

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO. 413 OF 2018**

**AIR AFRIK AVIATION LIMITED.....**  
**PLAINTIFF**

**-VERSUS-**

**STANBIC BANK KENYA LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**

**BANK OF SOUTH SUDAN.....2<sup>ND</sup>**  
**DEFENDANT**

**CONSOLIDATED WITNESS STATEMENT OF ERIC AGOLLA LUGALIA**

1. I am a director of the Plaintiff Company herein and well conversant with the facts in this case. I am also duly authorised by the Plaintiff to sign this Statement.
2. I refer and produce as evidence in this case all the documents produced in the Plaintiff's List of Documents dated 13<sup>th</sup> December 2018, the Plaintiff's Supplementary List of Documents dated 4<sup>th</sup> November 2019, the Plaintiff's 2<sup>nd</sup> Supplementary List of Documents dated 28<sup>th</sup> May 2021 and the Plaintiff's 3<sup>rd</sup> Supplementary List of Documents dated 18<sup>th</sup> July 2022 filed herein.
3. The Plaintiff is a Limited Liability Company incorporated both in Kenya and the Republic of South Sudan. (*Refer to the Certificate of Incorporation at Page 4 and 5 of the Plaintiff's List of Documents dated 13<sup>th</sup> December 2018.*)
4. At all material times in this suit, the 1<sup>st</sup> Defendant was a banking institution carrying out its banking business as a bank whereas the Plaintiff was the 1<sup>st</sup> Defendant's customer holding Account Numbers **020000098786** and **020000043906** domiciled at the 1<sup>st</sup> Defendant's Juba branch. (*Refer to the Account Opening Forms at Page 4 to 8 of the 1<sup>st</sup> Defendant's Bundle of Documents dated 26<sup>th</sup> August 2019.*)
5. The Plaintiff's accounts were being operated under a branchless system between Kenya and South Sudan with its Juba branch being treated merely as a branch and controlled from the Nairobi head office of the 1<sup>st</sup> Defendant and with an arrangement that enabled and entitled the Plaintiff to carry out all its banking business from either Juba or Kenya.
6. A similar banker and customer relationship existed, at all material times, between the 1<sup>st</sup> Defendant and the Government of South Sudan (hereinafter referred to as '**GOSS**') as customer pursuant to which **GOSS** held and operated and continues to hold and operate several bank accounts with the 1<sup>st</sup> Defendant's

Nairobi and Juba branches, including, but not limited to bank Account Numbers **024008093501,00269210001024, 0100000296613** and **00269210001/005**.

7. By a Leasing Agreement dated 4<sup>th</sup> September 2014 signed between the Plaintiff and the Ministry of Defence & Veteran Affairs of the Republic of South Sudan ("**the Lessee**"), the Plaintiff leased several Aircrafts to the Lessee for a term of one year but renewable

for Five (5) years commencing on 1<sup>st</sup> October 2014 upto 12.00 midnight on 30<sup>th</sup> August, 2015 for the agreed total cost of United States of America Dollars \$20,640,000. It was expressly agreed in the said Leasing Agreement, *inter alia*, that the Lessee shall pay to the Plaintiff a deposit of 35% of the value of the total contract sum equivalent to \$7,224,000 as advance payment and that such payment shall be made into the Plaintiff's bank account held with the 1<sup>st</sup> Defendant on a lump sum basis. *(Please refer to the Leasing Agreement at Page 6 to 9 of the Plaintiff's List of Documents dated 13<sup>th</sup> December 2018.)*

