

GOLDENBERG INQUIRY DAY 162

Kotut accused of lying to the inquiry

CONTINUED FROM PAGE 19

companies my lords.
Baraza: On page 200 of the Exhibit I referred you to a list of companies and individuals. Were these customers of the bank?

Kotut: I believe they were my lords.

Baraza: And what name is listed as number 24?

Kotut: It was Karen Roses my lords.

Baraza: Karen Roses belongs to who?

Kotut: It belongs to me my lords.

Baraza: Could you explain to this commission how you came to be in this list showing you owed the collapsed Pan Africa Bank Sh13 million?

Kotut: The truth of the matter is that Karen Roses did not owe the money at that time. My lords as I explained earlier on Karen Roses had borrowed money from the bank as a bridging loan pending the disbursement of the original loan that Karen Roses had taken for. When the money was disbursed, part of it went to clearing the liability at Pan African Bank my lords. I can also explain that this document here is not authenticated because this was what the bank's supervisory team would be calling for in preparation for its inspection. It was not a list that was to be made public. If one wanted to get a more accurate list of the debtors, he would need to get the audited one.

Kotut: My lords, with due respect, Mr Kotut has this art of throwing in technical words here and there to make us lose sight of what the problem is. According to that list, Karen Roses owes Pan African Bank Sh13,000; is that so Mr Kotut?

Kotut: That is what that document says and I'm trying to explain that it is not correct.

Kitonga: When was the money paid.
Kotut: I would have to check that one and give an answer my lords.
Kitonga: But as at January 1992, was the money owed?
Kotut: I believe not my lords.

Bosire: Whoever prepared it must have been looking at individual borrowers and as at January 9, 1992, whatever money you got from overseas had not been entered in the account.

Kotut: That might be the case my lords but I am saying is that it might not have been entered into the books. (At this stage, Kenya Commercial Bank lawyer George Akoto started cross-examining the witness on the Sh5.8 billion which was moved from the Paymaster General's account through the three one paragraph letters by then Treasury PS Dr Wilfred Koinange.)

Akoto: Do you know whether the contents of that letter were acted upon?
Kotut: No my lords.

Bosire: I thought we went through all this although you had not arrived Mr Akoto but if you want a copy of the Hansard, we can avail it to you. (Justice Bosire then directed that a new witness from the KCB will have to be brought in to shed more light on the transaction. Mr Justice Bosire said Mr Elijah Bii, who was KCB general manager at the time the amount passed through the bank, would have to be recalled to the witness stand as he was a suspect.)

Wainaina: Who were the originators of the document?
Kotut: It was Pan African Bank.
Wainaina: At item 23, the document refers to Honourable Arthur Magagu among others.
Kotut: Yes my lords.
Wainaina: Are you saying that the document is irrelevant.
Kotut: The document is inaccurate.
Wainaina: You are suggesting that at the time you drew up the document, it

come and show that the information on that document is not accurate.

Wainaina: At the time you called the Deposit Protection Fund board meeting, were you aware of the document?
Kotut: No my lord.

Wainaina: What contributed to the crisis at Pan African Bank?
Kotut: There was a run on the bank and the withdrawal of overnight lending by other banks.

Wainaina: Did it have to do with the major debtors?
Kotut: No my lords.

Wainaina: Your lordships I wish to introduce a bundle of documents which show that Mr Magugu paid off his debt with Pan African Bank.
Kitonga: It shall be marked Exhibit 138 S.

Wainaina: Mr Kotut, other than the stories relating to the death of Mr Aslam, were there other stories in the media relating to Pan African Bank? Was the bank in any crisis?
Kotut: It was one of the weak banks.

Wainaina: At the DPF board meeting, you have mentioned that Pan African

do that.

Wainaina: You have mentioned that Trade Bank was also in trouble in relation to a prominent politician.
Kotut: That is correct.

Wainaina: Do you recall who the politician was?
Kotut: I believe it is Honourable Biwott.

Bosire: I wish you could stick to the issues that directly relate to your client.
Wainaina: Yes my lords. But what we are trying to demonstrate is that the connection with which Mr Magugu is mentioned is a mere excuse.

Bosire: Your client was sued?
Wainaina: It is set out in the documents I have presented.

Bosire: And he paid the money?
Wainaina: He did.

Bosire: Why don't you go directly to it.
Wainaina: My understanding of my mandate to this commission is that it is not confined to that which directly linked to my client.

Bosire: But if you have produced documents which tend to exonerate your client, why don't you go into it. If I were you, that is what I would do. The vice

Kotut: Yes my lord.

Miller: And that is well after you had left the Central Bank?

Kotut: Yes.

Miller: The letter is addressed to Esmail and Esmail Advocates and the reference is LZ Engineering Ltd and related parties versus Trade Bank in liquidation and the DPF board and others?
Kotut: Yes my lords.

Miller: In paragraph one it says, "On behalf of the DPF board and management, I hereby confirm as correct and acceptable the terms and conditions of the agreement to settle all the outstanding costs of suit and other pending matters."

Is it clear that the agreement that was reached was in settlement of costs?
Kotut: Yes my lords.

Miller: The same letter says in paragraph three that payment of Sh85 million will be in full and final settlement of outstanding matters as at July 2001.

Miller: If you look at page two of the same document, you will see a Central Bank cheque dated July 20, 2001. Payable to?
Kotut: LZ Construction.

Miller: For how much?
Kotut: Sh85 million my lords.

Miller: Can we go to page four of the same document sir? You can see it is a memo from the director of the DPF board to the governor. It is dated July 17, 2001.

Kotut: Yes my lords.
Miller: The reference is legal costs. We are clear on that?
Kotut: Yes my lords.

