THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: OWINY - DOLLO, CJ; MWONDHA, TUHAISE, CHIBITA, MUSOTA, JJSC.

CIVIL APPEAL NO. 13 OF 2021

(Arising from the decision of Court of Appeal in Civil Appeal No. 242 of 2020)

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

VERSUS

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

JUDGMENT OF OWINY – DOLLO, C.J.

Introduction

This is a second appeal; it being an appeal against the decision the Court of Appeal (Coram: Buteera DCJ, Kakuru & Madrama JJA) made in the exercise of its jurisdiction as a first appellate Court in Civil Appeal No. 242 of 2020, which arose from High Court Misc. Application No. 654 of 2020, wherein Adonyo J, the trial judge, had disposed of High Court Civil Suit No. 43 of 2020 between the same parties in this appeal before us. In its judgment, the Court of Appeal overturned the decision the trial judge made in High Court Misc. Application No. 654 of 2020, and High Court Civil Suit No. 43 of 2020, respectively; and set aside the orders and decree, respectively, made therein.

Background

From the pleadings, joint scheduling memorandum, and the record of appeal, it is evident that certain facts, as are stated below, are not in contention. The 1st and 2nd Appellants are private limited liability

companies registered in Uganda, and carrying on the business of real estate development; while the 3rd Appellant is a director of the 1st Appellant. The 1st and 2nd Respondents are commercial banks based in Uganda and Kenya respectively; carrying on the business of commercial banking and related services. The 1st and 2nd Appellants obtained credit facilities from the 1st and 2nd Respondents. The two Appellants mortgaged several properties as security for the credit facilities. The 3rd Appellant was one of the guarantors of these credit facilities.

The 2nd Respondent appointed the 1st Respondent as its agent and conduit for disbursement of the credit facilities from the 2nd Respondent to, and recovery thereof from, the 1st Appellant. For the execution of these credit facilities, the 2nd Respondent held an escrow account with the 1st Respondent. For the repayment of the aforesaid credit facilities extended to the 1st Appellant by the 1st and 2nd Respondents, the 1st Respondent debited the 1st Appellant's accounts held by it, and remitted the funds to the 2nd Respondent.

Contending that the Respondents had wrongly debited their loan accounts beyond what was permissible under the loan agreements, and further that the debits were made basing on unlawful, unreasonable, and unconscionable interest rates, the Appellants filed High Court Civil Suit No. 43 of 2020 against the Respondents; founding their claims on, *inter alia,* breach of contractual, fiduciary, and, as well, statutory, duties. They obtained an order of Court for an account and reconciliation of the flow of funds between them and the 1st Respondent during the subsistence of their banker–customer relationship; and recovery of funds allegedly wrongfully debited by the 1st Respondent from the Appellant's accounts held by it.

In their joint written statement of defense, the Respondents admitted having extended credit facilities to the 1st and 2nd Appellants; but denied the alleged breach of the law in doing so. They contended that all debits made in the servicing of the loan were done pursuant to the terms of the loan agreements. The trial Judge ordered the taking of an audit of the 1st and 2nd Appellants' loan accounts with the Respondents for the period running from the 16th of February, 2011, up to the time of filing the suit in 2020. The Appellants amended the plaint; and introduced a new cause of action, claiming that the loan agreements between them and the 2nd Respondent were void for illegality.

They asserted that the 2nd Respondent was carrying out financial institution business in Uganda; but without the requisite license from Bank of Uganda to enable it do so; which was in breach of the Financial Institutions Act, 2004, as amended. In their joint amended written statement of defense, the Respondents denied the alleged illegalities; contending instead that all credit facilities advanced to the Appellants were legally binding and enforceable under the law. The Appellants raised a preliminary objection on a point of law in High Court Miscellaneous Application No. 654 of 2020 for an order that the amended joint written statement of defense in HCCS No. 43 of 2020 be struck out.

The grounds for the application were twofold. First, was that the amended joint written statement of defense was a perpetuation of the illegalities committed by the Respondents in conducting financial institution business in Uganda without a license; in contravention of the Financial Institutions Act, 2004, as amended. Second, which was in the alternative, was that the defense by the Respondents was frivolous, vexatious, and evasive; and did not disclose any reasonable answer to

the Applicant's claim of illegal conduct of financial institutions business by the 2nd Respondent. Accordingly, they pleaded with Court that the application be allowed, and judgment be entered against the Respondents in HCCS No. 43 of 2020; and provisions be made for costs.

The trial judge allowed the H.C.M.A No. 654 of 2020; and made orders and declarations with far reaching consequences; of which the ones relevant for this appeal are:

(i) Striking out the Respondents' joint written statement of defence for perpetrating illegalities.

(ii) Declaring that the facilities extended by the 2nd Defendant to the first Plaintiff were illegal and thus void ab initio, hence unenforceable for the reason that the 2nd Defendant had no licence from Bank of Uganda to conduct financial institutions business in Uganda.

(iii) Declaring the appointment of the 1st Defendant by the 2nd Defendant as agent bank and security agent in respect of the 2nd 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 Amended) as well as the Bank of Uganda Consumer Protection Guidelines 2011 and Kenyan Banking Act.

Being aggrieved at the orders of the learned trial Judge, the Respondents appealed to the Court of Appeal vide Civil Appeal No. 242 of 2020; basing the appeal on the following grounds:

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

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

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

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

5. The learned trial Judge erred in law and in fact in finding that the 1st Appellant acted as an agent of the 2nd Appellant contrary to Regulation 5 of the Financial Institutions (Agent Banking) Regulations 2017 and section 125 (3) of the Financial Institutions Act, 2 of 2004 as well as similar the laws of Kenya without receiving evidence.

6. The learned trial judge erred in law in holding that the 2nd Appellant committed illegalities by violating section 117 of the Financial Institutions Act 2004 in so far as it did not open a representative office in Uganda.

... ...

9. The learned trial judge erred in law and in fact in striking out the written statement of defense of the 1st Defendant whereas there was no challenge to it.

... ...

11. The Learned trial judge erred in law and in fact in entering judgment for the Plaintiffs as prayed for in their joint plaint by

virtue of O. 9 r. 6, 8, 10 AND 30 of the Civil Procedure Rules S.I 71 – 1."

The Appellants then pleaded with the Court of Appeal to set aside the decree and orders of the learned trial judge; with costs. The Court of Appeal dealt only with grounds 9 and 11 of the appeal; and deemed it unnecessary to consider the other grounds of appeal because, in its view, the determination of these two grounds had disposed of the appeal. The Court of Appeal faulted the learned trial judge for striking out the written statement of defense of the 1st Respondent; and for entering judgment for the Plaintiffs/Appellants under O. 9 r. 30 of the Civil Procedure Rules, without according the Defendants a hearing.

The Court further held that introducing a new cause of action through amendment of the plaint was unlawful; hence, it struck out the plea of illegality raised in the amended plaint, and, as well, the amended defence thereto. It consequently allowed the appeal with costs; and set aside all the orders of the trial Court that had been appealed against. Pursuant to this, it remitted the suit to the High Court for trial before another trial judge; basing on the pleadings in the original plaint and the defence. This has resulted into the instant appeal before this Court.

The Grounds of Appeal

The grounds on which this appeal is founded are that:

1. *The Learned Justices of the Court of Appeal erred in law and fact when they avoided to adjudicate the substantial question of illegality which was the basis of the Respondent's Appeal before them.*
2. *The Learned Justices of Appeal erred in law and fact when they abandoned the grounds of appeal raised by the Respondents and irregularly introduced new grounds of Appeal that were not implicitly*

set out in the memorandum of Appeal and thereby erroneously ordered;

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

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

3. *The Learned Justices of Appeal erred in law and fact in finding that the Respondents were never heard on the question of illegality in Misc. Application No. 654 of 2020 before their joint written statement of Defense was struck out and judgment entered for the Appellants.*
4. *The Learned Justices of Appeal erred in law and fact in failing to evaluate evidence which was before the trial court and setting aside the judgment entered in favor of the Appellants under Order 6 rule 30 of the Civil Procedure Rules S.I 71-1.*
5. *The Learned Justices of Appeal erred in law and fact in ordering for a retrial of the suit in which the overriding question of illegality had been fully heard and determined inter partes by the trial Court.*
6. *The Learned Justices of Appeal erred in law and fact in condemning the Appellants to costs in an appeal where the Respondents had not been purged of the illegality adjudged against them by the trial court.*
7. *The Learned Justices of Appeal erred in law and fact in rewarding the Respondent's with costs for committing an illegality.*

The Appellants seek orders of this Court that the judgment, orders and decree, of the Court of Appeal appealed from herein be set aside; and instead the judgment, orders and decree of the Trial Judge in the High Court in HCMA 654/2020 and HCCS 43/2020 be upheld. They also plead

for provision of costs of this appeal, and in the Courts below, with a certificate for two counsel.