8. Thereafter, the Ministry of Finance and Economic Planning of South Sudan raised a Payment Order No. **287** dated 10<sup>th</sup> December 2015 for the sum of \$7,224,000 in favour of the Plaintiff. It was an express term and condition of the said Payment Order No. **287** that payment of the subject sum to the Plaintiff would be by way of "**Transfer**" and the Payment Order named the 1<sup>st</sup> Defendant's Juba branch as the Correspondent Bank for purposes of the said transfer thereby authorizing the 1<sup>st</sup> Defendant to make a transfer from the account of **GOSS** held with the 1<sup>st</sup> Defendant for purposes of effecting the said instructions. *(Please refer to the Payment Order No. 287 and covering letter at Page 12 and 13 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*
9. The 2<sup>nd</sup> Defendant in turn raised a Credit Advice dated 5<sup>th</sup> February 2016 and credited the 1<sup>st</sup> Defendant's account with the said amount of \$7,224,000 on 5<sup>th</sup> February 2016 vide Swift reference number 201600719939 with specific instructions to the 1<sup>st</sup> Defendant to pay the said amount to the Plaintiff by crediting the Plaintiff's bank account as appropriate. *(Please refer to the Credit Advice at Page 11 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018 and the Statement of account reflecting the credit of \$7,224,000 at Page 44 of the 1<sup>st</sup> Defendant's Supplementary List of Documents dated 12<sup>th</sup> March 2020.)*
10. On 8<sup>th</sup> February 2016, the 1<sup>st</sup> Defendant accepted, processed and executed the said Payment Order Number **287** and credited the Plaintiff's Account Number **0000098786** with the sum of \$7,224,000 and notified the Plaintiff accordingly. On the same day the 1<sup>st</sup> Defendant levied and debited the Plaintiff's account with a funds transfer commission of \$108,360.00 being 1.5% of the total sum of \$7,224,000 received by the Plaintiff thereby completing the entries. *(Please refer to relevant correspondence in this regard at Page 14 to 17 and also the Statements of account at Page 26 to 29 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*
11. The Plaintiff immediately accessed the funds between 10<sup>th</sup> and 11<sup>th</sup> February 2016 and carried out several transactions in the normal manner and in the course of business which involved, *inter alia*, making withdrawals and payments from its bank account with the 1<sup>st</sup> Defendant from the 1<sup>st</sup> Defendant's Head Office branch located on Chiromo Road, Nairobi all amounting to a total of USD 1,100,000 and without any hinderance or encumbrances whatsoever. The 1<sup>st</sup> Defendant promptly levied and debited its account with \$300.00 and \$600.00 as cash withdrawal fees on 10<sup>th</sup> February 2016 and 11<sup>th</sup> February 2016 respectively in addition to other bank charges, taxes and levies. *(Please refer to the Statements at Page 26 to 29 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*
12. On 12<sup>th</sup> February 2016, the 1<sup>st</sup> Defendant suddenly and without any formal notification whatsoever to the Plaintiff and without the Plaintiff's knowledge, consent or approval illegally, unlawfully and without any Court Order, valid justification or colour of right whatsoever purported to freeze the Plaintiff's bank Account Number **020000098786** and thereby denied the Plaintiff access to its account and the credit balance of United States Dollars Six Million, Fifteen Thousand, One Hundred and Fifty Two and Seventy Four Cents (USD 6,015,152.74) thereon as at the close of business on 11<sup>th</sup> February 2016. *(Please refer to the correspondence at Page 30, 40, 41 and 42 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*

13. Upon the Plaintiff's directors making further inquiry, they were referred to the 1<sup>st</sup> Defendant's Head Office located on Chiromo Road, Nairobi where several meetings were held with senior officers of the 1<sup>st</sup> Defendant. In the said meetings, the 1<sup>st</sup> Defendant's officers contended that there was a court case filed at the High Court in Nairobi which affected the Plaintiff's payment and requested the Plaintiff to wait without providing further details of the alleged court case which they claimed was confidential information. This position contradicted the contents of an earlier email dated 19<sup>th</sup> February 2016 which alleged that the Plaintiff's account had been credited in error and that the 1<sup>st</sup> Defendant was entitled to deny access of the account to the Plaintiff and reverse the credit balance remaining to the remitter of the funds. *(Please refer to the said email dated 19<sup>th</sup> February 2016 at Page 30 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*
14. I later on became aware that the subject suit alluded to by the 1<sup>st</sup> Defendant above was **High Court Miscellaneous Suit No. 531 of 2015, Active Partners Group Limited vs. The Republic of South Sudan and CFC Stanbic Bank Limited (Garnishee)** and ascertained the following from the said suit:
  - a.) On 8<sup>th</sup> February 2016, a Garnishee Order *Nisi* was issued against the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant as Garnishee was required to withhold all funds in the three accounts specified in the Application which belonged to **GoSS**;
  - b.) The Garnishee Order *Nisi* was served upon the 1<sup>st</sup> Defendant on 9<sup>th</sup> February 2016, that is, a day after the Plaintiff's account had already been credited and the Plaintiff had already obtained unfettered access to the payment of USD. 7,224,000.00 credited to its account;
  - c.) Subsequently, on 16<sup>th</sup> February 2016 the Order *Nisi* was made Absolute by Consent of the parties and the 1<sup>st</sup> Defendant paid over to the Decree Holder some USD 18,000,000.00 or thereabouts; *(Please refer to the Garnishee orders at Page 18 to 22 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*
15. The Plaintiff was not a party to the said Garnishee proceedings and no court order was issued or obtained by the 1<sup>st</sup> Defendant freezing or withholding the funds in the Plaintiff's bank Account Number **020000098786**. The Plaintiff's payment was in any event unaffected by the Garnishee Orders issued in the said suit since as at 8<sup>th</sup> February 2016 when the proceedings commenced and Orders issued and more so by 9<sup>th</sup> February 2016 when the Garnishee Order was served upon the 1<sup>st</sup> Defendant, the Plaintiff had already been credited by the 1<sup>st</sup> Defendant with the sum of USD. 7,224,000.
16. Upon the 1<sup>st</sup> Defendant receiving demand letters dated 20<sup>th</sup> April 2016 and 9<sup>th</sup> May 2016 written by **Triple OK Law Advocates** on behalf of the Plaintiff demanding an explanation concerning the freezing of the Plaintiff's account aforesaid, the 1<sup>st</sup> Defendant through its Advocates sought to be given ten (10) days to provide the explanation only to then purport by its letter dated 27<sup>th</sup> May 2016 to reverse the entire credit balance of USD7,224,000 whereas it had previously alleged that no funds were indeed received and despite seeking indulgence against legal action. The 1<sup>st</sup> Defendant's communication to the Plaintiff was contradictory and dishonest in this regard. *(Please refer to the said correspondence at Page 23, 25, 32 and 40 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*
17. On several occasions the 1<sup>st</sup> Defendant's Relationship Manager at Chiromo branch requested the Plaintiff's directors to consent to the reversal of the credit balance in the Plaintiff's account for reasons that the account was credited in error which request was expressly declined. The 1<sup>st</sup> Defendant however refused and/or failed to clarify the nature of the alleged error leading to the crediting of the Plaintiff's account despite several