Miller: Look at page four paragraph two. Let me read it for you; "LZ Engineering is associated with Honourable Nicholas Biwott. The suits arose from the loan of Sh600 million advanced by the DPF in 1992 to Trade Bank Ltd. To secure the loan, Trade Bank charged with DPF Yaya Towers Ltd owned by LZ Construction Engineering Ltd. The debtor failed to repay the loan. Efforts to realise the assets of the debtor ended up in court ruling in favour of LZ Engineering. The title of the security was also discharged to the owner who has not paid the debt." Is it clear that as of 2001, the debt had not been paid?
Kotut: Yes my lords.

Miller: Further down it says, "In the past, DPF has lost all the cases against LZ Engineering on technicality and the trend is unlikely to change in future." Do you find that statement strange?
Kotut: It is a loaded statement.

Miller: Why do you say it is loaded?
Kotut: I did not understand the ruling of the Court of Appeal but the subject was loaded because it took a long and was complicated.

Miller: Let's move to page two of the same exhibit. Are you aware that costs are normally awarded to the advocates and not their clients?
Kotut: I would not know that my lords.

Miller: But in this case, you can see that the money went to LZ?
Kotut: Yes my lords.

Bosire: Was this not party and party costs.
Miller: My submission will be that this was not party and party costs.

Bosire: What was it?
Kotut: I believe that this was part of a negotiated figure.

Le Pelley: Don't you think that if the client has paid the full costs to the advocate, he is entitled to this?
Kotut: Obviously, this was an ordinary loan.

Kotut: From the documents here, that is what is shown.
Wainaina: And the application was made in 1987 before Goldenberg came



Photo: William Oeri

Police officers block Mr Michael Mashare, a herbalist, from entering the inquiry hall with his medicine. He was finally allowed in but had to leave the herbs with the security men.

Bank owed Trade Bank Sh300 million. Had you sought information regarding the manner in which the loan had been advanced to Trade Bank?
Kotut: No my lords.

Wainaina: Would you know whether the loan had been secured or not?
Kotut: Yes. I believe that the charge was Yaya Centre.

Wainaina: Look at page nine of the DPF board meeting proceedings. You say; "Fortunately, the HZ Group has agreed to surrender Yaya Centre in settlement of owed to the two banks."

It shows that at that point, there was no security which had been given to Pan African Bank in relation to the loan. Is that so?
Kotut: I do not believe that this is

chairman said earlier that from now on, we will be confining you to your client's case.

Wainaina: Mr Kotut, move to Exhibit 138 S. Page one shows the application and page two shows that the funds were indeed dispatched to Honourable Magugu by a Sh6 million cheque. Is that so?
Kotut: Yes my lords.

Wainaina: At page 17, it shows that the money was paid back. Is that so?
Kotut: Yes my lords.

Wainaina: Obviously, this was an ordinary loan.
Kotut: From the documents here, that is what is shown.

Wainaina: And the application was made in 1987 before Goldenberg came

the decisions we not as you would have expected?

Kotut: That is correct my lords.
Miller: Can we go to page 72 of the same bundle.

Bosire: I'm feeling uncomfortable that the decisions you are challenging, are by my colleagues.

Miller: I understand that my lords but it means that the decisions are done with. And you have told us that so long as a matter has been settled, then we can go into it. Myself and the assisting counsel are looking for an authority which says that if a commission of inquiry can reopen matters that have been closed in the courts and we hope to present that during submissions.

The fact of the matter is that the money went and the security wet and we have already laid the basis for the connection with Goldenberg my lords and this company. It is then in your remit to look at the issues we will be raising.

Bosire: Show your client's grievance and let's proceed.

Miller: Can we go to page 72 of the same document. These are minutes of the special meeting of the DPF board held on August 25, 1999. BY that time, you were no longer governor?

Kotut: Yes my lords.

Miller: If you look at it, it says; "Proposed settlement of litigation matters relating to Yaya Centre and HZ Group of companies. The board briefed on the proposal received by the management from Esmail and Esmail in respect of the claims relating to Yaya Centre and HZ Group. In a nutshell they said that all the claims relating to DPF and Yaya Centre should be marked as settled and the title be discharged and released to Yaya Towers Ltd."

What Mr Kotut, do you understand by that?
Kotut: My understanding is that the borrower's lawyers were saying that they pay a small amount of what was owing and the matter is then settled.

Miller: And you can see that this was 1999?
Kotut: Yes.

Miller: The next paragraph says; "The board having considered the proposal noted that the sum of Sh100 million repayment is too low. The board rejected the proposal."

It is clear that even as late as 1999, the borrower was making an offer for payment?
Kotut: Yes my lord.

Miller: If you look at page 75 under the heading, Trade Bank and HZ Group. "Members were informed that the HZ Group owed Trade Bank Sh800 million as at November 1, 2000. Borrowings were secured by fixed and floating debentures over the assets of the companies but realisation of the funds and appointment of receivers have over the years been hampered by court injunctions and ultimately the disappearance of court files."

You can see clearly that as of the year 2000, there is an outstanding Sh800 million.
Kotut: Yes my lords.

Miller: Would you know whether this was part of the Sh500 million?
Kotut: I would imagine so my lords but of course I do not know.

Miller: Can I refer you to Exhibit 138 Q and move to page 179. You can see that that has to do with the Sh600 million loan from DPF to Trade Bank.

Were you aware at the time of transacting with Trade Bank who owned Yaya Centre?
Kotut: I can't recall because we were dealing with the bank.

Miller: Move to page six of the same Exhibit. Whose is that letter head?
Kotut: Esmail and Esmail.

Were you aware of the fact that when you were dealing with them, when