applicant company having been incorporated after the assignment of the Imperial Bank depositors' debt for recovery, it had no right to access the First Respondent's pre-assignment documentation but, in any event, having appointed a receiver to manage the affairs of the Imperial Bank, the First Respondent had no custody of any documentation pertaining to the said Bank. It was his contention that the Applicant had not satisfied any of the principles it propounded for the grant of applications such as the present one. In his view, compelling the Governor to attend a Court whose jurisdiction had been challenged, more so to testify in support of the opposite party, would run contrary to the test of fairness that is inherent in the said principles.

13. Learned Counsel maintained that although the Governor was indeed the Chief Executive Officer of the Central Bank, the supervisory arm of the Bank was not under his office thus rendering him incompetent to produce documents pertaining to commercial bank supervision. He further reiterated the view that the present Application arose from a Court Order that had made no reference whatsoever to

the amendment of pleadings, therefore that aspect of the Application had exceeded the mandate that was granted by the Court.

SECOND RESPONDENT'S SUBMISSIONS

14. On her part, citing the decision in **Oluoch vs. Charagu (2003) 2 EA 649**, Counsel for the Second Respondent underscored the duty upon the Applicant to demonstrate that the documents sought did actually exist and the party in possession of them had neither disclosed them nor accepted a request for their production, as well as establish their relevance to the proceedings and that the witness sought to be summoned was, in fact, in possession of them. In her view, the Applicant had neither satisfied the foregoing principles nor specified the requisite documents with due accuracy for ease of identification, as was advocated in **The Motor Mart & Exchange Ltd** case. She faulted the proposed amendment for having been brought with inordinate delay and, in agreement with Mr. Ochieng Oduol, maintained that the Court had only granted the Applicant leave to file an application under Rule 56, not to seek leave to amend any pleadings.

SUBMISSIONS IN REPLY

15. In a brief reply, it was Prof. Ssempebwa's contention that the issues that had been raised by the First Respondent pertained to the substantive Reference and should not be canvassed at this stage. He opined that at this stage all that the Court was required to do was make a determination as to whether or not it was fair and just for the Application to be granted and summons in the terms designated under Rule 56 be issued.

COURT'S DETERMINATION

16. The Application before us is essentially two-faceted. There is, on the one hand, an application for summons to issue in respect of Dr. Njoroge and, on the other hand, an application for leave to further amend the Amended Reference to redress what appears to be a typographical error. In response to questions from the Bench, both Respondents intimated that they only took issue with the latter application in so far as it exceeded the terms of the Court Order made at the

Scheduling Conference of 18th November 2019 and was, to that extent, misconceived. Beyond that, however, the Respondents did both concede that they stood to suffer no prejudice if the application for amendment was granted in the terms sought. By consent of the Parties, we do therefore grant the application for amendment of the Amended Reference by correcting the date of the meeting mentioned in paragraph 65B of the Amended Reference to read 28th June 2017.

17. Turning to the Application for witness summons, we are constrained to state from the onset that although it was filed under the then Rules of Procedure of the Court, these Rules have since been revoked following the formulation of the East African Court of Justice Rules of Procedure, 2019 that took effect in February 2020.[2] Rule 136 of the Court Rules as amended provides for their applicability to all proceedings that were pending before the Court to the extent practicable. As has been extensively argued before us, the present Application was instituted under Rule 56(1) and (2) of the now defunct East African Court of Justice Rules of Procedure, 2013. The cited provisions are reflected in Rule 66(1) and (2) of the Court's Rules as amended therefore the Application shall be determined on that basis. We reproduce Rule 66(1) and (2) below for clarity.

> (1) **Any party in a claim or reference may apply to the Court for summons to any person whose attendance is required to give evidence or to produce documents.**
>
> (2) **Every witness summons shall specify the time and place of attendance, and whether the attendance is required for the purpose of giving evidence or to produce a document, or for both purposes and shall as well describe with reasonable accuracy the document required.**

18. The Application explicitly seeks witness summons to issue in respect of Dr. Njoroge with regard to both evidence and the production of documents.[3] The First Respondent took issue with both the evidential aspect, as well as the production

[2] See Rule 135 of the Court Rules as amended.
[3] See paragraph (a) of the Notice of Motion.

of the sought documents. We take the view that the documents sought from the First Respondent would give an indication as to whether Dr. Njoroge should be compelled to testify in the Reference as requested by the Applicant or, in fact, his personal appearance as a witness is not necessary, as was argued by learned Counsel for the First Respondent. We do therefore commence our determination of the Application with the question of the production of documents.