requests from the Plaintiff and its duly appointed Advocates as well as Central Bank of Kenya.

18. Upon receiving the 1<sup>st</sup> Defendant's threat dated 27<sup>th</sup> May 2016 (*at Page 40 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018*) that it was proceeding to reverse the entire amount of USD.7,224,000 credited to its account on 8<sup>th</sup> February 2016, the Plaintiff applied for a bank statement for its account and surprisingly, the statement provided by the 1<sup>st</sup> Defendant revealed the following illegal, false and/or fraudulent entries;
  - a.) On 30<sup>th</sup> May 2016, a transfer of USD.7,224,000.00 was purportedly made to the Bank of South Sudan, 2<sup>nd</sup> Defendant under reference number FT16151XKBLB/SSB with the result that the Plaintiff's bank account with the 1<sup>st</sup> Defendant was debited with the said amount. The Plaintiff did not authorise the 1<sup>st</sup> Defendant to make the said transfer or debit its account as purported. (*Please refer to the Statements at Page 67 of the Plaintiff's 3<sup>rd</sup> Supplementary List of Documents dated 18<sup>th</sup> July 2022.*)
  - b.) On 30<sup>th</sup> May 2016, a bank transfer of USD.1,100,000 was purportedly made into the Plaintiff's bank account from Bank of South Sudan, the 2<sup>nd</sup> Defendant herein under reference number FT161516N22D/SSB with the result that the Plaintiff's bank account with the 1<sup>st</sup> Defendant was credited with the said amount. The Plaintiff had no knowledge whatsoever of the said transaction neither did the Plaintiff authorise the alleged transaction. (*Please refer to the Statements produced at Page 67 of the Plaintiff's 3<sup>rd</sup> Supplementary Bundle of Documents dated 18<sup>th</sup> July 2022.*)
19. The foregoing transactions constituted false and fraudulent banking by the 1<sup>st</sup> Defendant in that as at 15<sup>th</sup> August 2016, the 2<sup>nd</sup> Defendant confirmed that the funds were still with the 1<sup>st</sup> Defendant and had not been reversed. (*Please refer to the letter of confirmation in this regard dated 15<sup>th</sup> August 2016 at Page 60 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.*)
20. The 1<sup>st</sup> Defendant further engaged in false, fraudulent and/or distorted accounting against the Plaintiff contrary to the banking practice by:-
  - i.) Outrightly lying in its letter dated 5<sup>th</sup> May 2016 that **'on 11<sup>th</sup> February 2016, the aforesaid oversight came to light and the (Plaintiff's) account was immediately frozen pending corrective action, more particularly reversal of the funds to the original remitter'** when in fact on 11<sup>th</sup> February 2016 the Plaintiff, without any objection from the 1<sup>st</sup> Defendant made two separate cash withdrawals vide cheque encashments for which the 1<sup>st</sup> Defendant levied bank charges and Excise Duty as stated above. (*Please refer to the said letter dated 5<sup>th</sup> May 2016 at Page 25 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.*)
  - ii.) Expressly misrepresenting to the Plaintiff in its letter dated 5<sup>th</sup> May 2016 aforesaid that **'kindly note that the frozen funds should shortly be reversed to the account of the original remitter as soon as we receive appropriate instructions'**, contrary to the earlier contention that no funds were received and when in fact no funds were remitted back to the 2<sup>nd</sup> Defendant, thereby contradicting the earlier allegation of mistaken payment.
  - iii.) Unilaterally and without the consent or authority of the Plaintiff debiting the Plaintiff's bank account on 30<sup>th</sup> May 2016 leaving a debit balance thereon as stated above and in spite of a request for authorisation of the same having

