



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.
CIVIL CASE NO. E303 OF 2020
IN THE MATTER OF
XPLICO INSURANCE COMPANY LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND
IN THE MATTER OF INSOLVENCY REGULATIONS, 2015
AND
IN THE MATTER OF THE COMPANIES ACT, 2015
AND IN THE MATTER OF
AND APPLICATION BY XPLICO INSURANCE COMPANY
RULING

Introduction

1. Xplico Insurance Company Limited (“the Company”) is a limited liability company incorporated on 23rd October 2009 under the *Companies Act (Repealed)*. It is licensed to carry on insurance business in Kenya under the *Insurance Act (Chapter 487 of the Laws of Kenya)* and is one of only four insurance companies covering Public Service Vehicles in the country. The Company has its head office in Nairobi and has a branch network in various town in Kenya.

The First Application

2. The Company, through the firm of *Awuor and Company Advocates*, filed a Notice of Motion dated 20th August 2020 seeking, inter alia, orders staying all the proceedings against the Company for a period of one year to allow it to verify and audit their genuineness, an order barring taxation proceedings against the Company and its policy holders for a period of one year, an order staying the effectiveness of statutory notices, demands or claims whatsoever from being effective for one year to allow the Company to review its portfolio. The application was supported by the affidavit of Raj Sahi, a director of the Company, sworn on 20th August 2020.

3. That application was placed before me on 24th August 2020 and I made the following order:

- a. *The Application be advertised in two daily newspapers of nationwide circulation.*
- b. *That Law Society of Kenya be enjoined in the proceedings.*

c. The application be listed for mention on 11th September 2020 for further directions.

The Second Application

4. Before the scheduled mention date, the Company filed a Notice of Motion dated 28th August 2020 (“the second application”) made, inter alia, under **Order 45 Rule 1** of the **Civil Procedure Rules** seeking the following orders;

a. Spent

b. THAT this Honourable Court be pleased to set aside, review or vary the orders issued by the Honourable court on 24th August 2020.

c. THAT pending the hearing and determination of this Application inter parties, the Applicant be restrained, whether by itself, servants and/or agents from advertising these proceedings as directed by the Honourable Court on 24th August 2020.

d. THAT the Honourable Court be pleased to issue and order restraining the Applicant whether by itself, servants and/or agents from advertising these proceedings as directed by the Honourable Court on 24th August 2020.

e. THAT this Honourable Court be pleased to strike out the Application dated 20th August 2020.

f. THAT the costs of this Application be provided for by the Applicant.

5. The second application is supported by the affidavit of Julius Mwangi, the Company’s Principal Officer, sworn on 28th August 2020. It is opposed by Raj Sahi, through the replying affidavit sworn on 7th September 2020. The parties filed written submissions in support of their various contentions. What is clear is that the dispute revolves around the shareholding of the Company and therefore the authority of the firm of advocates entitled to maintain these proceedings on the Company’s behalf.

6. Julius Mwangi, the Company’s Principal Officer, depones that when its advocates, *Ahmednasir, Abidkadir and Company Advocates*, informed the Company that the suit had been filed, the Board of Directors resolved to file the present application. It is contended *Awuor & Company Advocates*, lacked instructions to institute the suit on the Company’s behalf as Raj Sahi was neither director nor shareholder of the Company and could not issue instructions to the said firm to agitate the proceedings. He deponed that Raj Sahi was not appointed by the Company’s Board and has not been approved by the Insurance Regulatory Authority (“the IRA”) as required by the **Insurance Act**. Julius Mwangi deponed that the Board of Directors comprise the following; Shukri Noor Adan as the Chairman and Mohamed Badi Loo, Frank Muchiri and Jamala Bake Hassan as directors.

7. Julius Mwangi contested the allegations in support of the first application on the ground that they do not represent the true and accurate position as communicated by the Company. He further deponed that the firm of *Awuor and Company Advocates* was not formally instructed by the Company to file the first application. He complained that *Awuor and Company Advocates* failed to exercise due diligence in order to ascertain the veracity of the instructions and that it should be ordered to pay for any damage, whether monetary or reputational, suffered by the Company.