19. In their respective submissions, all the Parties extensively canvassed the practice of discovery within the EAC Partner States, the Applicant referring us to numerous decided cases in a bid to provide clarity on the parameters that courts would take into account in considering an application of that nature. Unfortunately, not all the cases referred to were availed to the Court and, where they were availed, the text sought to be relied upon was not highlighted. We cannot presume to know what exactly informed the Applicant's deference to each case in the absence of the courteous practice of highlighting the text of emphasis.

20. Be that as it may, we deem it necessary to restate what this Court observed in the case of **Fred Mukasa Mbidde vs. The Attorney General of Burundi & Another**:[4]

> **We do firmly recognize the doctrine of judicial precedent as a cardinal rule in the determination of cases. This doctrine is premised on the principle of *stare decesis* (which in a nutshell means 'to stand by decided matters') and enjoins courts, in arriving at their own decisions, to give due regard to binding and persuasive precedents as reflected in the decisions of superior courts and courts of concurrent jurisdiction respectively. The rationale behind this is fairly obvious: judicial precedent engenders legal certainty in the administration of justice, ensuring as far as possible that similar facts attract a similar result from courts. Needless to say, legal certainty is a critical tenet of the rule of law.**

[4] EACJ Application No. 6 of 2018

21. In the instant case, the authorities to which we were referred pertain to decisions of municipal courts within the EAC region. They were neither decided by a superior court so as to have binding force upon us nor by the First Instance Division of this Court so as to necessitate good reason before departing from them. On the contrary, they speak to an entirely different jurisdiction from that of which this Court is seized. To compound matters, the legal regime within the EAC municipal courts is such that discovery proceedings entail interrogatories, inspections and the production of documents in convoluted processes as spelt out in the respective Civil Procedure Rules or Codes.[5] This is not necessarily the mischief of Rule 66(1) of this Court's Rules.

22. The discovery of documents is intended to **'provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weaknesses of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at trial.'**[6] Conversely, in its literal sense, Rule 66(1) simply mandates parties to seek the Court's intervention in the summoning of witnesses for evidential purposes and/ or the production of documents for the same purpose. Thus, whereas the documents that are disclosed and/ or provided under the typical discovery proceedings would be for purposes of inspection to ascertain their relevance to a dispute, Rule 66 would appear to address documents whose evidential worth has been pre-determined but are in possession or control of a third party (possibly including the opposite party). It seems to us, therefore, that while the practice of discovery as articulated in *Halsbury's Laws of England* above might well be included within the ambit of Rule 66 of this Court's Rules, discoveries cannot be construed to be the sole import of that legal provision. Accordingly, we are disinclined to follow EAC municipal courts' approach to discoveries in this matter. We are neither bound by their decisions nor, in this case, are we persuaded to abide by them. This being an international court with a regional mandate that should be in tandem with broad international practice, we deem it more prudent to draw inspiration from the Court's Rules themselves, as well as related decided cases within the international arena.

[5] See for instance Order 10 of the Civil Procedure Rules of Uganda and Order 11 of the Civil Procedure Rules of Kenya.

[6] Halsbury's Laws of England (5th Edition) Vol. 13, Lexis Nexis Butterworths, 2009, para. 1.

23. In a nutshell, Rule 66(1) confers upon parties the right to apply for summons to issue in respect of any person whose attendance is required either for evidence or the production of documents. That, in general terms, is what the Applicant in this case seeks from the Court. On the other hand, sub-Rule (2) of the same Rule outlines the contents of a witness summons accruing from sub-Rule (1), should the Court be inclined to issue it, *inter alia* prescribing clarity as to whether the summons pertain to evidence as opposed to the production of documents, or both evidence and the production of documents. In the latter scenario, sub-Rule (2) calls for *'reasonable accuracy'* as to the specific document(s) required.