Representation

At the hearing of the Appeal, the Appellants were represented by Counsel Fred Muwema, Arnold Kimara and Mathew Kiwunda; while Counsel Edwin Karugire, Usama Sebuwufu and Richard Bibangambah appeared for the 1st and 2nd Respondents. Counsel for the parties filed respective written submissions; and, at the hearing of the appeal, also made oral clarifications in Court. Counsel on either side argued grounds 1 and 4 together; and similarly for grounds 3 and 5, and as well grounds 6 and 7. Ground 2 was however argued alone. I render the arguments combining grounds 1, 3, 4, 5, 6 and 7 together; and then the 2nd ground alone.

Grounds 1 & 4, 3 & 5, and 6 & 7.

Case for the Appellants

The essence of the submissions made for the Appellants on these six grounds is that the Court of Appeal erred when it declined to adjudicate on the substantial question of illegality raised in eight out of twelve grounds of appeal in that Court concerning the Respondents' conduct of financial institution business without a license. Counsel argued that such questions of law supersede all questions of pleadings including any admissions made; and Court has no discretion to overlook them as the 1st Appellate Court did. The failure to deal with the issue of illegality raised before Court, counsel submitted, rewarded the Respondents with undeserved orders, including the award of costs, for their illegal acts. He thus urged this Court to determine the question of illegality.

Case for the Respondents

In response, Counsel for the Respondents submitted on the first ground and fourth grounds that the Court of Appeal did not err by declining to adjudicate on the question of illegality; and that, in fact, the Court of Appeal evaluated evidence before the trial judge before setting aside the trial judge's respective decisions. Counsel submitted that there is no set formula for re-valuation; contending that it boils down to the circumstances of each case, and the style adopted by that Court. In this regard, Counsel argued that the Court of Appeal did the right thing in first dealing with procedural issues raised in grounds 9 & 11 of the appeal before it; which they noted would have a bearing on the rest of the grounds of appeal, including that of illegality. Counsel argued that the Court of Appeal actually re-evaluated the pleadings by the parties which was before the trial judge; to wit, the amended plaint, written statement of defense and averments made therein, and the application to strike out the defense.

Pursuant to this, counsel argued, the Court found that the orders made by the trial judge pursuant to Order 6 rule 30 were not lawful. Counsel also argued that the Court of appeal rightly found that the issue of illegality had arisen from an unlawful amendment to the plaint. Counsel further argued that it did not matter that the amendment was by consent of the parties; and pointed out that the Respondents raised no objection to the amendment. Counsel argued that upon the amended plaint that had introduced the issue of illegality having been struck out, the issue of illegality went with it; and therefore the issue became moot before Court. Counsel contended that the Court had power, under rule

32 (1) of the Court of Appeal Rules, to remit the case back for retrial as it did, without determining that issue.

Regarding the submissions made for the Appellants on ground 3, Counsel concurred with the Court of Appeal that the trial judge had failed to give the Respondents a hearing on the question of illegality before striking out the amended written statement of defense. Counsel submitted that the objection raised before the trial judge was one on law and fact; which necessitated a trial to ascertain the relevant facts. On account of this error, Counsel contended, the trial Judge thus failed to consider pertinent issues such as *pari delicto* of the parties, and the other separate contracts in which the issue of illegality had no relevance, before making his orders. Counsel then argued that in the event, the trial judge's decision empowered the Appellants to avoid their obligations of repayment of the loans under their contracts with the Respondents; thus, in effect, making them beneficiaries of an alleged illegality in which they participated in committing.

With regard to grounds 5, 6, and 7, Counsel submitted that the order of retrial and award of costs to the Respondents were justified as fruits for a successful litigation; and pursuant to rule 32 (1) of the Judicature (Court of Appeal Rules) Directions. Counsel prayed that grounds 1, 3,4,5,6 & 7 should fail.

Appellants' submissions in Rejoinder

Counsel for the Appellants reiterated most of their earlier arguments set out above. In addition, Counsel contended that the question of illegality before the trial Judge had been for determination of the specific question of law on illegality, and was not one of mixed law and fact requiring a full trial. Counsel argued that even if it were a matter

of law and fact, a point of law could be raised on disputed facts by way of application; and for this proposition of the law, Counsel relied on ***Yaya Farajallah v Obur Ronald & 3 others – Civil Appeal N. 81 of 2018.*** Secondly, citing ***Ismail Serugo v KCC & A.G. – Constitutional Appeal No. 2 of 1998*** and ***Jeraj Shariff & Co. v Chotai Fancy Stores [1960] 1 EA 374***, Counsel submitted that it is the law under O.6 r. 30 of the CPR that Court can rely only on pleadings including annexures thereto, to strike out pleadings as the Court of Appeal did.

Counsel countered the Respondents' contention that the Appellants founded their cause of action on an illegality; and argued that the Appellants' claims were instead for recovery of a sum of monies based on a cause of action founded on unjust enrichment from money had and received. Counsel also argued that the Respondents, independent of any influence by the Appellants, had a duty to ensure they conducted a licensed financial institution business; hence they should be found liable for contravening the Financial Institutions Act 2004 as amended, and the Uganda Consumer Protection Guidelines.

Ground 2

Case for the Appellants

Counsel for the Appellants submitted that the Court of Appeal erred in resolving the appeal basing on issues extraneous to the memorandum of appeal. Counsel submitted that during the hearing, one of the Justices raised new grounds and points for consideration, and directed that the parties file written submissions on them; thus effectively abandoning the actual grounds of appeal, which led to the erroneous issuance of orders striking out the amended plaint, and an order for a retrial. Counsel argued that it is settled law that issues cannot properly

arise at the stage of submissions, as such a procedure would allow a party to succeed on a case not set up by them. For this, counsel referred to **Rule 86 (1) & Rule 102 (c)** of the Judicature (Court of Appeal Rules) Directions; ***Interfreight Forwarders Ltd v EADB SCCA No. 33/1992;*** and ***Fang Min v Belex Tours & Travel SCCA 06/2013.*** Counsel argued that this departure from the grounds of appeal was irregular, erroneous and occasioned a total miscarriage of justice.

Case for the Respondents

For their part, Counsel for the Respondents disputed the argument that the Court of Appeal abandoned the grounds of appeal; and submitted that the questions raised by the justices were not entirely new and had a basis in the grounds of appeal raised by the Respondents. Counsel also submitted that it is the duty of Court to frame issues as would be necessary for determining the matters in controversy as between the parties; and this was permitted by Rule 102 (c) of the Judicature (Court of Appeal Rules) Directions subject to the parties being heard. Last, Counsel submitted that no injustice was occasioned as both parties were given an opportunity to be heard on these grounds. Counsel thus concluded that the Court of Appeal was right in their re-evaluation, and finding that determination of grounds 9 and 11 of the appeal disposed of the entire appeal.

Appellants' submissions in Rejoinder

In rejoinder, Counsel for the Appellants submitted that r. 102 (c) only applies to a litigant who raises new grounds or matters on appeal; but not for the Court to raise such new grounds or matters. Counsel further submitted that the amendment to the plaint did not introduce a new cause of action as the Court of Appeal found, because the issue of

illegalities was at all times implicit and covered in the plaint in H.C.C.S No. 43 of 2020 under the Appellants' claim of breach of fiduciary and statutory duty by the Respondents. In addition, Counsel argued that it was permissible under the law to raise the illegalities, and introduce new facts in the plaint under O. 6 r. 6 and O.6 r. 7 of the Civil Procedure Rules, SI 71-1, respectively. All the trial Judge did was to make a finding that the Respondents had conducted financial institution business without a license.

Supplementary submissions

When this appeal came up for hearing, the Respondents made an oral application, under Rule 102 (a) of the Rules of this Court, to be allowed to make additional submissions regarding foreign lending to Ugandan citizens, in light of the recommendations made by the trial Judge to the Bank of Uganda; and due to its importance and potentially far-reaching impact on the economy. The Appellants objected to this application. Court gave the parties timelines for filing submissions on the matter.

However, only the Respondents filed their submissions; in which they addressed the questions as to whether foreign lenders require a license to lend to Ugandan entities and citizens, and whether a license is required for syndicated banking, and furthermore whether an agent of a foreign lender requires a license under the Financial Institutions Act (Agent Banking) Regulations 2017.

Counsel for the Respondents argued that the Financial Institutions Act, 2004, as amended, and the Financial Institutions Act (Agent Banking) Regulations of 2017, do not apply to a foreign financier extending financial facility to a Ugandan entity; hence, a foreign financier was

under no obligation to establish a representative financial institution here in Uganda to enable it extend a facility to a Ugandan entity.

CONSIDERATION AND DETERMINATION OF THE APPEAL

At the hearing of this appeal, the Coram had included Hon Justice Rubby Aweri Opio JSC; who however fell ill, and tragically passed on before judgment could be delivered. This necessitated the reconstruction of the Coram; for which counsel for the parties were afforded the right to address Court again. Counsel for the respective parties however informed Court that they had nothing new to add to their earlier respective submissions; which they adopted, and urged Court to rely on in its consideration and determination of the appeal.