8. The Company submitted that the representations made in the first application misled the court to issue the orders which were likely to cause severe panic and hysteria in the insurance industry resulting in great damage to the Company. The Company maintains that it does not need a moratorium of whatever form or nature to audit claims or suits pending before the various courts. It states that should the need arise, the Company shall seek such relief through the proper procedures under the **Insurance Act, Companies Act** and following its own internal processes and procedures, file the application and seek appropriate relief.

9. Julius Mwangi disclosed to the court that the Company is engaged in litigation over its shareholding. He stated that the matter in the Court of Appeal; **XPLICO Insurance Company Limited v Obsidion Investment Limited & Others NRB CA Civil Application No. 281 of 2019 [2019] eKLR** is awaiting resolution and that the Court of Appeal issued a stay of execution pending the determination of the appeal from the ruling and order of Tuiyott J., issued on 26th July 2019 in **Obsidion Investments Limited v Attorney General and Another, HC COMM Misc. No. 490 of 2014 [2019] eKLR**. He therefore deponed that the Company does not have an updated CR-12 for the period until the determination of the Appeal.

10. The Company complained that Raj Sahi has attempted to interfere with its operations and that the IRA is aware of his actions. Julius Mwangi deponed that the Company has put in place measures to protect the Company from his intermeddling including addressing letters dated 22nd January 2020 and 23rd January 2020 to the IRA and the Registrar of Companies in which it brought the decision of the Court of Appeal to their attention.

11. Counsel for the applicant submitted that the Company is regulated by the **Insurance Act** and acts through the Principal Officer whose duties and functions are set out under **section 68** thereof. Counsel further submitted that Raj Sahi has not, in his deposition, demonstrated that he was appointed by the Board and his position confirmed by the IRA.

12. Based on the facts set out, the Company submitted that it has established a case for review of the orders granted on 24th August 2020 under **Order 45 Rule 1** of the **Civil Procedure Rules**. Counsel for the applicant submitted that the orders granted on 24th August 2020 were based on an application instigated by Raj Sahi’s deliberate concealment and failure to disclose material facts such as the pending litigation culminating in the orders of stay issued by the Court of Appeal. Counsel contended that Raj Sahi cannot purport to coronate himself director and further to act on behalf of the Company. She cited **National Bank of Kenya v Ndungu Njau [1997] eKLR** where the Court of Appeal

held that a review may be granted whenever the court considers it necessary to correct an apparent error or omission on the party of the court and on that basis submitted that this case is in line with the cited decisions as the error is self-evident and does not require elaborate argument.

The Response

13. Raj Sahi depones that he is a director of the Company. He explained that in June 2012, the IRA wrote to the Company demanding that as a condition for issuing a licence for that year, the shareholder should inject an additional Kshs. 107 million in the Company as share capital. As the existing shareholders were unable to raise the additional capital, he was requested by Keith Beekmeyer, one of the shareholders, to purchase shares from the Company in order to save it from collapsing. He subsequently injected Kshs. 60 million to the Company and was issued with share certificates for the following companies which he controls; Open Scope Ventures Limited, Obsidition Investment Limited, Green Space Properties Limited and Red Stone Holding Limited.

14. Raj Sahi stated that following the transfer of shares to his companies, he became a director of the Company and that his name and those of his companies appear on the current CR-12 and a recent search conducted on 8th September 2020 reflects this position. He further states that other directors who appear on the CR-12 have resigned from the Company leaving himself and Isaac Ng'ang'a as the Company's directors.