24. As observed earlier in this Ruling, this Application seeks the personal appearance of Dr. Njoroge for both evidential purposes, as well as the production of documents. That being so, Rule 66(2) requires the summons sought to specify the precise nature of documents he would be expected to produce. A purposive interpretation of that sub-Rule would of necessity suggest that the Court cannot specify the requisite documents with *reasonable accuracy* without a related duty upon applicants to describe them with due specificity. It would be a tad absurd to expect a neutral arbiter, such as the Court, to deduce with reasonable accuracy the documents sought in the absence of corresponding specificity in the application. We take the view, therefore, that an application for the production of documents under Rule 66(1) should describe the documents with such degree of specificity as would enable the issuer of the summons to deduce from it, for inclusion within the summons, the levels of accuracy prescribed in Rule 66(2). We so hold.

25. The requirement for reasonable accuracy in the description of documentation sought to be produced is re-echoed in the case of **Guyana vs. Suriname**,[7] an international maritime dispute before the Permanent Court of Arbitration (PCA) between the States of Guyana and Suriname. In that case, Suriname had objected to Guyana's access to specific files located in The Netherlands and, despite the diplomatic intervention of the Tribunal, maintained that this was not a case of 'equal access' to public records. It argued that the records in question were not public and covered many sensitive subjects; access to the files was

[7] International Courts of General Jurisdiction (ICGJ) 370 (PCA 2007)

restricted under a general policy of The Netherlands, and some of the files in question were 'unrelated to the maritime boundary dispute.' Guyana then sought an Order requiring both parties to cooperate and refrain from interference with each other's attempts to obtain documents or other information, and to take necessary action to undo the effects of past interference. In its Award, the Tribunal held:[8]

> (1) **The Tribunal shall not consider any document taken from a file in the archives of The Netherlands to which Guyana has been denied access.**
>
> (2) **Suriname shall take all measures within its powers to ensure that Guyana have timely access to the entire file from which any such document already introduced or to be introduced into evidence was taken, either by withdrawing its objections made to The Netherlands government, or, if this proves unsuccessful, by providing such file directly to Guyana.**
>
> (3) **Each Party may request the other Party, through the Tribunal, to disclose relevant files or documents, identified with reasonable specificity, that are in the possession or under the control of the other Party**. *(Emphasis ours)*

26. In that case, the Tribunal identified the documents' relevance, specificity of description and their being in the possession or under the control of opposite party (in no particular order of prominence) as necessary pre-requisites for their disclosure or production. We are most persuaded by and do abide the foregoing judicial approach. We hasten to add, nonetheless, that the specificity of document identification would be the primary consideration in our context given the express provisions of Rule 66(2) that re-echo the call for reasonable accuracy in the description of the documents sought. It seems to us that the question as to whether documents are either relevant or within the possession or control of a proposed witness can scarcely be interrogated in the absence of a reasonably explicit description of them. Having thereby ascertained the documents, they

[8] See Order No. 1 entitled 'Access to Documents'.

would then be subjected to the tests of relevance and possession or control of the party from which they are sought.

27. In the instant case, the Applicant seeks ten (10) broad categories of documents as encapsulated in clauses B1, B2, B3, B4, B6, B7, B8, B9, B11 and B12 of Schedule A to Mr. Smith's Affidavit in support of the Application. It does also seek the documents described in clause B13. Item B5 is omitted because it was clarified for the Applicant that it had been included on the list in error.[9] This begs the question as to whether or not the rest of the documents meet the tri-fold test of specificity, relevance and opposite party's possession or control.

28. Prof. Ssempebwa cited **The Motor Mart & Exchange Ltd** case to buttress his position that it was sufficient for purposes of an application such as the present one if an applicant specified the 'species of the document'. First and foremost, as has been stated earlier herein, authorities emanating from EAC municipal courts do not have binding force over this Court. Nonetheless, even if we sought to interrogate the persuasive value of the cited case, the decision in that case would appear to run contrary to learned Counsel's submission. In that case, the application did not contain any specific description of the documents sought to be discovered, merely referring to *'any document or documents relating to'* the subject matter of the suit. Citing with approval the English Court of Appeal case of **White vs. Spafford & Co. (1901) 2 KB 241**, it was held:

> **To justify an application for discovery of documents under r. 19A(3) of O. XXXI, the party making the application must in his affidavit name and specify, so that they can be identified, the particular documents of which he desires discovery. It is not sufficient to make a general affidavit based on a priori reasoning that certain classes of documents must be in his opponent's possession or power. The discovery must be of a species not a genus.** *(Emphasis ours)*

29. Quite clearly, the generic nature of the documents' description was rejected in deference to a more specific description. Therein lays the distinction between the

[9] This clarification transpired in the course of questions from the Bench.

terms *species* and *genus* in that decision. We would therefore disallow the inference that has been drawn by learned Counsel for the Applicant.