This being a second appeal, I consider it prudent to restate the scope of duty of a 2nd appellate Court and that of the 1st appellate Court, from the outset, and then determine whether, or not, the Court of Appeal as a first appellate Court properly applied the law in coming to its impugned decision. The powers conferred on this Court as a second appellate Court are, pursuant to Rule 30 of this Court, limited to matters of law or mixed law and fact; but not on matters that are strictly of fact only. The duty of this Court does not extend to re-evaluation of the evidence, but only to ensure that the 1st appellate Court correctly exercised its duty. In ***Milly Masembe Vs Sugar Corporation and Anor, Civil Appeal No. 01 of 2000,*** which is quite instructive on the matter, Mulenga JSC stated that: –

> *"In a line of decided cases, this court has settled two guiding principles at its exercise of this power. The first is that failure of the appellate court to re-evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. The second is that the Supreme*

Court, as the second appellate court, is not required to, and will not re-evaluate the evidence as the first appellate court is under duty to, except where it is clearly necessary.'

See also ***Kifamunte Henry v Uganda SC Cr. App No 10 of 1997*** where this Court stated thus: –

'It does not seem to us that except in clearest of cases, we are required to re-evaluate the evidence like a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles.'

The principles referred to in ***Kifamunte v Uganda*** (supra) regarding the powers of the Court of Appeal as a first appellate Court are espoused in Rule 30 (1) of the ***Judicature (Court of Appeal Rules) Directions*** (conveniently referred to as the Court of Appeal Rules); and have been well articulated in a line of authorities.

It is incumbent on the 1st appellate Court to re-evaluate or scrutinize the evidence afresh; as if it were the trial Court. However, it is precluded from questioning such findings of the trial Court as are supported by evidence; and this, even where the Court of Appeal considers it possible or even probable that it would have itself come to a different conclusion from that reached by the trial Court. The Court of Appeal can only interfere when it is satisfied that a finding of fact by the trial Court was not supported by evidence. For this proposition of the law, see ***Ntambala Fred v Uganda Crim. Appeal No. 34 of 2015***; and In ***Kifamunte Henry v Uganda SC Cr. App No 10 of 1997***.

The instant appeal raises multiple issues for determination by this Court. There are those arising from the grounds of appeal as specified

by the Appellants in the memorandum of appeal, and those raised by the Respondents with regard to foreign lending. I will first consider ground 2 of appeal; and then followed by grounds 1, 3, 4, 5, 6 & 7.

Ground 2

With regard to the issue raised by the Court of Appeal, of its own volition, which is impugned in this appeal, I should point out that it is trite that appeals are a creature of statute; and are governed by rules that confer jurisdiction, prescribe the form the appeal should take, and the procedure Court should follow for its disposal. The rules also specify matters that are appealable as of right, and those that require leave of Court for an appeal to lie therefrom. Appeals in the Court of Appeal, and in this Court are instituted through a memorandum of appeal. Rule 86 (1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 requires that the Appellant sets out in such memorandum, concisely under distinctive heads, the specific points wrongly decided by the lower Court; and, as well, propose the desired remedial orders the Court should issue in redress.

Rule 102 (a) of the Court of Appeal Rules bars parties from arguing or canvassing any issue or matter neither included in, nor implicit from, the grounds listed in the memorandum of appeal. These Rules place emphasis on the parties' right to be informed of the case against them, and thus enable them prepare their respective case accordingly; and also enable the appellate Court effectively delineate and address issues crucial for the determination of the appeal. While the Rules cited above emphasize the need for clear formulation of grounds of appeal to enable the adverse party to the appeal properly understand and prepare

for the appeal, it is noteworthy that Rule 102 (c) thereof provides as follows:

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

It is clear that Rule 102 (c) confers on the Court of Appeal the power to recast issues or even raise extraneous ones, as in its persuasion would enable parties canvass all the issues in controversy between them; thus asserting the right of the parties to be heard on the matters so raised, and thereby enable Court render substantive justice. Hence, Rule 102 (c) of the Court of Appeal Rules provides for an exception, which waters down the force of Rule 102 (a) of the Rules of the Court that appeals should be determined basing only on the grounds listed either in the memorandum of appeal, cross appeal, or notice of affirmation. Rule 102 (c) therefore enjoins Court to deal with all matters or issues in controversy between the parties; the determination whereof would conclusively achieve the ends of justice. See ***Restetuta Twinomugisha v Uganda Aluminum Ltd - Supreme Court Civil Appeal No. 19 of 2001.***

There is a long line of authorities on the proposition that an appellate Court has the discretion to deal with issues that do not arise from the grounds set out in the appeal, if this would enable Court achieve the ends of justice. The new issue could be raised by any of the parties, or

by the Court of its own volition. In ***Warehousing & Forwarding Co. of East Africa Ltd. v. Jafferali & sons Ltd. [1963] E.A. 385***, the Privy Council stated at p. 390, as follows:

> *"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interest of justice to entertain the plea. ... ... But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."*

In ***Esso Petroleum Co. Ltd. v. Southport Corporation [1956] A.C. 218,*** at p. 238, LORD NORMAND said on the question of pleadings, that*:*

> *'The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them ... To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.'*

In ***Tanganyika Farmers Association Ltd. v. Unyamwezi Development Corporation Ltd., [1960] E. A. 620,*** **where** the appellant's counsel raised a question that had not been raised at the trial. The Court, at p.626, held:

> *"... An appeal court has a discretion to allow a new point to be taken on appeal but it will permit such a course only when it is assured that full justice can be done to the parties.*

The Court cited, with approval, the case of ***In The Tasmania [1890] 15 A.C. 223,*** where at 225, LORD HERSCHELL said:

> '*My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.*
>
> *It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box.'*

In ***North Staffordshire Railway Co. v. Edge [1920] A.C. 254,*** LORD BUCKMASTER, at p. 270, put the matter thus*:*

> *"Upon the question as to whether the appellants should be permitted to raise here a contention not raised in the court of first instance ... ... such a matter is not to be determined by mere consideration of the convenience of this House but by considering whether it is possible to be assured that full justice can be done between the parties by permitting new points of controversy to be discussed. If there be further matters of fact that could possibly and properly influence the judgment to be formed, and one party has omitted to*

take steps to place such matters before the court because the defined issues did not render it material there, leave to raise a new issue dependent on such facts at a late stage ought to be refused, and this is settled practice."

Of paramount importance is that in the exercise of this discretion, the appellate Court must ensure that all the parties to the appeal are accorded the opportunity to exercise their respective right to be heard on the issues raised by the parties or by the Court itself. This power conferred on and enjoyed by an appellate Court, to raise matters extraneous to the one raised by the parties to the appeal, is strengthened by the general powers provided for under Rule 2 (2) of the Rules of the Court; which confers on the Court unlimited inherent powers:

"... to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court ...".

Further, once a Court is convinced that the appeal before it may be disposed of on a procedural, or some other, point of law, the proper course of action it should take is to, first, deal with and determine that point of law. In the instant appeal before this Court, the Court of Appeal itself, as is manifest from pages 770 to 772 of the Record of Appeal, raised new issues that are discernible from the Court's judgment; the relevant part whereof I reproduce here *in extenso*:

"These are our issues we would like counsel to highlight or if they have authorities you cite them for me and for Court. Whether the trial judge can dispose of a suit under order 6 rule 30 in view of the right of appeal under sub rule 2.

If sub rule 2 says you have a right of appeal, you have the right to appeal against the order, so I am wondering whether at that stage the Judge can proceed to determine a suit that is not before him because an application has been made to strike out a defence or to strike out a plaint and the Judge determines that a plaint does not disclose a cause of action, or the defence does not disclose a reasonable answer. Does he make the order and then call the suit or within the application he disposes of a suit.

Because it is a different matter when the application is made while hearing or at the hearing of the suit but in this case it was a stand alone application and the suit had not been called for hearing on that day.

And also in view of sub rule 2 which says the order is appealable as of right. So the question is whether a Judge can while determining an application make a judgement and a decree instead of a ruling and an order. You see under order 6 rule 30 can a judge originate a final judgment and a final decree.

Then the question is also about liquidated demand as to whether the suit the plaint that before its amendment had made averments and prayed for certain orders one of which was that an audit be carried out. (sic)

Now, the Judge made an order that the audit be carried out, can he now again say that the plaint had set out the liquidated demand in view of that. Of course I know that there was an amended plaint, now, the second arm of this is to address us on the issue of the amended plaint that raise the issue of illegalities. Whether such an amendment

is tenable or not in view of introducing a matter in which the trial Judge ends up... the issue of reconciliation audit is abandoned.

The fourth is whether a plaintiff whose claim is based on contract can sustain a suit on the basis of illegality of that very contract. In other words, can an illegality originate a suit? In other words, can judgment be entered in favour of a party on account of an illegal contract? If the Judge finds an illegality can the Judge on the basis of an illegal contract find and give remedies to any of the party or parties to that contract. But you can just say can an illegal contract sustain a suit?