15. As regards this suit, Raj Sahi depones that he recently identified fraudulent and fictitious claims in the Company that are being invaded by fraudsters with decrees founded on fake and/or forged certificates of insurance, fake claims, fake medical records over fictitious accidents which claims spell a disaster of monumental proportion of the Company, policy holders, creditors, employees and members of the public. Consequently, the Company authorized the firm of *Awuor and Company Advocates* to seek stay orders for all claims against the Company amongst other orders. He further states that the impugned application was done in the best interests of the Company since the fraudulent claims and suits that are in court will eventually cripple the Company. He denies that he is an intermeddler in the Company's affairs and depones that the application does not benefit him individually.

16. Raj Sahi further claims that the persons claiming to be directors are illegally in office as they do not hold any shares in the Company and have not been appointed by any shareholders. He refers to an internal memo dated 14th November 2019 from the then Principal Officer Mike G. Muriithi, who notified to all employees that the alleged directors do not have authority to make decisions on behalf of the Company since their names do not appear in the CR-12. He states that he is not a party to the proceedings in the Court of Appeal; **Civil Appeal No. 281 of 2019** and that his directorship and shareholding are not contested in the said Appeal nor was it contested in the trial court and that the orders of stay do not negate his position as director of the Company.

17. To support his case, Raj Sahi refers to a letter dated 4th September 2020 in which the IRA wrote to the Company's chairman referencing a meeting between himself, the Chairman and the Commissioner of Insurance highlighting the governance challenges faced by the Company. He states that he does not have any personal interest in the first application and that it is made in the best interests of the Company, policy holders, creditors, employees and members of the public.

18. Raj Sahi asserts his directorship based on the CR-12 showing that he was a director of the Company as at 8th September 2020. As regards the position of Julius Mwangi, he points out that the letter dated 15th June 2020 showing his appointment as Principal Officer was approved by the IRA for a further period of three months only from 6th June 2020. That the term expired on 6th September 2020 and has not been extended by the IRA.

19. Raj Sahi defended the position of *Awuor & Company Advocates* and stated that it was duly authorised to file the impugned application. He stated that in carrying out instructions the firm was relying on the letter and current CR-12 of the Company. The firm relied on the principle that a corporation acts through agents usually its Board of Directors by way of resolutions passed. Counsel cited the decision in ***Kimani Kabucho Karuga & Company Advocates v Sundowner Lodge Limited ML HC Misc. 835 of 2010 [2011] eKLR*** where the court held that a person contracting with the directors is not bound to see that all these preliminaries have been observed and is entitled to presume that the directors are acting lawfully. Raj Sahi maintains that as a director of the Company and the Company having passed a resolution instructing the firm, it had proper instructions to file the first application.

Determination

20. It is apparent from the parties' contentions I have set out above that the applications are a manifestation of the disputes between two factions of the Company directors. The question I am asked to resolve is whether Raj Sahi had authority to issue instructions to *Awuor and Company Advocates* to file this suit.

21. In ***Obsidition Investments Limited v Attorney General and Another (Supra)***, the applicant filed an application under **section 118** of the ***Companies Act*** seeking an order that the Company register be rectified to reflect the shareholders and directors as at 30th June 2014. The court allowed the rectification in respect of the shareholding but declined to make an order in respect of the directors. In effect, the court upheld the status of the shareholders including the companies controlled by Raj Sahi, that is, Open Scope Ventures Limited, Obsidition Investment Limited, Green Space Properties Limited and Red Stone Holding Limited. At that date, the directors were Keith David Beekmeyer, Lee Wariungi, Jitin Mediratta, Anil Mahan, Isaac Ng'ang'a and Raj Sahi. The Company lodged an appeal against the decision and applied for stay. The Court of Appeal in ***XPLICO Insurance Company Limited v Obsidition Investment Limited & Others (Supra)*** stayed the decision of Tuiyott J.

22. Raj Sahi foists his claim as a director on the CR 12 issued by the Registrar of Companies on 8th September 2020. That CR-12 supports that position confirmed by Tuiyott J., but stayed by the Court of Appeal. In order to resolve that issue of who are the lawful directors, the court would have to settle the issue of the shareholders first as they are the ones entitled to appoint the directors.