30. Turning to the matter before us, the documents sought under Items B1 to B12 (with the exception of Item B5 that has been conceded and Item B10 that is blank) have been described in generic rather than specific terms. They are not described in explicit terms beyond the generic reference to them as 'All documents' relating to a particular function. In our considered view, such a broad categorisation of the documents depicts non-knowledge of the specific documents required, lending credence to the possibility of a fishing expedition. That cannot have been the intention of the Court's Rules. With specific regard to the emails sought, the fact that various emails are referred to in paragraph 16 of the Amended Reference underscores the need for a more specific description of the precise emails sought under clause B6, particularly in so far as some of them are ambiguously defined as *'a series of email messages between Imperial Management and 1st Respondent.'*[10] We therefore find that the documents outlined in clauses B1, B2, B3, B4, B6, B7, B8, B9, B11 and B12 have not been described in terms as would engender compliance with Rule 66(2) of the Court's Rules. It is so held.

31. By contrast, clause B13 does attempt to provide more detailed descriptions of the documents sought. We reproduce it below for ease of reference.

    a. *The Report from KDIC to the Central Bank which allowed them to request expressions of interest in the purchase of IBL.*

    b. *The situation analysis for the Central Bank on which the decision was taken to close the bank.*

    c. *The Central Bank Supervision Department Inspection Reports on Imperial Bank Ltd as at 30th June 2015, 2014, 2013, 2012, 2006 and 1996; complete with confidential transmission letters and signed certificates of awareness.*

    d. *External auditor's reports sent to Central Bank during the same period in (a) above.*

    e. *The report received by CBK, which confirmed fraudulent activities of substantial magnitude and the misrepresentation of IBL's financial statements, the subject of Press*

[10] See paragraph 16(xv) of the Amended Reference.

Release of October 27, 2015; and subsequent periodical reports from Kenya Deposit Insurance Corporation (KDIC).

f. *Minutes of the meetings CBK and KDIC held with IBL's shareholders, directors and parallel meeting they held with a cross-section of depositors on October 28, 2015.*

g. *Exit Discussion Issues raised by the Bank supervisory department during the inspection reports in (a) above; and responses of the management of Imperial Bank Limited.*

h. *Briefing notes to the Governor of Central Bank prior to his speech in June 2017 and June 2018.*

i. *The reports of results steps taken to facilitate the recovery of the funds that were obtained irregularly from IBL, a forensic audit and other investigations on the culpability of the fraudulent activities as stated in paragraph 6 of the press release of October 27, 2015.*

32. A plain reading of clause B13 would suggest that items B13(c), (e) and (i) are described with sufficient specificity as would make them readily ascertainable. Similarly, items B13(a), (b) and (f) are fairly accurately described. However, in our considered view, the description of the briefing notes referred to in item B13(h) is vague and ambiguous, a far cry from the reasonable accuracy envisaged under Rule 66(2) of the Court's Rules. In the same vein, items B13(d) and (g) appear to be misplaced and improperly cross-referenced and, to that extent, are unsatisfactorily described. We come to that conclusion because we see no reference in clause B13(a) to either Exit Reports or any time period. It is plausible that they could have been intended to cross-reference clause B13(c) but we are unable to conclusively draw that inference *suo moto*. To compound matters, it is not even readily apparent whether the audit reports sought under that item pertain to the First Respondent's external audit reports or external audit reports of Imperial Bank that were sent to the First Respondent. We would resolve that ambiguity against the Applicant since it is the party that bore the onus of accurately describing the documents. In any event, learned Counsel for the Applicant had ample opportunity to clarify these anomalies in oral submissions but did not do so. In the premises, we are unable to find that they have been described with due specificity.