The last one is whether the illegality alleged by the plaintiff as was admitted in the written statement of defence or was it a question to be tried as one of mixed law and fact."

These issues, save for the one on amendment of the plaint, flowed from grounds 9 and 11 of the appeal. I am unable to fault the Court of Appeal for, in the exercise of its duty to re-evaluate the proceedings of the trial Court, noting glaring errors in the procedure adopted by the trial judge; the determination of which it deemed might have a bearing on the decisions of the trial Judge. In the circumstances, the Court of Appeal was right in raising, of its volition, issues which merited consideration; albeit that they had not arisen from any of the grounds of appeal.

The Court identified such issues as the amendment of the plaint, the entering of judgment under O.6 rule 30 of the Civil Procedure Rules, and the legal basis for the orders granted by the trial judge; all done without conducting any hearing to determine, inter alia, whether the parties were in *"pari delicto",* and whether a cause of action can be founded on an illegality. In this, the Appellant suffered no injustice whatsoever. Where the determination of these issues disposes of the

appeal, there would be no need to proceed with any other ground of, or issue arising from, the appeal. In the premise, I find that Ground 2 of the appeal, in which the Appellants fault the Court of Appeal for raising issues outside of the grounds in the memorandum of appeal, for determination, devoid of merit; hence, it fails.

Ground 1

The matter here, for resolution by this Court, is whether the Court of Appeal erred in declining to consider the issue of illegality raised with regard to the foreign lending extended by the Respondents to the Appellants; and yet this was an express ground of appeal. To determine this issue of illegality, it is necessary for this Court to examine the decision of the trial Judge on the matter; and equally examine that of the Court of Appeal regarding the issues it raised of its own volition, owing to the resolution of which it came to the finding that it was unnecessary to consider the issue of illegality raised before that Court.

In the Court of Appeal, the Respondents herein (who were the Appellants then) made the issue of illegality of the impugned loan transactions central to the appeal under grounds 1 to 6 of the appeal; but these were restricted to the credit facilities advanced by the 2nd Respondent to the Appellants. The grounds were stated as follows:

> "*1.The learned trial judge erred in law in finding that the Financial Institutions Act 2004 applied to the 2nd Appellant in respect of credit facilities issued in Kenya to Ugandan entities. (sic)*
> *2. The learned trial judge erred in law and in fact in finding that the 2nd Appellant required approval from the Bank of Uganda to issue credit facilities in Kenya to Ugandan entities.*

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

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

5. The learned trial Judge erred in law and in fact in finding that the 1st Appellant acted as an agent of the 2nd Appellant contrary to Regulation 5 of the Financial Institutions (Agent Banking) Regulations 2017 and section 125 (3) of the Financial Institutions Act, 2 of 2004 as well as similar laws of Kenya without receiving evidence.

6. The learned trial judge erred in law in holding that the 2nd Appellant committed illegalities by violating section 117 of the Financial Institutions Act 2004 in so far as it did not open a representative office in Uganda."

Duty of Court to consider the issue of illegality

The core of the appeal at the Court of Appeal was therefore the ground faulting the trial judge for holding that the credit facilities the 2nd Appellant therein (2nd Respondent herein) had extended to the Respondents therein **(**Appellants herein**)** were illegal on the ground that the 2nd Respondent had operated financial institution business in Uganda without a licence from the Bank of Uganda. Madrama Izama J.A. (as he then was), in his lead judgment, considered the effect of the trial judge's striking out of the amended written statement of defence, in which the Defendants had been categoric in their refutation of the Plaintiffs' claim that the contracts executed with the Plaintiffs were

illegal. He faulted the trial judge for this finding; pointing out that once the defence against the plea of illegality was struck out, then illegality as a cause of action was unsustainable. He therefore set aside the order of the trial judge that had struck out the written statement of defence.

However, Kakuru J.A. for his part held a different view on the matter; opining instead that the amendment of the plaint, which introduced a cause of action based on illegality was wrong in law as the claim of illegality substituted the original cause of action that had been premised on claims of breach of contract amongst others. He accordingly held that the proper thing to do was to strike it off. In this regard, he had this to say:

> *"The entire claim that had been premised on breach of contract was amended on 10th August, 2020. It was substituted with a new claim in the amended claim... set out in the new paragraphs 5,6,7,8,9 as follows: ... ..."*

Later on, he noted:

> *"Where the action has been brought on a substantial cause of action to which a good defence has been pleaded, the plaintiff will not be allowed to amend his claim by including in it, for the first time, a trivial and merely technical cause of action, which such defence may not cover: See: Dillon v Balfour (1887) 20 L.R. Ir. 600."*

He then said:

> *"In my view, this amendment went beyond what is acceptable under the law. It constituted a fresh cause of action. It ought to have been disallowed on that account alone ...*

I would allow this Appeal. I would strike out the amended plaint on account that it did not comply with the law. It amounted to a fresh claim that was in any event unsustainable.

I would order that the parties revert to the position as it was on 31st August, 2020 immediately after the conclusion. Having done so, the amended defence would fall by the wayside."

On this proposition of the law, Buteera DCJ agreed with Kakuru J.A.; wherefore, by majority decision, the Court struck out the amended plaint that had introduced the plea of illegality; and the defence thereto consequentially suffered the same fate. In the event, the Court of Appeal referred the case back to the trial Court for consideration of the merits of the facts and averments contained in the original pleadings as they were before the amendment of the plaint and written statement of defence that the Court of Appeal had struck out. In so doing, the Court missed the opportunity to pronounce itself on this question of law, which could possibly determine the outcome of the suit altogether.

With utmost respect to the Court of Appeal, I am unable to find in the instant case any legal basis for its decision that the amendment, which had introduced a new cause of action to the plaint founded on a claim of illegality, was unlawful. First, contrary to the majority finding of the Court of Appeal, a proper perusal of the amended plaint shows that the amendment did not substitute the original claims of breach of contract and others with that of illegality. The amended plaint states in paragraphs 8 and 9 thereof as follows:

"8. The Plaintiffs bring this suit against the Defendants jointly and severally so that the question as to which of the Defendants is liable for illegally carrying out financial

institution business in Uganda and for breach of contract, among others, can be determined.

9. The subject matter of the suit and cause of action against the Defendants jointly and severally is for:

(i) A determination as to the legality of the credit facilities executed by the Defendants with the Plaintiffs.

(ii) A refund of monies unlawfully/unjustly appropriated by the Defendants from the Plaintiffs.

(iii) A dispute over properties comprised in ... ...

(iv) Breach of the terms of the loan agreement.

(v) Breach of contractual, fiduciary and statutory duty."

It is therefore unmistakably manifest that the claim of illegality introduced by amendment of the plaint was not in substitution of the claims made out in the original plaint. The amended plaint retained the original claims of breach of contract; and then introduced the claim of illegality as an additional and independent cause of action in the suit.

Second, I am persuaded by the authority of ***Dillon v Balfour (supra),*** relied upon by Kakuru J.A., for propounding a sound proposition of the law that Courts should not entertain causes of action founded on trivialities, or are merely technical; and which no defence could adequately cover. I however find that case easily distinguishable from the instant case before this Court. The reason is that in the instant appeal, the plea of illegality introduced by amendment of the plaint, to which the Defendant responded, cannot by any stretch of construction be categorized as *"a trivial and merely technical cause of action, which such defence may not cover",* as is envisaged in the case of ***Dillon v Balfour (supra).*** A plea of illegality is neither one of triviality nor of

frivolity, or a mere technicality, or one which no defence could cover. It is a substantive claim, which evokes serious attention of the Court.

In support of this proposition of the law, there is a rich corpus of authorities wherein Courts have pronounced themselves on the issue of substantive or reasonable cause of action, as is discernible from the plaint. In ***General David Tinyefuza vs Attorney General of Uganda – S. C. Constitutional Appeal No.1 of 1997*** – the Supreme Court reasserted the well established proposition of law that a plaint has a reasonable cause of action when it contains the facts disclosing the cause of action. The Court approved of the definition of *'cause of action'* contained in ***Mulla on Indian Code of Civil Procedure, (Vol. 1, 14th Edn., at p. 206)***; which is that: –

> *"A cause of action means every fact, which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the Plaintiff a right to relief against the Defendant. ... It is, in other words, a bundle of facts ... necessary for the Plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It is a media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."* (***emphasis added***).

In the English case of ***Drummond-Jackson vs British Medical Association & Ors., [1970] 1 All E. R. 1094***, at page 1101, Lord Pearson qualified the phrase *'reasonable cause of action'* thus: –

> *"... 'reasonable cause of action' means a cause of action with some chance of success. When only the allegations are examined it is*

found that the alleged cause of action is certain to fail, the statement of claim should be struck out."

In ***Ismail Serugo vs Kampala City Council & Anor. – Supreme Court Constitutional Appeal No. 2 of 1998*** – MULENGA JSC reiterated the well known consideration that a cause of action is constituted by three ingredients; when he stated as follows: –

"A cause of action in a plaint is said to be disclosed if three essential elements are pleaded; namely, pleadings (i) of existence of the Plaintiff's right, (ii) of violation of that right, and (iii) of the Defendant's liability for that violation. In ***Auto Garage vs Motokov (No. 3) [1971] E. A. 514,*** *at 519 D, after reviewing a line of precedents, SPRY V. P. put it thus: –*

'I would summarise the position as I see (it) by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated, and that the Defendant is liable, then in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.'

A reasonable cause of action on the other hand, has been described as a cause of action which, in light of the pleadings, has some chances of success; see ***Drummond – Jackson vs British Medical Association (1970) W.L.R. 668.***"

In ***Mulindwa Birimumaso vs Government Central Purchasing Corporation C.A.C.A. No. 3 of 2002***, TWINOMUJUNI J.A. in his lead judgment, followed the Supreme Court decision in the ***Ismail Serugo vs Kampala City Council*** case (supra), and stated that: –

"It is now settled law that when a Court is considering whether a plaint raises a cause of action or not, under order 7 rule 11, it must only look at the plaint and its annextures. See ***N.A.S. Airport Servises Ltd vs Attorney General of Kenya [1959] E. A. 53 ...*** *In* ***Wycliffe Kiggundu Kato vs Attorney General – S.C. Civil Appeal No. 27 of 1993*** *– the Court said: –*

'A distinction must be drawn between an application to reject a plaint and one when a matter of law is set down for argument as a preliminary point. That distinction was very clearly explained in ***Nurdin Ali Dewji & Others vs G.M.M. Meghji & Co. and Others (1953) 20 E.A.C.A. 132.*** *The distinction is that under Order 7 rule 11 (a) of the Rules an inherent defect in the plaint must be shown rather than that the suit was not maintainable in law. In the latter case a preliminary point should be set down for hearing on a matter of law ... if the State insists that as a matter of law no suit can be brought, the State should not try to have the plaint rejected under Order 7 rule 11, but should apply to have the suit dismissed on a preliminary matter of law.'"*

In ***SCCA No. 2 of 2001 – Tororo Cement Co. Ltd. vs Frokina International Ltd. [2002] KARL 233***, where the Defendant contended that the Plaintiff had not set out particulars of the negligence alleged, the Court cited the case of ***Auto Garage vs Motokov (No. 3) [1971] E. A. 514,*** *at 519 D,* with approval; and Oder JSC stated, at page 240, that: –

"A cause of action means every fact which is material to be proved to enable the Plaintiff to succeed, or every fact which, if denied, the Plaintiff must prove in order to obtain judgment see ***Cooke vs Gull LR 8 E.P.*** *at page 116 and* ***Read vs Brown 22 QBD*** *at p.31. It is now well established in our jurisdiction that a plaint has disclosed a cause of*

action even though it omits some fact which the rules require it to contain, and which must be pleaded before the Plaintiff can succeed in the suit. What is important in considering whether a cause of action is revealed by the pleadings are the questions whether a right exists and whether it has been violated, (Cotter vs Attorney General [1936] 5 EACA 18)." (***emphasis added***).

Third, it is a well settled principle of law that a point of law – and the issue of illegality is one such point – may be raised at any stage of the proceedings. In ***Mercantile Credit Co. Ltd v Hamblin [1964] 1 ALL ER 680***, there was an objection to the defendant raising the issue of illegality, which he had not pleaded. When the defendant then applied to have the defence amended, and this too was objected to, Court was categoric that counsel was right in bringing the issue of illegality of the impugned transaction to the notice of Court; as owing to this, Court would be spared from committing the act of enforcing an illegal contract.

This position of the law, as is well expounded in ***Civil Appeal No. 4 of 1981 – Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor [1982] UGSC 2***, enjoins the Court before which any issue of illegality is raised, to treat it as one of utmost gravity, because the issue overrides all matters before the Court, including any issue of pleadings; notwithstanding any admissions or agreements made by the parties, which would otherwise render the issue of illegality uncontested. In ***National Social Security Fund & W.H. Sentongo vs Alcon International Ltd., SCCA No 15 of 2009***, this Court departed from its holding in ***Stephen Lubega vs Barclays Bank, SCCA No. 2 of 1992,*** which was that '*fraud must not only be pleaded, it must be particularized*'. In departing from that position, Odoki CJ was most categoric in the ***National Social Security Fund*** *(supra)* that:

"One of the principles of law stated in ***Makula International*** *(supra) is that as long as there is an illegality, it can be raised at any time as a Court of law cannot sanction that which is illegal. Counsel for the appellant maintains that the arbitral award was procured by fraudulent means, which is an illegality, which this Court must act upon. I agree and hold that due to the fact that fraud was discovered on appeal, the Appellants were not barred from raising it in this Court. The Alcon Managers and Directors knew this fact, and why they concealed it. This conduct cannot be anything other than a deliberate concealment of pertinent information."* ***(emphasis added).***

Hence, a plea of illegality can be raised at any stage of the proceedings without the need to amend the pleadings for that purpose; as long as the adversary in the suit is accorded the opportunity to exercise the right to be heard on the matter, which would ensure they do not suffer the prejudice and miscarriage of justice that would result there from.

Indeed, a plea of illegality need not be raised only where it was pleaded. The issue of illegality may become apparent much later from evidence adduced before Court, without it having been pleaded. Court before which such revelation occurs is under duty to deal with the issue; notwithstanding that it had not been pleaded. In ***Mistry Amar Singh v. Serwano Wofunira Kulubya [1963] E.A. 408***, where an African had leased out mailo land to a non–African, without the requisite prior consent of the Lukiiko and the Governor, contrary to the provisions of the law in that regard, the Privy Council approved of the judgment of the East African Court of Appeal where from the appeal had emanated; and stated thus:

"In his judgment in ***Scott v. Brown Doering, McNab & Co. [1892] 2 Q.B. 724,*** *LINDLEY L.J.; at p. 728, thus expressed a well-established principle of law:*

'Ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.' ***(emphasis added)***

It is noteworthy that in the instant case on appeal before this Court, no objection was raised before the trial Court that the amendment introducing illegality as a cause of action would in any way prejudice the Defendants in their defense. To the contrary, the Defendants had in fact conceded to this amendment sought by the Plaintiffs; but had filed a defence negating it. Furthermore, the claim of illegality was clearly and discernibly implicit in the pleadings in the original plaint, as is evidenced by paragraph 9 (i) thereof reproduced above. Hence, there was no need to amend the plaint for that purpose. In the event, I find that Madrama Izama J.A. (as he was then) was right to set aside the order of the trial Court, which had struck out the defence; and rendered the claim of illegality unsustainable. This finding therefore effectively reinstates the plea of illegality and defence thereto, for determination.

I need to point out here that it is incumbent on a superior Court, before which any question or issue strictly of law is raised, and does not require evidence to be adduced in support, to exercise prudence and pronounce itself thereon; instead of referring the question of law back to a lower or inferior Court for determination. This owes to the fact that the superior Court has the overriding competence to make an authoritative and binding decision on the matter. This position of the law is better appreciated when one takes cognizance of the reality that a question of law referred by a superior Court, back to a lower Court, for determination, has the potential of returning to the superior Court on appeal; thus, occasioning avoidable delay and miscarriage of justice.

Accordingly then, the Court of Appeal ought to have addressed and determined the issue of illegality of the credit facilities extended by the 2nd Respondent to the Appellants herein, which was raised before it; and then refer the case back to the trial Court for determination of the issues of facts. Therefore, in declining to pronounce itself on the issue of illegality of the impugned transactions between the disputants, which was the crux of the appeal before it, and instead striking out the amended plaint for the reasons it has given, I find with the greatest respect to the Court of Appeal that it erred in law in doing so. Wherefore, I find that ground 1 of this appeal succeeds.

Grounds 3, 4, 5, 6, & 7

The issue of illegality, as was raised by the Appellants in their application at the trial Court, failed to distinguish between the credit facilities advanced by the respective Respondents to the 1st Appellant. It was the loans advanced by the 2nd Respondent that the trial judge, in determining the objection, found illegal. He nonetheless disposed of

the head suit – H.C.C.S No. 43 of 2020 – in its entirety; but without reference to the credit facilities between the 1st Respondent and the 1st Appellant, which were not affected by the issue of illegality. I concur with Madrama Izama J.A. (as he then was) in his holding that if the impugned transactions were found to be illegal, the trial Court would have had to accord the parties a hearing to establish the parties' contributory liability in the commission of the illegality; and determine the fate of the monies advanced under the illegal credit facilities.