been refused by the Plaintiff;

iv.) Demanding through its Advocate's letter dated 3<sup>rd</sup> June 2016 that the Plaintiff should refund the sum of USD 1,100,000.00 as monies '**mistakenly credited into (the Plaintiff's) account**' a demand which clearly contradicted the 1<sup>st</sup> Defendant's own statement of account issued to the Plaintiff which showed that a similar amount had already been paid to the 2<sup>nd</sup> Defendant on 30<sup>th</sup> May 2016. *(Please refer to the said demand letter dated 3<sup>rd</sup> June 2016 at Page 51 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*

21. The 1<sup>st</sup> Defendant also failed to substantially and effectively act on the various letters written by Central Bank of Kenya and/or to answer the pertinent questions raised by the said regulator. *(Please refer to the correspondence by CBK at Page 61, 63, 66 and 71 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*

22. Furthermore, the Plaintiff and its Advocates **Triple OKlaw Advocates** wrote numerous demand letters directly to the 1<sup>st</sup> Defendant and through its Advocates **IKM Advocates** demanding that the Plaintiff be allowed unfettered access to its bank accounts and the credit balance of USD 6,015,152.74 but the 1<sup>st</sup> Defendant adamantly refused to comply. *(Please refer to the demand letters produced at Page 23, 32, 36, 39, 43, 64, 68 and 73 of the Plaintiff's Bundle of Documents dated 13<sup>th</sup> December 2018.)*

23. By crediting the Plaintiff's account without receiving actual funds from the 2<sup>nd</sup> Defendant, if at all, the 1<sup>st</sup> Defendant breached and/or failed to adhere to the South Sudan payment regulations and procedures requiring that all high value FCY credit amounts exceeding USD 50,000 should only be credited to a customer's account once the 2<sup>nd</sup> Defendant had transferred the funds to its Nostro Accounts and receipt confirmed by GMO in Kenya Operations. The 1<sup>st</sup> Defendant also blatantly breached the Prudential Guidelines set by Central Bank of Kenya relating to transfer and credit of funds by crediting the funds without sufficient cover and/or due diligence.

24. I am further advised by the Plaintiff's Advocate on record that the 1<sup>st</sup> Defendant's action of freezing the account and denying the Plaintiff the use and access of the credit amount of USD 6,015,152.72 contravened the express provisions of **Section 9 of National Payment System Act, No. 39 of 2011** which stipulates that a settlement effected by payment of money or by means of an entry to the credit of the account maintained by a settlement system participant in the Central Bank settlement system or a designated payment system shall be final and irrevocable.

25. I state that by freezing the Plaintiff's bank account and consequently denying it access to the credit amount of USD 6,015,152.74 reflecting in its account as at 11<sup>th</sup> February 2016 and further, by reversing the said credit balance without the Plaintiff's consent and authority the 1<sup>st</sup> Defendant acted illegally, recklessly, fraudulently, maliciously, oppressively, in bad faith, negligently and in blatant breach of the duty of care owed to the Plaintiff as a customer of the 1<sup>st</sup> Defendant. I reiterate and rely fully on the particulars of illegality, recklessness, fraud, oppression, bad faith and breach of duty of care pleaded at **Paragraph 20(a) to (z)** of the Amended Plaint filed herein.

26. I believe that since the Payment Order pursuant to which the 1<sup>st</sup> Defendant paid to the Plaintiff the sum of USD 7,224,000.00 was in the form of a Credit Advice, the same connoted an electronic transfer from one of the 1<sup>st</sup> Defendant's customers (1<sup>st</sup> Defendant and/or GOSS) to another one of the 1<sup>st</sup> Defendant's customers (the Plaintiff). There was therefore no requirement of actual funds changing hands as the 1<sup>st</sup> Defendant seems to assert in its pleadings.