33. Having so held, we now revert to the question of relevance. As one of the grounds of the Application, subject to substantiation in the supporting Affidavits,

there was an averment in paragraph (ii) of the Motion that Dr. Njoroge had in his possession and control documents listed in Schedule A that were relevant to the Application before us. In paragraph 3 of his Affidavit in support of the Application, presumably to substantiate the foregoing averment, Mr. Smith appeared to suggest that the documents listed in Schedule A were necessary to prove the factual matters raised by the Applicant in the Reference. Whereas the First Respondent did not address the question of the documents' relevance beyond the blanket assertion in submissions that the established parameters for their production had not been met, the Second Respondent did in paragraph 8(b) of Mr. Mutinda's Affidavit in Reply fault the Applicant for not demonstrating the relevance of the documents sought as by law required. We are inclined to agree with the Second Respondent that alluding to documents as being necessary to establish one's case is not the same thing as demonstrating why they are, in fact, relevant to the trial. The Applicant did not attempt to elucidate their relevance to its case.

34. Be that as it may, it behoves this Court to interrogate this issue and determine it on its merits. The relevance of the sought documents to the trial is hinged on the cause of action advanced by the Applicant. In the course of arguing this Application, the Applicant did clarify that the cause of action in the Amended Reference accrues from the abdication by the First Respondent of its supervisory and financial regulatory role, which acts allegedly contravene the Treaty and the Protocol. We cannot fault the Applicant on this. It is borne out by paragraph 15 of the Amended Reference. Against that background, and having earlier in this Ruling held the documents outlined in items B13(a), (b), (c), (e), (f) and (i) of Schedule A to have been duly identified for production, we do now assess them to deduce their relevance to the matters in issue in the Amended Reference. Without purporting to delve into the merits of the Reference, taken at their face value, it seems quite apparent to us that all the documents sought under the above items do have a bearing on the First Respondent's supervisory and regulatory function in respect of the Imperial Bank Ltd. They could shed light on the diligence with which it executed the cited functions, thus facilitating the adept determination of the matters in issue under the Amended Reference. We do therefore find the cited documents relevant to the circumstances of this case.

35. Before taking leave of this issue, we deem it necessary to specifically address the documents referred to in items B13(d) and (g). We have earlier held that they were not satisfactorily described and that should have been the end of the matter. Nonetheless, even if perchance they had been adequately described, there would remain the question as to whether they are relevant. Given the already highlighted ambiguity therein, if item B13(d) does relate to the First Respondent's external audit reports they would typically evaluate the Bank's internal operations against its broad legal regime and internal governance structures. We are hard pressed to appreciate how relevant such reports would be to a Reference that is premised on the alleged abdication by the First Respondent of its duty of supervision viz a third party. On the other hand, if item B13(d) alludes to the external audit reports of Imperial Bank Ltd the import of such reports, as well as the documents outlined in item B13(g), would ordinarily be included in the reports identified in items B13(c), (e) and/ or (i) of Schedule A rendering it superfluous to replicate their production.

36. We now turn to the question of the possession or control of the identified documents. In so far as the function of the Central Bank does indeed (on Mr. Abuga's own admission[11]) include the commercial bank supervisory function, it is reasonable to posit (as we hereby do) that the documents in item B13(c), which preceded the receivership process, would be within the First Respondent's possession. On the other hand, paragraph 10 of the Reference succinctly depicts the First Respondent as being in receipt of the documents referred to in items B13(e) and (i). We are satisfied, therefore, that the documents in items B13(c), (e) and (i) are indeed within the possession and/ or control of the First Respondent.

37. However, we can scarcely say the same of the documents listed under items B13(a), (b) and (f). Having carefully considered the material that was availed to us in the present Application and the Amended Reference, we find nothing on record that supports their existence, let alone satisfactorily demonstrates that they are within the possession or control of the First Respondent. It cannot be presumed that either the report alluded to under item B13(a) exists or Minutes

[11] See paragraph 19 of Mr. Abuga's Affidavit in Reply

were actually taken at the meeting referred to in item B13(f). The requests therein would appear to be far-fetched and speculative. Finally, not only have we held that the briefing notes highlighted in item B13(h) were not satisfactorily described, no reference whatsoever is made to them throughout the Amended Reference as would suggest that they exist either. Consequently, we find that only the documents that were duly identified for production under items B13(c), (e) and (i) of Schedule A are relevant to the determination of the Amended Reference and in the possession and/ or control of the First Respondent. We so hold.

