



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS CASE NO. 67 OF 2012
IN THE MATTER OF THE INSURANCE ACT, CAP 487
AND
AND IN THE MATTER OF UNITED INSURANCE COMPANY LIMITED
(UNDER STATUTORY MANAGEMENT)
MISC. APPLICATION CAUSE NO. 67 OF 2012

SAMMY M. MAKOVE,

COMMISSIONER OF INSURANCE APPLICANT

VERSUS

KENYA REINSURANCE CORPORATION LTD.

(STATUTORY MANAGER,

UNITED INSURANCE COMPANY LIMITED) RESPONDENT

AND

KIRAGU HOLDINGS LIMITED 1ST INTERESTED PARTY

KIKI INVESTMENTS LIMITED 2ND INTERESTED PARTY

MUMBU HOLDINGS LIMITED 3RD INTERESTED PARTY

RULING

1. This Ruling should have been made immediately Counsel Wamalwa argued that the application dated 6th June 2019 should have been heard by Hon. Kasango J. That argument is not idle and I regret not having upheld it in peremptory fashion.

2. The said application is a Notice of Motion seeking the following orders:-

a) That this application be and is hereby certified as urgent and fit to be heard forthwith before the duty and presiding judge exported in the first instance.

b) That pending the interpartes hearing of this application, the orders of this Court as granted on 22nd February 2019 be varied to the extent that the Statutory Manager's operational expense payments are excluded from the subject prohibitory order on payments.

c) That the court orders of 22nd February 2019 in so far as they prohibit the Statutory Manager for making any payments be and is hereby varied, vacated and or set aside.

d) That the Court orders of 28th May, 2019 in so far as they extend the orders of 22nd February 2019 be and is hereby varied, vacated and or set aside.

e) That costs be in the cause.

3. Although prayers (2) and (3) of the Motion talk of an order of 22nd February 2019, no such order exists and the reality is that the impugned order is that made on 27th February 2019. This is clear not only from the submissions made before Court but also from one of the orders annexed to the Motion.

4. Although the applicant seeks variation, vacation and or setting aside of the order, the true effect of granting any of those orders is to review the order of 27th February 2019. Whatever name you call it the Motion is an application for review. A rose by any other name remains a rose! It is not possible to vary or vacate or set aside the said order without reviewing it.

5. It being an application for review then it cannot wriggle out of the strictures of Order 45 of the Civil Procedure Rules. Order 45 Rule 2 reads;-

Order 45, rule 2.] To whom applications for review may be made.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

6. Emerging from the grounds in support of the application and the submissions of Counsel for the Applicant, the application is founded on two broad arguments. One that a Court of law has no jurisdiction to restrain the statutory manager from discharging his/her duties and responsibilities and that the Court cannot grant an order that is not anchored on any pleadings. In addition the applicant seeks an interpretation of the Order (See paragraph 14 of the Affidavit of Godfrey K. Kiptum sworn on 6th June 2019).

7. It is true as pointed out to me that the impugned order was made by Hon. Justice Kasango. It is also true that both at the time of arguing the application and of delivery of this Ruling, Hon. Justice Kasango was and is attached to Milimani Station and to this division of the High Court. In so far as the grounds for review are not because of discovery of a new and important matter or evidence or existence of a clerical or arithmetic mistake or error apparent on the face of the decree (Order 45 Rule 2(1), the application ought to have been made to the Judge who made the order. There is logic to the rule. Orders that deserve review other than on grounds exempted by the Rule are best dealt with by the Judge who made the order. It would be much clearer to that Judge as to whether the order sought to be reviewed is deserving of such attention. To ask another Judge to do so would be to potentially ask a Judge of concurrent jurisdiction to reevaluate or appraise the order of a colleague. An embarrassing prospect!

8. Whilst Counsel Milimo for the Applicant decried that the objection was raised very late in the day and it was raised for the first time during the hearing of the application and in response thereto, the objection is on my power to hear the application. It is by all means a jurisdictional question and even the subheading to order 45 rule 2 suggests as much. It reads:-

“To whom applications for review may be made”

For the reason the matters of jurisdiction can be raised at any time, the timing herein, though inconvenient or even annoying, cannot stop the Court for determining the objection.

9. The objection is upheld. I direct that this matter be placed before Hon. Justice Kasango on a date that suits the Judge’s diary for further directions in respect to the Notice of Motion dated 6th June, 2019.

Dated, Signed and Delivered in Court at Nairobi this 23rd Day of September 2019

F. TUIYOTT

JUDGE

PRESENT;