23. I also note that a different slate of directors including Shukri Noor Adan, Josephine Mutai Saina, Jibril Maalim Mohamed, Bhavesh Harilal Gohil and Frank Muchiri were approved by the IRA on 14th March 2016 for a period of one year from 14th March 2016. Subsequent letters from the IRA dated 7th December 2017, 28th November 2018, 26th August 2019 approved Isaac Ng'ang'a, Muhammad Ali Abdalla Loo, Shukri Noor Adan, Frank Muchiri and Hassan Jamala Bake to continue serving as directors.

24. What the evidence shows is that the shareholding of the Company is a live issue in the pending decision of the Court of Appeal. The reason the application for rectification was made was because certain changes had taken place in the shareholding and directorship which Raj Sahi and his associated companies contested. Tuiyott J., affirmed the status quo ante while the Court of Appeal stayed that decision. What these changes are, this court cannot delve into in light of the pending litigation which will ultimately resolve the issue of shareholders. I also reject the position taken by Raj Sahi that he was not party to the litigation or affected by it. This is contrary to the position he has taken in this case that Obsidition Investments Limited, the applicant in case before Tuiyott J., is his company. Moreover, the companies which he controls are affected by the litigation.

25. Another issue I cannot ignore is that the insurance industry is highly regulated in order to protect the interests of the public and policy holders. **Section 68** of the **Insurance Act** requires every insurance company to have a principal officer who, “*shall be responsible for the general control, direction and supervision of the Kenya Insurance of the registered person and shall represent the registered person for the purposes of this Act*”.

26. By a letter dated 15th June 2020, the IRA approved the appointment of Julius Mwangi as the Acting Principal Officer for a period of three months from 6th June 2020. The IRA noted in the letter that, “*Kindly note that there will be no approval for any further extension of Mr. Mwangi's acting appointment. You are therefore required to appoint a substantive Principal Officer before the end of this extension.*” I did not see any authority of the IRA extending the Julius Mwangi's position beyond the three months. On the other hand, Raj Sahi, did not show that he was the lawfully appointed and approved as the Principal Officer of the Company as required by the **Insurance Act**. As I have stated, the importance of the position of the Principal Officer cannot be gainsaid particularly in light of the fact that this suit seeks a judicial moratorium on all payments and actions against the Company outside the statutory moratorium under the **Insurance Act**.

27. Turning to the issues raised in the second application, I note that the suit has been advertised as directed and there are indeed parties waiting at the door to be joined as interested parties. An order of review would therefore be in vain. The only issue is whether I should strike out the suit on account of want of authority by the firm of *Awuor and Company Advocates* to file this suit on behalf of the Company. As I have shown, the Company is in the middle of a dispute regarding its shareholders and any position I take on the matter, may ultimately prejudice the ongoing legal proceedings.

28. Although Raj Sahi, who issued instructions to the firm of *Awuor & Company Advocates* asserted his position of director of the Company, he is not its Principal Officer duly authorised by the IRA as the person, “*responsible for the general control, direction and supervision of the Company.*” He has not shown that he is duly authorised to hold that position by the IRA. On the other hand, I have not been shown the authority of Mr Mwangi to continue acting as the Principal Officer once the authority set out in the letter dated 15th June 2020 expired.

29. The order that commends itself to this court is to stay these proceeding pending resolution of the Company's directors and in particular the position of the Principal Officer who shall be able to give directions on the matter.

Disposition

30. For the reasons I have outlined above, I allow the Notice of Motion dated 28th August 2020 and order that this suit be and is hereby stayed pending hearing and determination of the intended appeal from the ruling and order dated 26th July 2019 in ***Obsidition Investments Limited v Attorney General and Another***, HC COMM Misc. No. 490 of 2014 or until further orders of the court. Costs in the cause.

DATED and DELIVERED at NAIROBI this 18th day of DECEMBER 2020.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Awuor instructed by Awuor and Company Advocates for the Applicant.

Ms Osman instructed by Ahmednasir, Abdikadir and Company Advocates for the Respondent.