



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 242 OF 2017**

**DILESH SOMCHAND BID.....PLAINTIFF**

**-VERSUS-**

**RASIKLAL KANTARIA.....1<sup>ST</sup> DEFENDANT**

**STEVE OMENGE JOHNSON MAINDA.....2<sup>ND</sup> DEFENDANT**

**PETER THINWA WARUTERE.....3<sup>RD</sup> DEFENDANT**

**TAUSI ASSURANCE COMPANY LIMITED.....4<sup>TH</sup> DEFENDANT**

**INSURANCE REGULATORY AUTHORITY.....5<sup>TH</sup> DEFENDANT**

**RULING**

**[1]** The Plaintiff, **Dilesh Somchand Bid**, filed this suit on **8 June 2017**, through the law firm of Issa & Company Advocates, praying for Judgment against the Defendants jointly and severally as follows:

**[a]** A declaration that the appointment of **Steve Omenge Johnson Mainda** (the 2<sup>nd</sup> Defendant) and **Peter Thinwa Warutere** by the 4<sup>th</sup> Defendant without complying with the Corporate Governance Guidelines for Insurance and Reinsurance Companies is null and void;

**[b]** A declaration that the appointment of **Steve Omenge Johnson Mainda** and **Peter Thinwa Warutere** by the 4<sup>th</sup> Defendant without adherence to the agreement made on **11 February 2015** between the Plaintiff and the 1<sup>st</sup> Defendant and ratified by the Board of Directors is null and void;

**[c]** A Declaration that the approval by the 5<sup>th</sup> Defendant of the appointment of **Steve Omenge Johnson Mainda** and **Peter Thinwa Warutere** without ensuring that there was compliance was in violation of its statutory duty and therefore the approval is null and void.

[d] An Order of Permanent Injunction to restrain **Steve Omenge Johnson Mainda** and **Peter Thinwa Warutere** from acting, discharging, sitting or in any way carrying on as directors of the 4<sup>th</sup> Defendant;

[e] A Mandatory Injunction to issue against the 5<sup>th</sup> Defendant to compel it to revoke the approval of **Steve Omenge Johnson Mainda** and **Peter Thinwa Warutere** as directors of the 4<sup>th</sup> Defendant and to compel the 4<sup>th</sup> Defendant to comply with the provisions of the Corporate Governance Guidelines for Insurance and Reinsurance Companies;

[f] An order that in default of the 4<sup>th</sup> Defendant complying with the Corporate Governance Guidelines for Insurance and Reinsurance Companies, the matter be referred to the Commissioner for Insurance to cancel the 4<sup>th</sup> Defendant's Insurance Licence;

[g] General Damages against the 1<sup>st</sup> Defendant;

[h] Costs of the suit;

[i] Any other or further relief as the court may deem appropriate.

[2] The brief background of the matter, as can be gleaned from the averments in the Plaintiff, are that both the Plaintiff and the 1<sup>st</sup> Defendant are shareholders and directors of the 4<sup>th</sup> Defendant. 1<sup>st</sup> Defendant is also the Chairman of the 4<sup>th</sup> Defendant's Board of Directors. It was the contention of the Plaintiff that in a meeting held at **The Stanley Sarova** on **11 February 2015** between the Plaintiff and the 1<sup>st</sup> Defendant in the presence of **Mr. Rapinder Sehmi**, also director of the 4<sup>th</sup> Defendant, it was agreed that all the decisions relating to the affairs of the 4<sup>th</sup> Defendant would be by agreement between the Plaintiff and the 1<sup>st</sup> Defendant; and that in the event of any conflict in regard to any issues, the matter would be referred to **Mr. Rapinder Sehmi** and his decision would be final.

[3] It was further the contention of the Plaintiff that pursuant to the agreement aforesaid, a Memorandum was executed between him and the 1<sup>st</sup> Defendant which was tabled before the Board of Directors on **25 November 2016** for endorsement and was duly ratified; and that pursuant to that Memorandum, the Managing Director of the 4<sup>th</sup> Defendant, **Ritta Thatthi**, forwarded a letter from the 1<sup>st</sup> Defendant as the Chairman of the Board of Directors for discussion at the next Board meeting, and that some of the documents thus forwarded were the Curriculum Vitae for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and indicated that he wished to propose them two persons as directors of the 4<sup>th</sup> Defendant.

[4] The Plaintiff further averred that at a meeting of the Board of Directors held on **27 February 2017**, the 1<sup>st</sup> Defendant proposed the appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as independent directors despite his objection thereto on the ground that the two had not been referred to the Nomination Committee for the due diligence inquiry; but that the 1<sup>st</sup> Defendant bulldozed his way at the Board meeting and had the two directors appointed without any fit and proper assessment being undertaken by the 4<sup>th</sup> Defendant's Nomination Committee and in disregard and breach of the 5<sup>th</sup> Defendant's Guidelines. The names were thereafter forwarded to the 5<sup>th</sup> Defendant, which approved the irregular appointment without satisfying itself that the two proposed directors had been subjected to the fit and proper test criteria. It was therefore the contention of the Plaintiff that the appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by the 4<sup>th</sup> Defendant and the approval by the 5<sup>th</sup> Defendant were in violation of the mandatory Corporate Governance Guidelines; and therefore null and void; hence the prayer for a Mandatory Injunction directing the 5<sup>th</sup> Defendant to revoke the approval and to compel the 5<sup>th</sup> Defendant to discharge its statutory mandate to ensure compliance with its Guidelines and the other prayers set out in the Plaintiff.

[5] Along with the Plaintiff, the Plaintiff filed the Notice of Motion dated **8 June 2017** seeking temporary injunction to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from acting, discharging, sitting or in any way carrying

on as directors of the 4<sup>th</sup> Defendant pending the hearing and determination of both the application and the main suit. The application was supported by the Plaintiff's affidavit, sworn on **8 June 2017**; which is, in the main, a reiteration of the averments in the Plaintiff.

**[6]** In response to the application, the 4<sup>th</sup> Defendant filed Grounds of Opposition dated **13 June 2017** through the law firm of **Oraro & Company Advocates**. Those grounds are:

**[a]** That the action is an abuse of the process as it is a dispute between the Plaintiff and the 1<sup>st</sup> Defendant;

**[b]** That the Plaintiff and the 1<sup>st</sup> Defendant unlawfully agreed to refer all the disputes in the 4<sup>th</sup> Defendant to be determined between themselves or **Mr. Rapinder Sehmi**, to the exclusion of the Board of Directors of the 4<sup>th</sup> Defendant, contrary to the provisions of the **Companies Act, 2015** and the **Articles of Association** of the 4<sup>th</sup> Defendant;

**[c]** That the appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was carried out in accordance with the **Articles of Association** of the 4<sup>th</sup> Defendant and not in breach of the **Corporate Governance Guidelines for Insurance and Reinsurance Companies, 2011** as purported by the Plaintiff;

**[d]** That the Plaintiff has not come to court with clean hands and does not deserve equitable remedies as the application is intended to facilitate the benefit of the Plaintiff to the prejudice of the 4<sup>th</sup> Defendant as is evident in the Memorandum dated **11 October 2016**;

**[e]** That as evidenced in the Supporting Affidavit to the application, sworn by the Plaintiff, the dispute is not compliance with the **Corporate Governance Guidelines for Insurance and Reinsurance Companies, 2011** but lack of agreement by the Plaintiff to the appointment of the two new directors irrespective of the Fit and Proper Purpose Criteria as indicated at paragraph 31 of the said affidavit.

**[f]** That the application is predicated on an illegality.

**[7]** Besides the Grounds of Opposition, the 4<sup>th</sup> Defendant filed a Notice of Preliminary Objection dated **13 June 2017**, thereby giving notice that it would raise a Preliminary Objection to the hearing of the Plaintiff's application on a point of law, to the effect that there is not only an alternative remedy under **Section 3A, 3E, 9,67(c)(ii)** and **168** of the **Insurance Act, Chapter 487** of the **Laws of Kenya**, but also that the Plaintiff had already invoked the same. The Preliminary Objection was canvassed by way of written submissions; and for the Plaintiff, **Mr. Oraro, SC**, filed his written submissions on **20 June 2017** while **Mr. Issa** filed written submissions on behalf of the Plaintiff on **28 June 2017**.

**[8]** According to **Mr. Oraro**, there is an elaborate procedure set out in the Insurance Act for the settlement of any disputes falling within the jurisdiction of the 5<sup>th</sup> Defendant. He drew the attention of the Court to the provisions of **Section 3A** of the Act, by which the 5<sup>th</sup> Defendant is empowered to issue supervisory guidelines and prudential standards from time to time for the better administration of the insurance industry; and submitted that it was pursuant to that provision that the Guidelines were issued. Counsel also made reference to **Section 67C(2)(ii)** of the Act, by which the Commissioner, with the approval of the Board of the 5<sup>th</sup> Defendant, may remove any officer or employee of an insurance company who, in the opinion of the Commissioner, has caused or contributed to any contravention of any provision of the Act or regulations or directions made thereunder or to any deterioration in the financial stability of the insurer or has been found guilty of conduct detrimental to the interest of the policy holders; and posited that any person aggrieved by the decision of the Commissioner is under obligation, by dint of **Section 168** and **173** to appeal to the Insurance Tribunal, which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary such decision.