27. In essence, what was then exchanged was merely legal obligations to pay (1<sup>st</sup> Defendant to

the Plaintiff) and to demand payment or seek reimbursement (1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant). The said documentary transaction or exchange of obligations terminated or ended, resulting in a finality of payment to the Plaintiff on 8<sup>th</sup> February 2016 when the 1<sup>st</sup> Defendant, for lawful consideration, credited the Plaintiff's account with the sum of USD.7,224,000.00 and thereafter unconditionally allowed the Plaintiff to access the same and freely draw funds therefrom in the form of cash and also to make equivalent payments against the said credit.

28. I state that the Plaintiff was not privy to and should not be concerned with the 1<sup>st</sup> Defendant's internal affairs or its contractual dealings with the 2<sup>nd</sup> Defendant having not been a party to any agreement, express or implied between them pertaining to the payment of the sum of USD.7,224,000 and having had no notice of any error, fraud or irregularity in the subject payment which payment was legally due and payable to the Plaintiff for services rendered and/or for lawful consideration.
29. As a consequence of the 1<sup>st</sup> Defendant's illegal actions aforesaid, the Plaintiff suffered extreme inconveniences, loss and damage and its business operations were totally crippled. Further, the Plaintiff failed to execute its obligations under the Leasing Agreement dated 4<sup>th</sup> September 2014 which was eventually terminated due to the Plaintiff's failure and/or inability to execute its part of the Contract which breach was induced or caused by the 1<sup>st</sup> Defendant's acts and omissions aforesaid. *(Please refer to the said letters of termination dated 3<sup>rd</sup> March 2016 and 20<sup>th</sup> March 2016 produced at **Page 230 and 231** of the Plaintiff's Supplementary List of Documents dated 4<sup>th</sup> November 2019.)*
30. As a consequence of the termination, the Plaintiff thereby lost the business opportunity and benefit contained in the said contract and/or to secure an extension of the subject contract for Five (5) years and/or lost the opportunity to execute other contracts of a similar nature and/or the opportunity to re-invest the profits and to expand its business. In this regard, the Plaintiff suffered estimated consequential loss and damages amounting to USD.80,090,432.94. I reiterate the particulars of **Paragraph 25** of the Amended Plaintiff filed herein and the findings of the Report on Financial Loss dated 9<sup>th</sup> March 2022 prepared by **ORWA WARREN ODHIAMBO**, a Certified Public Accountant. *(Please refer to the said Financial Report at **Page 3 to 102** of the Plaintiff's 3<sup>rd</sup> Supplementary List of Documents dated 18<sup>th</sup> July 2022.)*
31. I am further aware that the Plaintiff spent substantial time, resources and also incurred substantial loss and damages in pursuit of the illegal freezing of its account but the 1<sup>st</sup> Defendant adamantly refused to unfreeze or allow the Plaintiff to access the said credit balance. *(Please refer to the numerous demand letters and correspondence mentioned in **Paragraph 21 and 22** above.)*
32. After immense pressure from the Plaintiff and the regulating authorities, the 1<sup>st</sup> Defendant eventually returned the sum of USD.5,724,000 only to the 2<sup>nd</sup> Defendant on 12<sup>th</sup> April 2017 after a delay of approximately one year and 2 months (14 months) from the date the funds were credited to the 1<sup>st</sup> Defendant's account on 8<sup>th</sup> February 2016. *(Please refer to the 1<sup>st</sup> Defendant's letter dated 12<sup>th</sup> April 2017 confirming the refund at **Page 88** of the Plaintiff's List of Documents dated 13<sup>th</sup> December 2018.)*
33. From the foregoing, it is clearly evident that the 1<sup>st</sup> Defendant wrongfully, and illegally benefited itself immensely by retaining and trading with the Plaintiff's credit balance of United States Dollars \$ 6,015,152.74 for a period of one year and two months (14 months) without any lawful justification whatsoever. I verily believe that a wrongdoer should not be allowed to benefit from an illegality and/or to retain a benefit or profit derived from an illegality. Consequently, the Plaintiff ought to be awarded damages in the nature of interest on the withheld amount of USD.6,015,152.74 at the then prevailing average commercial lending rates published by Central Bank of Kenya as pleaded in the Amended Plaintiff. I rely fully on the average commercial lending rates published by the

Central Bank of Kenya from time to time and the Weighted Average Lending Rates for the year 2016 and 2017 as published. *(Please refer to the interest rates published by the Central Bank of Kenya produced at **Page 3 to 21** of the Plaintiff's Supplementary List of Documents dated 4<sup>th</sup> November 2019 and the Weighted Average Lending Rates for 2016 and 2017 at **Page 3 to 4** of the Plaintiff's 2<sup>nd</sup> Supplementary List of Documents dated 28<sup>th</sup> May 2021.)*