Second, the trial judge had ordered for the audit of the impugned transactions and ascertainment of the status of the loans between the parties; hence, he was under duty to determine the aspects of the dispute between the Appellants and the 1st Respondent, arising from the loan the 1st Respondent had extended to them, and over which the issue of illegality had not arisen. He, however, failed to do so; and instead made an omnibus finding of, and order on, illegality of all the transactions. His failure to conduct a trial in the head suit, where from ascertainment of all the facts pleaded would have been achieved by the parties adducing relevant evidence, offended the age old cardinal rule that no one should be condemned without being accorded the right to be heard on the matter in controversy. His decision therefore occasioned a miscarriage of justice; hence, ground 3 of the appeal fails.

In the event, I find no justification whatsoever to fault the Court of Appeal for its finding that the trial judge erred in entering judgment in the main suit under O. 6 r. 30 of the Civil Procedure Rules, when the matter before him was not for the determination of the head suit; but rather an application whose resolution, in the circumstances, could not dispose of the head suit. The Court of Appeal was, thus, right in setting

aside the orders of the trial judge, and ordering for a retrial of the head suit before another judge. Accordingly, then, grounds 4, 5, 6, and 7, of this appeal, also fail.

The issue of foreign lending in Uganda

It therefore falls on this Court then, as the apex Court in our jurisdiction, to conclusively pronounce itself on the issue of illegality, as a point of law, which has been raised right from the trial Court up to this Court; and thereby avert the inordinate delay and consequential injustice that the parties would certainly suffer if the matter were referred back to the trial Court, but its decision were again appealed against up to this Court. The determination of this issue will resolve a core point of law in this appeal; and also render clarity on the position of the law with regard to persons in Uganda carrying out financial transactions with foreign financial institutions or persons. This will enable the banking and other financial institutions transacting business in, or with institutions in, Uganda, carry out their businesses with certitude; in the knowledge that they are secure under the law.

For a better appreciation of the instant case, I consider it prudent to recast the issue of illegality raised as a ground in this appeal; as follows:

> *"Whether the Financial Institutions Act 2004, as amended, and regulations made thereunder, apply to the 2nd Respondent, it being a foreign bank, and to the 1st Respondent as its agent in respect of credit facilities issued by the 2nd Respondent to a Ugandan borrower."*

The laws that govern the operations of financial institutions in Uganda are enshrined in the Constitution, provided for in Acts of Parliament, and, as well, in subsidiary legislations and regulations made

thereunder. The Bank of Uganda, being the Central Bank, is seized with oversight or supervisory and regulatory powers over all financial institutions operating in the country. The legal basis for, and functions of, the Bank of Uganda are provided for in the Constitution, the Bank of Uganda Act 2000, and, as well, the Financial Institutions Act, 2004, as amended.

Article 161 of the Constitution provides as follows:

*"**161. The central bank.***

(1) The Bank of Uganda shall be the central bank of Uganda ...

162. Functions of the bank.

*(3) Subject to the provisions of this Constitution, Parliament may make laws prescribing and regulating the functions of the Bank of Uganda." (**emphasis added**)*

Article 162 of the Constitution spells out the functions of the Bank further as follows:

"162 (1) The Bank of Uganda shall —

(a) promote and maintain the stability of the value of the currency of Uganda;

(b) regulate the currency system in the interest of the economic progress of Uganda;

(c) encourage and promote economic development and the efficient utilisation of the resources of Uganda through effective and efficient operation of a banking and credit system; and

*(d) do all such other things not inconsistent with this article as may be prescribed by law. (**emphasis added**)*

The purpose of the supervisory and regulatory powers conferred on the Central Bank is clearly spelt out in the long title to the Bank of Uganda Act, 2000; as follows:

"An Act to amend and consolidate the Bank of Uganda Act for regulating the issuing of legal tender, maintaining external reserves and for promoting the stability of the currency and a sound financial structure conducive to a balanced and sustained rate of growth of the economy and for other purposes related to the above".

Section 4 of the Bank of Uganda Act also provides as follows:

"(1) The functions of the bank shall be to formulate and implement monetary policy directed to economic objectives of achieving and maintaining economic stability."

(2) Without prejudice to the generality of subsection (1), the bank shall—

(a) maintain monetary stability;

... ...

*(j) supervise, regulate, control and discipline all financial institutions and pension funds institutions." (**emphasis added**)*

The Bank is enjoined, under section 37 of the Bank of Uganda Act, to execute this mandate in cooperation with all the financial institutions; in the following terms:

"*37. Cooperation with financial institutions.*

The bank shall in the discharge of its functions under this Act seek the cooperation of and cooperate with financial institutions in order —

(a) to promote and maintain adequate and reasonable banking services for the public;

(b) to ensure high standards of conduct and management throughout the banking system;

(c) to promote such policies not being inconsistent with any provision of this Act ..."

In the exercise of the powers conferred on it by the Bank of Uganda Act, and the Financial Institutions Act 2004, the Bank of Uganda in consultation with the Minister responsible for Finance issued two Regulations; to wit, the *Financial Institutions (Licensing Regulations) 2005,* and the *Financial Institutions (Agent Banking) Regulations 2017*, which are of relevance to the matters in contention in this appeal. These are for the supervision and regulation of financial institutions; and their scope was the subject of the application before the trial Court, the decision where from has been appealed against up to this Court. It is noteworthy that the supervisory and regulatory functions of the Central Bank over financial institution business, is not peculiar to Uganda; but is a global phenomenon, as the provision for and exercise of such functions in other countries are similarly within the purview of the legislation establishing their respective central banks.

The specific provisions of the law, which the Appellants contend have been contravened by the Respondents in the impugned financial transactions, need to be restated. Section 4 of the Financial Institutions Act 2004, as amended, which prohibits the carrying out of certain transactions unless one has a license to do so, states as follows:

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

Section 4(3) of the Act also provides thus:

"(3) A financial institution shall not—

(a) transact any financial institution business not specified in its licence;

*(b) effect any major changes or additions to its licensed business or principal activities without the approval of the Central Bank. (**emphasis added**)*

The pertinent issue here is whether the transactions carried out between the 2nd Respondent and the 1st Respondent, and between the 2nd Respondent and the 1st Appellant, are subject to, or governed by, any of the provisions of the Financial Institutions Act, 2004, as amended, and the regulations made thereunder. I consider that for a better appreciation of this issue, it is necessary to recast it and address the following specific areas.

(a) type of business
(b) jurisdiction; and,
(c) whether the transactions fall within those covered in (a) and (b) above?

With regard to the type of business covered under the Financial Institutions Act 2004, as amended, section 4(2) thereof provides as follows:

*"4 (2). No person shall be granted a licence to transact business as a financial institution unless it is a company within the meaning of this Act." (**emphasis added**)*

Therefore, under this provision of the Act, the type of businesses covered are *"financial institution businesses"*; which from the provisions of sections 3 and 4 of the Act, only a company incorporated or

registered under the Companies Act can engage in. Such companies include the Uganda Development Bank, a building society duly incorporated under the Uganda Development Bank Act; and *"any institution classified as a financial institution under this Act;* ***(emphasis added)***

Admittedly, the 2nd Respondent does not satisfy the requirements set out in the provision of the Act above; owing to the fact that it is not licensed to carry out financial institution business in Uganda. This, nonetheless, still begs the question whether the impugned transactions between the 2nd Respondent and the Appellants, carried out through the 1st Respondent, amounts to the 2nd Respondent '*transacting financial institution business*' in Uganda, within the meaning ascribed thereto by the Financial Institutions Act, 2004, as amended. The Bank of Uganda Act, in section 1 (d) thereof, defines the term "*financial institution"* to include "*a bank, credit institution, building society and any institution classified as a financial institution by the bank.*" The Bank of Uganda therefore has considerable latitude in the exercise of the power conferred on it to determine what entity to classify as a financial institution; and thus bring it within the operations of the Act.

Prior to the amendment of the Financial Institutions Act, 2004, the relevant parts of section 3 thereof had, for purposes of the issue in contention before this Court, defined the term *"financial institution business"* as follows:

> *""financial institution business" means the business of—*
> *(a) acceptance of deposits;*
> *(b) issue of deposit substitutes;*
> *(c) lending or extending credit, including—*

... ...

(ci) the financing of commercial transactions;

(cii) <u>the recovery by foreclosure or other means of amounts so lent, advanced or extended;</u>

... ...

(civ) acceptance of credits;

... ...

(f) providing money transmission services;

(g) trading for own account or for account of customers in—

(i) money market instruments, including bills of exchange and certificates of deposit;

(ii) debt securities and other transferable securities;

(iii) futures, options and other financial derivatives relating to debt securities or interest rates;

... ...

(i) soliciting or advertising for deposits;

... ...

(m) mortgage banking;

... ...

(p) <u>transacting such other business as may be prescribed by the Central Bank</u>."

It is important to note that section 1 of The Financial Institutions (Amendment) Act, No. 2 of 2016, made pertinent amendments to the definition of the term *"financial institution business"* as follows:

"1. Amendment of section 3 of the Financial Institutions Act, 2004

The Financial Institutions Act, 2004, in this Act referred to as the "Principal Act", is amended in section 3-

...