**[9]** In the premise, it was the contention of the **Mr. Oraro** that where there is a clear procedure for the

redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure must be followed. Counsel relied on the cases of **Speaker of National Assembly vs James Njenga Karume [1992] eKLR** and **Gladys Mwaniki & 6 others vs Gordon Oluoch & Others [2015] eKLR** in support of his submissions that, in the circumstances, this Court has no jurisdiction to entertain the application or the suit itself. He accordingly urged for the striking out of the suit with costs to the 4<sup>th</sup> Defendant.

[10] Counsel for the Plaintiff, on his part, urged the Court to draw a distinction between the role of the Commissioner of Insurance while sitting as the Chief Executive Officer of the 5<sup>th</sup> Defendant and his role as the Commissioner of Insurance. It was therefore his submission that a decision made with the approval of the 5<sup>th</sup> Defendant under **Section 67C(2)(ii)** of the **Insurance Act**, arising from a contravention of the Corporate Governance Guidelines, is effectively a decision of the 5<sup>th</sup> Defendant and not the decision of the Commissioner of Insurance. Counsel further submitted that the jurisdiction of the Tribunal is limited to hearing appeals from the decision of the Commissioner of Insurance and does not have jurisdiction with respect to decisions made by the Insurance Regulatory Authority.

[11] With regard to **Section 168** of the **Insurance Act**, it was the contention of Counsel that what is sought herein is a Mandatory Injunction to compel the 5<sup>th</sup> Defendant to perform its statutory duty; and that this is not a suit brought against the Board or the Cabinet Secretary in charge of Finance or any person authorized by them for acts done in good faith under the Act as is envisaged by **Section 168(1)** of the Insurance Act. For this reason, it was argued that the Plaintiff is well within his rights to bring forth the instant suit and that the Court has jurisdiction to determine the dispute before it to ensure that the rule of law is upheld. Accordingly, the Plaintiff urged the Court to dismiss the 4<sup>th</sup> Defendant's Preliminary Objection in order for his application for injunction to be heard and determined on its merits.

[12] As was enunciated in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696**:

**"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

And therefore the single issue for my determination, at this stage, is whether the point raised by **Mr. Oraro, SC**, is tenable as a Preliminary Objection.

[13] The 5<sup>th</sup> Defendant, as a public body, is a creature of **Section 3** of the **Insurance Act**; and its objects and functions are set out in **Section 3A** of the Act; which include the formulation and enforcement of standards for the conduct of insurance and reinsurance business in Kenya. There is no gainsaying, therefore, that it was in that capacity that the 5<sup>th</sup> Defendant issued the **Corporate Governance Guidelines for Insurance and Reinsurance Companies, 2011**; which were signed by **Sammy M. Makove** in his capacity, not just as a Chief Executive Officer of the 5<sup>th</sup> Defendant, but also as a Commissioner. Clearly, the argument by the Plaintiff's Counsel that there is a distinction between the two roles, to my mind, amounts to mere splitting of hairs and is untenable, for **Section 3E(1)** of the **Insurance Act** is explicit that:

**"There shall be a Commissioner of Insurance who shall be the Chief Executive Officer of the Authority and who shall be appointed by the Board ..."**

[14] And **Section 67C** of the Act does give the Commissioner the mandate, pursuant to **Section 67C(2)(iii)** to intervene in the management of insurance companies, including the power to:

**"... appoint three competent persons familiar with the business of insurers to its Board of Directors to hold office as directors who shall not be removed from office without the**

**approval of the Commissioner."**

In the premises, any grievances arising from such decisions must, of necessity be channeled through the avenue provided for in **Section 173 of the Act**, which stipulates that:

**(1) A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision.**

**(2) Except as provided in this section the decision of the Tribunal on an appeal made to it under subsection (1) shall be final and conclusive.**

**(3) A person aggrieved by a decision of the Tribunal made under subsection (1) may, if it involves a question of law, within one month from the date on which the decision is intimated to him, appeal therefrom to the court.**

[15] It is now trite that where there is a clear procedure for the redress of any particular grievance, then that procedure ought to be followed strictly. (See Speaker of the **National Assembly vs. James Njenga Karume [1992] eKLR**). Accordingly, I fully agree with the expressions by **Odunga, J** in **Gladys Mwaniki (Regional Club) & 6 Others vs. Gordon Oluoch & 7 Others [2015] eKLR** that:

**"The Constitution ...clearly recognizes the role of independent tribunals in dispute resolution scheme. Accordingly, where there is an alternative remedy provided under an Act of Parliament, which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute...where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement."**

[16] In the foregoing premises, it is my considered finding that the Plaintiff's suit and the application filed therein dated **8 June 2017** are not only premature, but are also completely incompetent. I would accordingly uphold the Preliminary Objection and order that the suit be struck out accordingly with costs to Defendants.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2017**

**OLGA SEWE**

**JUDGE**