34. The Plaintiff also suffered extreme inconveniences as a direct consequence of the illegal actions of the 1<sup>st</sup> Defendant and seeks adequate compensation in the nature of exemplary damages as sought in the Amended Plaint.
35. In response to the various issues raised in the 1<sup>st</sup> Defendant's pleadings and particularly in the Cross-suit, I wish to state as follows:-
36. Whereas it is indeed true that the Plaintiff's relationship with the 1<sup>st</sup> Defendant was governed by the General Terms and Conditions of operating the account signed by the Plaintiff produced at **Page 8** of the 1<sup>st</sup> Defendant's List of Documents, I wish to state that:-
  - i.) Such General Terms and Conditions are subject to strict compliance with the various laws of Kenya governing the business of banking undertaken by the 1<sup>st</sup> Defendant and the Regulatory and Prudential Guidelines set by the Central Bank of Kenya as well as the laws and Guidelines set by the 2<sup>nd</sup> Defendant in South Sudan regulating the business of banking and in particular clearing/crediting of funds in the customer's accounts. The 1<sup>st</sup> Defendant failed to adhere to these laws and guidelines and/or undertake proper due diligence. *(Please refer to the Central Bank of Kenya Prudential Guidelines at **Page 22 to 218** of the Plaintiff's Supplementary List of Documents dated 4<sup>th</sup> November 2019.)*
  - ii.) As stated earlier in my Statement, the 1<sup>st</sup> Defendant failed to comply and adhere to payment procedures contained in the clearing and settlement procedures for South Sudan requiring *inter alia*, that all high value FYC credit amounts over USD 50,000 should be backed by actual funds before crediting the customer's account with the value.
37. To the best of my knowledge, the 1<sup>st</sup> Defendant had no right in law and/or mandate to enter into the Plaintiff's bank account and reverse the credit amount of USD 7,224,000 long after the transaction had been completed and funds credited and accessed by the Plaintiff. The 1<sup>st</sup> Defendant could only lawfully access the Plaintiff's account and/or freeze the funds through a valid court Order or a directive from the Central Bank of Kenya, the Regulator of the 1<sup>st</sup> Defendant's business and operations.
38. The documents produced in evidence prove that actual funds were remitted by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant vide Credit Advice Note dated 2<sup>nd</sup> May 2016 and Payment Order No. **287** dated 10<sup>th</sup> December 2015. The 1<sup>st</sup> Defendant was under a legal obligation to exercise the necessary care and due diligence to carefully verify all the documents before crediting the Plaintiff's account with the subject funds. *(Please refer to the Statements of account at **Page 44** of the 1<sup>st</sup> Defendant's List of Documents dated 12<sup>th</sup> March 2020.)*
39. It is therefore not true that no actual funds were remitted by the 2<sup>nd</sup> Defendant or that the 1<sup>st</sup> Defendant credited the Plaintiff's account with its own money and/or that the 1<sup>st</sup> Defendant acted in good faith as alleged in the pleadings filed by the 1<sup>st</sup> Defendant. The nature of the error and/or the circumstances under which the alleged error was made and/or discovered has not been disclosed or sufficiently

explained by the 1<sup>st</sup> Defendant. Further, such error, if any, constitutes recklessness and negligent conduct on the part of the 1<sup>st</sup> Defendant. I reiterate the particulars of negligence

contained in the Amended Plaintiff filed herein in this regard.

40. I also invite this honourable court to note that the 1<sup>st</sup> Defendant has expressly pleaded at **Paragraph 3(i)** of its Amended Statement of Defence filed herein that on 21<sup>st</sup> April 2016, **it made several requests to the 2<sup>nd</sup> Defendant requesting it to fulfil its obligations by crediting the 1<sup>st</sup> Defendant's Nostro Account with various outstanding amounts that had accrued over time for other transactions.** This serves to confirm that it was a normal practice by the 1<sup>st</sup> Defendant to credit the customer's account before receiving a corresponding credit in the 1<sup>st</sup> Defendant's Nostro account. In the circumstances, the 1<sup>st</sup> Defendant's allegation that the Plaintiff's account was credited in error is false and deliberately misleading to the court.
41. Further, the fact that the 1<sup>st</sup> Defendant belatedly reversed the credit of USD 5,724,000 on 20<sup>th</sup> April 2017 (*see Page 88 of the Plaintiff's List of Documents dated 13<sup>th</sup> December 2018*) also serves to confirm that the funds were indeed remitted by the 2<sup>nd</sup> Defendant and credited to the Plaintiff's account on 8<sup>th</sup> February 2016 but the 1<sup>st</sup> Defendant illegally froze and/or withheld the funds for all this period while falsely claiming that no actual funds were remitted by the 2<sup>nd</sup> Defendant.
42. I believe that the alleged error/oversight on the part of the 1<sup>st</sup> Defendant, if any, should not prejudice the commercial interests of the Plaintiff in any manner whatsoever. The Plaintiff is not concerned or involved with the financial dealings between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> Defendant had the option of either accepting the instructions to credit the Plaintiff's account with the sum of USD 7,224,000 as advised in the Credit Advice Note and the Payment Order or to reject the instructions for lack of actual funds. Having opted to accept the credit and indeed credited the Plaintiff's account accordingly, the payment was complete and final and could not be reversed as purported.
43. In any event and as far as the Plaintiff is concerned, it is immaterial whether the 1<sup>st</sup> Defendant credited its account mistakenly, in error or through an oversight in the assumption that it had received actual funds from the 2<sup>nd</sup> Defendant as alleged in its pleadings. The payment was completed and it fully discharged the Plaintiff's debts and the credited amount of USD.7,224,000 was not reversible as purported by the 1<sup>st</sup> Defendant.
44. Further, I state that the alleged oversight/error in crediting the Plaintiff's bank account should not prejudice the Plaintiff in any manner whatsoever since the Plaintiff was not under any legal obligation to verify the subject payments. This duty belonged to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is therefore deemed to have weighed the various options available in the business of banking before eventually deciding to credit the funds into the Plaintiff's account. These options included a settlement, clearing or netting arrangements with the 2<sup>nd</sup> Defendant the remitter of the funds to ensure that the 1<sup>st</sup> Defendant was fully covered.
45. I reiterate that the payment of the sum of USD 7,724,000 was complete upon receipt of the funds in the Plaintiff's account as Payee and the funds were not encumbered in any manner whatsoever. It was not a loan either. The Plaintiff was therefore entitled to withdraw and utilize the credited funds as it deemed fit and without any hindrance from the 1<sup>st</sup> Defendant. The withdrawn amount of USD 1,100,000 rightfully and lawfully belonged to the Plaintiff and not the 1<sup>st</sup> Defendant. The Plaintiff is not therefore liable to refund the 1<sup>st</sup> Defendant or to compensate the 1<sup>st</sup> Defendant as alleged in the Cross-suit.
46. It is also noteworthy that the 1<sup>st</sup> Defendant was listed as both the intermediary and the beneficiary bank in the Credit Advice Note and Payment Order No. **287** and therefore payment instructions by the remitter was by way of transfer of credit (*see the Credit Note and Payment Order at Page 11 and 13 of the Plaintiff's List of Documents dated 13<sup>th</sup> December 2018*) from one CFC Stanbic account to the Plaintiff's account through an



internal process. No evidence has been produced by the 1<sup>st</sup> Defendant to prove that these instructions were countermanded by the remitter of the funds. The 1<sup>st</sup> Defendant had no authority to unilaterally alter the prescribed mode of payment without a proper mandate/instructions as purported. The amount of bank charges/commission levied by the 1<sup>st</sup> Defendant at 1.5% after effecting the transfer of USD.7,224,000 also indicate that the transaction was purely an internal transfer and not a cross border swift transfer from the Nostro account as alleged by the 1<sup>st</sup> Defendant. *(Please refer to the advice on commission charges at Page 14 to 16 of the Plaintiff's List of Documents dated 13<sup>th</sup> December 2018.)*

47. In the circumstances, the 1<sup>st</sup> Defendant should pursue the 2<sup>nd</sup> Defendant for indemnity for any damages suffered if it believes that actual funds were not sent as alleged in its pleadings, which it has already done by joining the 2<sup>nd</sup> Defendant in this suit and by the act of filing the cross-suit. I reiterate that the Plaintiff was not privy to, had no control whatsoever and should not be concerned with the manner in which the 1<sup>st</sup> Defendant conducts its own internal affairs as far as the procedures relating to clearing and crediting of funds is concerned neither was the Plaintiff privy to its financial dealings and/or arrangements with the 2<sup>nd</sup> Defendant.