(k) in the definition of "financial institution business"-

(i) by substituting for "lending or extending credit" the following-

*(ii) "lending or extending money held on deposit or any part of that money including by way of …" (**emphasis added**)*

The key provision introduced by section 4 of the aforesaid 2016 amendment to the Act, provides that:

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

The determination of whether one is carrying out a financial institution business lies in establishing the intention of Parliament, when it amended the original provision in the Act, which was *"lending or extending credit"*, by substituting it in the amended Act with the provision *"lending or extending money held on deposit or any part of that money …"*. It is unmistakably clear from the amendment of the Act that key to the determination of financial institution business is the holding of money on deposit; from which money is extended or lent out to borrowers. For any person to transact financial institution business in Uganda, such a person must first obtain a licence from the Bank of Uganda for that purpose, in accordance with the provisions of the Act.

Whether, or not, an entity is carrying out a financial institution business in Uganda is a question of fact. The Appellants contend that the agreement between them and the 2nd Respondent was concluded in Uganda; hence, the 2nd Respondent was carrying out financial institution business in Uganda. The 2nd Respondent refutes this, contending that the agreement was instead concluded in Kenya; hence

it did not carry out any financial transaction business in Uganda. The trial Judge made no finding on this contention. From the two contract deeds executed by the 2nd Respondent and the Appellants, dated 23rd October 2017 and 24th August 2018, the parties bound themselves through a severance provision that in the event of any of the provisions of the agreement being struck out for offending any Kenyan law, it would not affect the validity of other provisions of the agreement.

The logical conclusion one would make from this, is that the agreement was concluded in Kenya; otherwise, for an agreement concluded in Uganda, for activities that would, as it is, take place entirely in Uganda, there would be no sense in the parties referring to a Kenyan law to interprete any provisions of the agreement. Be it as it may, in my considered view, the issue of illegality pleaded in this case, turns not on where the contract was concluded; but rather on the terms thereof, and the jurisdiction it was performed in. From the facts of the case, on which the parties are in agreement, the disbursement of the impugned loan funds from the 2nd Respondent to the Appellants, as well as the servicing of the loan, took place in Uganda; hence, the performance of the agreements was undoubtedly carried out in Uganda.

It is clear from the credit facility agreements between the parties that the 2nd Respondent did not extend the impugned credit facilities directly to the 1st Appellant; but, instead, through the 1st Respondent, which was its appointed agent strictly for purposes of disbursing the credit facilities to, and ensuring recovery thereof from, the 1st Appellant. It was thus the 1st Respondent, which transacted directly with the 1st Appellant in this regard. It is the transactions done through this agency relationship, which the trial judge found was illegal because it contravened the Financial Institutions Act, 2004, as amended.

The 1st Respondent is a duly licensed *deposit-taking* financial institution registered, and carrying out financial institution business in Uganda, pursuant to the provisions of the Financial Institutions Act, 2004, as amended by Act No. 2 of 2016. The *Financial institutions (Agent Banking) Regulations, 2017,* regulates agent banking and applies to all financial institutions in Uganda and their agents. Regulation 5 thereof provides that "*a financial institution shall not conduct agent banking in Uganda without the prior written approval from the Central Bank.*" An application seeking approval to conduct agent banking in Uganda is made to the Central Bank in Form 1 specified in Schedule 1 to the Regulations. Regulation 4 thereof defines agent banking as follows:

> *"agent banking" means the conduct by a person of financial institution business on behalf of a financial institution as may be approved by the Central Bank". (**emphasis added**)*

Regulation 3 provides thus:

> "*The objectives of these regulations are-*
> *(a) To provide for agent banking as a channel for offering banking services in a cost effective manner to foster financial inclusion;*
> *(b) To set out activities which may be carried out by an agent and to provide a framework for offering agent banking services and*
> (c) *To provide a set of minimum standards of customer protection and risk management to be adhered to in the conduct of agent banking.*"

The intention of Parliament, in amending the Financial Institutions Act, 2004, to provide for agent banking, can be garnered from the Hansard of Wednesday 6th January 2016, at page 42 thereof; which is quite instructive on the matter. It is recorded therein as follows:

*"**5. Introduction of Agent Banking***

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

The committee observes that:

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

b) There is need for clear definitions on who an agent under this Act should be. …" (***emphasis added***)

The record on page 53 of the Hansard, shows that Parliament adopted this Committee Report; which clearly explains the purpose for, and kind of, agency envisaged by Parliament when it introduced the term *"agent banking"* in the amendment to the Act. It is in furtherance of this provision in the amended Act that Bank of Uganda issued the *Financial Institutions Act (Agent Banking) Regulations 2017*. Regulation 4 thereof defines an *"agent banker"* as:

(a) "*… a person contracted by a financial institution to provide financial institution business on behalf of the financial institution in accordance with the Act and these regulations.*"

The agency relationship referred to in Regulation 4 of the Regulations is clearly between a principal, which is a financial institution registered and carrying out financial institution business in Uganda, and a human agent acting on behalf of the principal. This unconventional way of carrying out banking business arose from the need to fill the gap or deficiency resulting from the inadequacy of normal or conventional bank–branch operations. The Regulations provide for the exercise of due diligence as a prerequisite for appointment of a person as an agent banker; and also provides for supervisory requirements. Some of the provisions in the Regulations that bolster and lend force to this position, and are intended to ensure success of agent banking practice, are pointed out herein below.

It is provided in "Form 2" under Regulation 7(2), for the prerequisite recommendation, by the LC1 or LC2 of the area, certifying that the person intending to carry out agent banking in the area is a suitable person. Schedule 2 of the Regulations requires agent–banking operations to be reported on, with the number of agents attached to each parent branch shown, Schedule 3 has a notification Form for showing the outlets in the district, village, details of the LC1, and their unique identification particulars. Furthermore, Regulation 5 provides that the application form for agent banking shall contain information on the number of agents per district for the next twelve months.

Regulation 7 restricts the appointment of an agent to those who, for six consecutive months prior to the making of the application, operated an account in a financial institution licensed by the Central Bank. Regulation 9 enjoins the banks to, among other specified functions, assign an agent to a specific parent branch, and display a list of agents who each have a unique identification number. It is thus clear that the

intention of Parliament in amending the Financial Institutions Act, 2004, to provide for agency banking, and the issuance of the 2017 Regulations by Bank of Uganda in furtherance of this amendment, were to avail banking services to the wider public, especially where banking services are either inadequate or unavailable altogether.

Whether the 1st Respondent required a license under the Financial Institutions Act (Agent Banking) Regulations:

In my considered opinion, the trial judge fell into error because of his failure to appreciate the nature of the credit transactions carried out between the Appellants and the Respondents. From the pleadings, the transactions for the impugned credit facilities the 2nd Respondent extended to the Appellants, were done through the 1st Respondent, which is a bank duly licensed to carry out financial institution business in Uganda. The disbursement of the funds to the 1st Appellant, was not out of the deposits taken and held by the 1st Respondent; but rather from funds transmitted to it by the 2nd Respondent, which it held in an escrow account strictly for the execution of the impugned credit facility transactions agreed on between the Appellants and the 2nd Respondent.

The uncontested pleadings disclose that both the 1st and 2nd Respondents advanced funds to the 1st Appellant on similar terms for the same or similar purpose. These transactions were carried out pursuant to the credit facility agreements between the 2nd Respondent and the 1st Appellant; entered into on 23 October 2017 for this purpose. This agreement was extended, and also another one entered into, in 2018. Clause 3 of the 2017 agreement states clearly that the 2nd Respondent held an "*escrow account"* with the 1st Respondent, as their *"appointed agent for this lending"*.

Clause 4 of the agreement provided for repayment of the loan "*by way of direct debit to escrow account held with Diamond Trust Bank (U) Limited, Kampala, who are our appointed agents for this lending.*" Clause 6 of the loan agreement provides as follows:

> *"By accepting this Letter of offer, you irrevocably authorize Diamond Trust Bank (U) Limited, Kampala, who are our appointed agents for this lending to debit your account held with them with the said Appraisal fee and taxes simultaneously with establishment of the facility in the Bank's books and on each anniversary of the term Loan and remit the fund to us." (**emphasis added**)*

Clause 7 (iv) of the loan agreement provides for the credit facility to be secured by the Appellants through assignment of rentals from specified properties to the 1st Respondent as the 2nd Respondent's appointed agents for the purpose of collection of the rental income. Clause 9 of the Letter of Offer of 2018, Clause 6 on the Appraisal Fee, and clause 7 on the securities and appointment of the 1st Respondent as the appointed agents of the 2nd Respondent, and the terms of the new loan entered into, in 2018, also have similar terms with the ones provided in clause 3 of the agreement of October 2017, part of which has already been reproduced above. Similarly, clause 4 of the 2018 agreement, which provides for servicing of the credit facilities by the 1st Appellant through its accounts with the 1st Respondent for remittance to the 2nd Respondent's escrow account held by the 1st Respondent, are textually the same as the corresponding provisions in the 2017 agreement.