38. The foregoing conclusion begs the question as to whether indeed, as has been proposed by the Applicant, Dr. Njoroge is the only competent and compellable witness for purposes of attesting to the First Respondent's supervisory and regulatory function, and producing the regimen of documentation identified under items B13(c), (e) and (i). The documentation includes:

    a. The Central Bank Supervision Department Inspection Reports on Imperial Bank Ltd as at 30th June 2015, 2014, 2013, 2012, 2006 and 1996; complete with confidential transmission letters and signed certificates of awareness.

    b. The report received by CBK, which confirmed fraudulent activities of substantial magnitude and the misrepresentation of IBL's financial statements, the subject of Press Release of October 27, 2015; and subsequent periodical reports from Kenya Deposit Insurance Corporation (KDIC).

    c. The reports of results steps taken to facilitate the recovery of the funds that were obtained irregularly from IBL, a forensic audit and other investigations on the culpability of the fraudulent activities as stated in paragraph 6 of the press release of October 27, 2015.

39. Meanwhile, in Mr. Smith's affidavit it had been averred that Dr. Njoroge's evidence was required to shed light on:

    (1) *The follow-up over the proposals made to the shareholders that would have enabled the reopening of the Bank (IBL) as reported to in the 1st Respondent's Press Release of 27th October 2015;*

(2) *The follow-up over a forensic audit and other investigations on the culpability of the fraudulent activities in IBL's operations that were to be undertaken as stated in the same Press Release of 27th October 2015;*

(3) *The extent to which the supervisory role of the 1st Respondent was applied to IBL's operations in the relevant period of the years 2000 to 2016;*

(4) *The extent to which depositors of IBL are to be reimbursed with their funds.*

40. It seems abundantly clear to us that virtually all the answers sought of Dr. Njoroge would be quite effortlessly found in the documentation listed under items B13(c), (e) and (i). That documentation would appear to fall squarely within the First Respondent's bank supervisory function. It is by no means perfunctory to note that Mr. Abuga, a Director in the Governor's office, did in paragraphs 6, 18 and 19 of his Affidavit of Reply attest to the First Respondent's overall mandate viz the role of the Governor. For avoidance of doubt, we reproduce the cited paragraphs below.

Paragraph 6

THAT *in respect to the prayer for Witness Summons, I wish to state that the Central Bank of Kenya exercises constitutional mandate provided under Article 231(2) of the Constitution of Kenya. Its mandate includes formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.*

Paragraph 18

THAT *I wish to state that the Governor discharges statutory obligations as the Chief Executive Officer of the CBK and its representative under section 13(3) & (4) of the CBK Act. However, the Governor's statutory obligations are quite distinct and separate from the obligations of the CBK which includes the regulation and inspection of Banks including IBL.*

Paragraph 19

THAT *there are many Departments within the CBK including Bank Supervisory Department with a Director in charge and other competent Officers who can attend Court and give evidence based on knowledge and relevance. This information is in the public knowledge and the Applicant had an opportunity to identify a relevant Officer to attend Court and give the required evidence (if any).*

41. The foregoing evidence was not rebutted by the Applicant and therefore remains uncontroverted. Its veracity is indeed supported by the Central Bank of Kenya Act where, whereas sections 4 and 4A spell out the First Respondent's general mandate, section 13(3) and (4) do encapsulate the functions of the Governor. This legal position does fortify the cogency of Mr. Abuga's evidence as highlighted above. In paragraph 19, he attests to the staff of the Bank Supervisory Department being more competent witnesses than the Governor for purposes of the Reference. This proposition resonates quite aptly with available jurisprudence on the evidential worth of direct as opposed to indirect evidence. Thus in the case of **Democratic Republic of Congo (DRC) vs. Uganda**,[12] it was held:

> **It** (the International Court of Justice) **will prefer contemporaneous evidence from persons with direct knowledge. ... The Court moreover notes that evidence obtained by persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention.**

42. This position was appositely summed up in an article on a related subject titled *'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inference'*,[13] where it was opined that the ICJ's case law indicates a hierarchy of case law by which **'the court favours direct evidence over circumstantial evidence. The court finds factual evidence that has been put through the trial process more persuasive than factual evidence that has not withstood cross examination.'**