48. I further state and reiterate that if indeed the 1<sup>st</sup> Defendant credited the Plaintiff's account before sighting the actual funds as alleged in its pleadings, the 1<sup>st</sup> Defendant acted in total disregard, non-compliance and breach of the established banking procedures and Prudential Guidelines set by the Central Bank of Kenya. *(Please refer to the Prudential Guidelines at Page 22 to 218 of the Plaintiff's Supplementary List of Documents dated 4<sup>th</sup> November 2019.)*

49. In specific response to the Cross-suit filed by the 1<sup>st</sup> Defendant, I reiterate the Plaintiff's pleadings filed herein and state that the Cross-suit is incompetent, fatally defective, an abuse of the process of the court and pray that the Cross-suit should be dismissed at the preliminary stage for reasons that:-

a.) Leave of the court to file the Cross-suit was not sought or given by this honourable court.

b.) The cause of action against the 2<sup>nd</sup> Defendant in the Cross-suit (defamation) and in the Plaintiff's suit are entirely different, separate and distinct. It is therefore improper for the 1<sup>st</sup> Defendant to file a Cross-suit in this suit as purported and the 1<sup>st</sup> Defendant ought to have filed a separate suit.

c.) No notice or demand before action was served by the 1<sup>st</sup> Defendant (Plaintiff in the Cross-suit) upon the Plaintiff (2<sup>nd</sup> Defendant in the Cross-suit) prior to filing the Cross-suit.

d.) I am advised by the Plaintiff's Counsel on record that the 1<sup>st</sup> Defendant's claim in the Cross-suit namely, damages for libel and/or defamation is time barred by law.

e.) I reiterate that the Plaintiff (2<sup>nd</sup> Defendant in the Cross-suit) is not privy to the financial dealings between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. The Cross-suit is therefore wholly misconceived and the 1<sup>st</sup> Defendant has not established any reasonable cause of action against the Plaintiff.

50. In any event, I reiterate that the amount of USD.1,100,000 which was withdrawn by the Plaintiff from its account lawfully belonged to the Plaintiff and it was not a loan or advance granted by the 1<sup>st</sup> Defendant. Hence, the 1<sup>st</sup> Defendant's allegation that it was deprived of the use and benefit of the said amount and/or that the 1<sup>st</sup> Defendant incurred any loss as a consequence of the withdrawn amount is false, farfetched and misconceived.

51. To the best of my knowledge, the Plaintiff did not publish any damaging material concerning the 1<sup>st</sup> Defendant (the Plaintiff in the Cross-suit) in the Kenyan media or at all in respect to the Credit Advice Note dated 5<sup>th</sup> February 2016 as alleged and particularized in the Cross-suit. The Plaintiff is a stranger to the said allegations and no evidence has been produced to connect the Plaintiff and/or its directors with the alleged publication.
52. As a director of the Plaintiff, I am not aware that the Plaintiff caused the publication of the subject Article quoted at **Paragraph 47** of the Cross-suit as alleged. It is also not true that the alleged article quoted thereunder contained defamatory statements against 1<sup>st</sup> Defendant (the Plaintiff in the Cross-suit) and no evidence has been adduced in support of this allegation. The Plaintiff was not the source of the published information and no evidence has been produced to support this allegation.
53. Furthermore, the Plaintiff did not publish or share in the social media or elsewhere the alleged defamatory material and no evidence has been produced by the 1<sup>st</sup> Defendant (Plaintiff in the Cross-suit) in this regard. The Plaintiff had no knowledge or connection whatsoever with the various social media platforms and links listed under **Paragraph 48(a) to (h)** of the Cross-suit.
54. To the best of my knowledge, the Plaintiff did not defame the 1<sup>st</sup> Defendant as alleged or at all neither did it act in a careless and reckless manner whatsoever in respect to the alleged Article as claimed by the 1<sup>st</sup> Defendant in the Cross-suit. The allegations made by the 1<sup>st</sup> Defendant in the Cross-suit are generalized without any valid basis.
55. The 1<sup>st</sup> Defendant's allegation that the alleged article attracted maximum attention from its customers and/or that the 1<sup>st</sup> Defendant's reputation to its customers was damaged is hollow and the 1<sup>st</sup> Defendant has not pleaded and/or provided any particulars, material and/or relevant evidence to support such allegations. The Plaintiff does not admit any of the said allegations in any manner whatsoever.
56. Further, it is not true or proved that the Plaintiff or its directors commented adversely or at all regarding the pending litigation in this suit. In any event and to the best of my knowledge and understanding, it is not legally offensive for any party to state that it is involved in a dispute which is pending in court and to explain the nature of the pending dispute. I therefore deny that the Plaintiff and/or its directors have acted in contempt of this court as alleged and no evidence has been placed before the court to proof such allegations.
57. In the view of the foregoing, the 1<sup>st</sup> Defendant (Plaintiff in the Cross-suit) is not entitled to any general or exemplary damages as claimed in the Cross-suit and the same lacks any merit.
58. In conclusion, I urge this honourable court to enter Judgement in favour of the Plaintiff as sought in the Amended Plaint and to dismiss the 1<sup>st</sup> Defendant's Cross-suit with costs.

That is all.

Dated at **Nairobi** this

day of

2022.



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**ERIC AGOLLA LUGALIA**

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