It is thus clear from the terms of the contracts above that the 2nd Respondent did not receive or hold any deposits in Uganda; and indeed it did not advance the impugned credit facilities to the Appellants out

of any such deposits since it had no authority to carry out financial institution business in Uganda. Second, the 2nd Respondent did not advance the credit facilities directly to the Appellants; as these were instead routed through the 1st Respondent, which is a bank duly licensed to carry out financial institution business in Uganda; and which then disbursed the funds to the 1st Appellant. Furthermore, on the pleadings, the 1st Appellant did not service the loan facilities by payment directly to the 2nd Respondent; but rather through the 1st Respondent as agent of the 2nd Respondent in a fiduciary relationship.

By no stretch of construction could the type of agent banking provided for in the Financial Institutions Act, 2004, as amended, and the Financial Institutions (Agent Banking) Regulations, 2017, made thereunder be applicable to the agency relationship obtaining between the 1st and 2nd Respondents herein. This agency relationship is between a foreign financial entity (the 2nd Respondent), which is not registered or carrying out financial institution business in Uganda, on the one hand, and a financial entity (the 1st Respondent), registered and carrying out deposit taking business in Uganda, on the other hand. The 2nd Respondent is not the type of principal bank envisaged under the 2017 agent banking Regulations, since it is not licensed to carry out financial institution business in Uganda. Similarly, the 1st Respondent was not the type of agent envisaged under the agent banking Regulations; which only provide for humans operating outlets as agents of financial institutions licensed to carry out banking services.

The type of financial transactions entered into between the 1st and 2nd Respondents is, otherwise, known as a syndicated loan facility; which is a global lending phenomenon practised by local and foreign banks or

non–bank lenders. This practice usually stems from the need to spread out, and thus reduce, the enormous risk associated with lending large sums of money. Individual countries may enact laws that place limits on the amount of money a bank can lend to a single borrower; thus encouraging syndicated lending. See for example regulations 6, 9 & 10 of the *Financial Institutions (Limits on Credit Concentration and Large Exposures) Regulation, 2005.* With these restrictions, large entities constantly look to foreign financial institutions, which may be banking or non–banking institutions, for syndicated credit facilities.

Syndicated credit facility as a loan system has been explicated by renown authors in a number of literary works; such as Alistair Hudson – ***The Law of Finance, 2nd Edition, Sweet & Maxwell, 2013,*** at page 994; Colin Paul et al – ***Banking and Capital Markets Companion, 6th Edition, Bloomsbury,*** at pp. 126 – 132; E.P Ellinger et al – ***Ellinger's Modern Banking Law 5th Edition, Oxford University Press*** at pp. 781–783. Colin Paul et al – ***Banking and Capital Markets Companion,*** (supra) identifies all the principal parties in a syndicated lending as the lender, borrower, the arranger who is the agent and also security trustee if the loan is secured. The authors explain at page 128 that:

> *"... in the loan agreement, the lenders appoint one of their own number (often the arranger) to be the agent bank to represent the lenders in dealings with the borrower ..."*.

The authors also note at page 130 that the role of the agent in relation to the drawdown of funds is that:

> *"... it collects funds from each lender prior to the drawdown date. It transfers the funds to the borrower on the drawdown date."*

See also E.P Ellinger et al, ***Ellinger's Modern Banking Law***, (supra), at p. 782 on this. Alistair Hudson explains in his work ***The Law of Finance*** (supra), at p. 994, on syndicated credit facility thus:

> *"Importantly the covenants which arise in syndicated loans are the same as those in ordinary loans ... <u>There are other covenants, however, which apply only to syndicated loans, such as: syndicated agent clauses, "syndicated democracy" provisions, set-off, and so forth. Most of these provisions relate to the allocation of rights and responsibilities between the various lenders, and the role of a fiduciary (the "syndicate agent")</u> to ensure the proper flow of moneys and performance of obligations between the members of the syndicate." (**emphasis added**)*

On the role of the security trustee, Colin Paul *et al* explain in their works ***Banking and Capital Markets Companion,*** (supra) that:

> "*If a syndicated loan is secured, then one of the lenders is usually appointed as security trustee.*
>
> *-The security trustee holds the collateral on trust for all the lenders for the time being and any other party entitled to the benefit of the collateral eg: hedging counterparties.*
>
> *.... ... ...*
>
> *-The security trustee is responsible for:*
>
> *-The administration of the collateral, including holding the title deeds and documents relating to the charged property, and*
>
> *-The protection and enforcement of collateral, and'*
>
> *-The distribution to the lenders of the proceeds of enforcement ...*"

As is discernible from the analysis above, the rights and roles of the agent appointed in the agency relationship provided for under the

Financial Institution Act, 2004, as amended, and the 2017 Regulations made thereunder, differ markedly from the ones conferred on the agent appointed under the syndicated relationship. The duties of the agent in the syndicated relationship are much wider than that conferred on the agent provided for under the Act and Regulations made thereunder. Most notably, a financial institution in the syndicated credit facility arrangement which is appointed an agent of the other creditors in the syndicate remains at par with them; because it is, in its own right, also a creditor to the same borrower; which is precisely the case herein.

In the instant case before this Court, the 2nd Respondent is neither licensed nor regulated to carry out financial institution business in Uganda; hence, its appointment of the 1st Respondent as its banking agent could not have been so done under the provisions of the Financial Institutions (Agent Banking) Regulations, 2017. Second, the 1st Respondent, being an entity duly licensed to carry out financial institution business in Uganda, could not have been appointed a banking agent of the 2nd Respondent within the purview of the Financial Institutions Act, 2004, as amended, and the Agent Banking Regulations of 2017 made pursuant thereto. Accordingly then, the relationship between these two banking institutions, and between them and the Appellants, with regard to the financial credit transactions carried out between and amongst them, were neither governed by the Financial Institutions Act, 2004, as amended, nor the Financial Institutions (Agent Banking) Regulations, 2017, made thereunder.

In the syndicated agency relationship created between the 1st and 2nd Respondents as banking institutions, the rights and duties conferred on the 1st Respondent as the agent bank in the relationship between the two banking institutions, makes the 1st Respondent a fiduciary to the

2nd Respondent. This is because the 1st Respondent is responsible for the disbursements of the funds from the 2nd Respondent to the Appellants, holds the mortgaged loan securities in trust for the 2nd Respondent, and follows up on the servicing of the loan by the Appellants for remittance to the 2nd Respondent. I can't see how this arrangement and the transactions that were carried out pursuant thereto could be construed to mean that the 2nd Respondent carried out financial institution business in Uganda within the meaning ascribed to the phrase *"financial institution business"* by the Financial Institutions Act, 2004, as amended, and the Financial Institutions (Agent Banking) Regulations, 2017, made thereunder.

Furthermore, it is worthy of note that no law was cited or brought to the attention of this Court, which forbids the creation of the impugned syndicated agency relationship entered into by the 1st and 2nd Respondents. Similarly, no law was brought to this Court's attention that forbids foreign financial institutions from extending credit facilities to any financial institution or person in Uganda. If anything, in furtherance of international trade and investment, financial institutions the world over are known to engage in global financial business transactions by dealing with, or through, financial institutions based in other jurisdictions. In the case of Uganda, such international financial business transactions are certainly neither governed by the Financial Institutions Act, 2004, as amended, nor the Financial Institutions (Agent Banking) Regulations, 2017, made pursuant thereto. The trial judge therefore erred in holding that the credit agreements between the parties hereto were clothed with illegality.

In the premises then, this appeal would succeed only in part; and I would accordingly make the following declarations and orders:

(i) The amendment of the plaint, which introduced the claim of illegality as a cause of action, was proper in law.

(ii) The syndicated credit-facility executed between the 2nd Respondent and the 1st Appellant, with the 1st Respondent as agent of the 2nd Respondent, is lawful; and neither the Financial Institutions Act of 2004, as amended, nor the Financial Institutions (Agent Banking) Regulations, apply to them.

(iii) Accordingly, the claim impugning the legality of the credit-facility contracts between the parties hereto is disallowed.

(iv) The issue of illegality having been resolved in this appeal, High Court Civil Suit No. 43 of 2020, between the parties hereto, which was the genesis of the appeal to the Court of Appeal, and ultimately to this Court, is remitted back to the High Court for trial before another judge; basing only on issues of fact arising from the pleadings.

(v) The Respondents are awarded 50% of the costs in this Court, and in the Court of Appeal.

Since the other members of the Coram are in full agreement with the judgment and orders I have proposed above, judgment and orders are accordingly hereby given in the terms set out therein.

Dated this ***6th*** day of ***June*** **2023**.

Alfonse Chigamoy Owiny – Dollo

Chief Justice