43. The rule of thumb in the foregoing jurisprudence is that evidence should, as much as is practicable, be direct evidence. In the instant case, with utmost respect to Dr. Njoroge, it is undoubtedly apparent that the Bank's Supervisory Department would have first-hand knowledge of the matters in contention in the Amended

[12] (2005) ICJ 201

[13] Scharf, Michael P. & Day, Margaux, **'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inference'**, Chicago Journal of International Law, 2012, Vol. 13: No. 1, Article 6, p. 149

Reference, as well as the documents sought to be produced. They are therefore the more competent witnesses to provide direct evidence therein. Indeed, although section 13(3) of the Central Bank of Kenya Act does designate the Governor as the Chief Executive Officer of the Central Bank, section 13(5) of the same statute empowers him to delegate any function thereunder to any other officers of the Bank. We therefore find no reason to compel Dr. Njoroge to appear as a witness in **Reference No. 8 of 2017**.

CONCLUSION

44. This Application sought the issuance of summons for Dr. Patrick Njoroge, the Governor of the Central Bank of Kenya, to appear as a witness in **Reference No. 8 of 2017** and produce documents of purported evidential value at the trial. It did also sought the Court's leave for the further amendment of the Amended Reference. The application for amendment was conceded and consequently allowed by consent of the Parties.

45. On the other hand, both the appearance of Dr. Njoroge as a witness and his production of designated documents were contested by the Respondents. We have held that an application for the production of documents under Rule 66(1) should describe the documents in such degree of specificity as would enable the issuer of the summons to deduce from it, for inclusion within the summons, the levels of accuracy prescribed in Rule 66(2); the documents should be relevant to the matter they are sought for, and they should be in the possession and/ control of the opposite party. We are satisfied that the documents delineated in items B13(c), (e) and (i) of Schedule A to the Application were duly identified; are relevant to the determination of the Amended Reference, and are in the possession and/ or control of the First Respondent. We do, however, disallow the production of the documents outlined in clauses B1, B2, B3, B4, B6, B7, B8, B9, B11, B12 and B13(a), (b), (d), (f), (g) and (h) of the same Schedule.

46. Finally, to the extent that the crux of the matter in **Reference No. 8 of 2017** is the alleged abdication of the First Respondent's bank supervisory function, we found no reason to compel the Central Bank Governor, Dr. Njoroge to appear as a witness. Whereas any officer of the Central Bank's Supervisory Department

might be a competent and compellable witness for that purpose, given the gravity of the allegations in the Reference, we deem it prudent to issue witness summons in respect of the Head of that Department. S/he will also produce the documents that were duly identified for production.

47. In terms of costs, Rule 127 of the Court's Rules proposes that costs should follow the event unless the Court, for good reason, decides otherwise. In this case, where the success of either party is fairly evenly balanced, we would exercise our discretion to order each party to bear its own costs.

48. In the result, we would partially grant the Application in the following terms:

    a. By consent of the Parties, the application for amendment is allowed. The Amended Reference stands duly amended by correcting the date of the meeting mentioned in paragraph 65B of the Amended Reference to read 28th June 2017.

    b. The application for the production of the documentation delineated in items B13(c), (e) and (i) of Schedule A to the Application is hereby allowed.

    c. The application for the production of the documents outlined in clauses B1, B2, B3, B4, B6, B7, B8, B9, B11, B12 and B13(a), (b), (d), (f), (g) and (h) of the same Schedule is hereby disallowed.

    d. The application for witness summons to issue in respect of Dr. Patrick Njoroge is hereby disallowed.

    e. Witness summons are hereby issued in respect of the Head of the First Respondent's Bank Supervisory Department to appear in person for purposes of adducing evidence and production of the documents stipulated in clause 48(b) hereof.

    f. We order each Party to bear its own costs.

It is so ordered.

Dated and delivered by Video Conference this 15th Day of June, 2020.

Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE

Hon. Justice Audace Ngiye

JUDGE

Hon. Justice Charles Nyachae

JUDGE

Certified as True Copy of the original

15 JUN 2020

Reg.

EAST AFRICAN COURT OF JUSTICE