



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**MEDIATION REFERENCE NO. 31 OF 2016**  
**ARISING FROM HCCC 534 OF 2014**

**GEORGE NGURE KARIUKI.....PLAINTIFF**

**- VERSUS -**

**CHARLES OSORO MAKONO (THE STATUTORY MANAGER)**

**COONCORD INSURANCE CO. LTD.....1ST DEFENDANT**

**CHARLES PETER MWANGI.....2ND DEFENDANT**

**RULING**

1. **Charles Peter Mwangi** the *2nd Defendant* was ordered by this Court to show cause why his defence should not be struck out due to his failure to attend mediation.
2. The original suit from which the mediation was ordered to proceed was *Commercial & Admiralty Division HCCC No. 534 of 2014*. That case was filed by **George Ngure Kariuki** the *Plaintiff* against **Charles Osoro Makone** (Statutory Manager of Concord Insurance Co. Ltd), *1st Defendant*.
3. The Plaintiff's claim in that suit is for the release for the sale proceeds of the property that was sold by **Charles Osoro Makone** in his capacity as the Statutory Manager. It is not denied that both the *Plaintiff* and the *2nd Defendant* are share holders of Concord Insurance. When the *2nd Defendant* learnt of the suit filed by the *Plaintiff* against **Charles Osoro Makone**, the *2nd Defendant* sought to be joined. On *8th July 2015*, the court permitted the *2nd Defendant* to be joined in that case.
4. The case was referred for mediation. The mediation failed to proceed because of the absence of the *2nd Defendant*. Consequently, the mediation file was referred back to court. On being referred to the court, the *2nd Defendant* was ordered to show cause why his defence should not be struck out for failing to attend mediation.
5. The *2nd Defendant* was able to show that during the relevant period when the mediation was scheduled he was unwell and had travelled to India and the USA for treatment. Indeed even at the time scheduled for him to show cause, the *2nd Defendant* was out the country still receiving treatment. It was his *learned counsel who swore the affidavit* which gave the information of his illness.
6. I have considered the affidavit and the submissions presented to this court. It is clear to me that to strike out pleading would divest the *2nd Defendant's* rights to be heard. It would indeed be draconian. I

was able to discern from the parties case summary before the mediator that both the **Plaintiff** and the **2nd Defendant** had misunderstanding in relation to the affairs of Cooncord Insurance. It is therefore essential, that both the **Plaintiff** and the **2nd Defendant** be afforded a hearing in the case before court. In the light of the evidence provided to the court which showed that the **2nd Defendant** was unwell, and was out of the country receiving treatment and because the **2nd Defendant** may have a claim similar to that of the plaitniff against Concord Insurance, i decline to strike out the **2nd Defendant's defence**. In my view, the **2nd Defendant** did show cause why his defence should not be stuck out.

7. In the end I order that **HCCC No. 534 of 2014** do proceed through litigation. In that regard, parties are ordered to comply with the pre-trial procedures and to fix that case for case management within a period of three months.

**DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May 2018.**

**MARY N. KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant