



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE NO. 24 OF 2013**

**UAP INSURANCE COMPANY LTD.....APPLICANT/PLAINTIFF**

**=VERSUS-**

**TOIYOI INVESTMENT COMPANY LTD.....DEFENDANT/RESPONDENT**

**RULING**

On 9th October, 2013, the Plaintiff, **UAP INSURANCE COMPANY LIMITED** ( who shall hereinafter be cited as “**UAP Insurance**”) filed a suit against the Defendant, **TOYOI INVESTMENTS LIMITED** (hereinafter cited as “**TOYOI**”).

The said suit was substantially seeking to stop **TOYOI** from filing a Winding-Up Petition against **UAP Insurance**.

The Plaintiff also filed an application for an interlocutory injunction to restrain the Defendant from filing or advertising the Winding-Up Petition against the Plaintiff.

This Ruling is in relation to the application for an interlocutory injunction.

The facts giving rise to the suit and to the application are largely uncontested. I will set down the said facts, as I understand them.

- (1) **UAP Insurance** is an insurance Company carrying on the business of providing insurance services in Kenya.
- (2) One of the clients of **UAP Insurance** is **UCHUMI SUPERMARKETS LIMITED** (hereinafter cited as “**Uchumi**”).
- (3) **Uchumi** were tenants at **ELDO-CENTER**, which was wholly owned by **TOYOI**.
- (4) On or about 11th December, 1998, a fire reportedly broke out at the **Uchumi Supermarket** premises, within **Eldo-Center**. The fire spread and engulfed other shops, offices and stores at the **Eldo-Center**.
- (5) A total of 34 law suits were filed against **Uchumi**, arising from the fire disaster. One of the suits, **ELD HCCC NO. 164 OF 2000**, was taken as the test case. The Plaintiff in that test case was **TOYOI**.
- (6) On 30th October, 2012, the High Court delivered its Judgment, in favour of the

Plaintiff (TOYOI). The Defendant was ordered to compensate Toiyoi in the sum of **Kshs 37,251,960/=**.

(7) Uchumi lodged an appeal to challenge the Judgment.

(8) Whilst awaiting the hearing and determination of the appeal, Uchumi sought and was granted an order for stay of execution. The condition for the order of stay of execution was that Uchumi should provide an Insurance Bond in the sum of Kshs 41,751,960/=.

(9) After Uchumi secured the Bond, which was granted by UAP Insurance, the latter negotiated with TOYOI, for a settlement.

The two parties negotiated a settlement in the sum of Kshs 59,632,900/=.

(10) After TOYOI signed the Discharge Voucher for the negotiated sum, UAP Insurance has failed to pay the sums due under the negotiated settlement.

(11) TOYOI issued a Statutory Notice dated 22nd August, 2013; The said Notice was for the Winding-Up of UAP Insurance, because of their failure to pay the sum of Kshs 59,632,900/=.

(12) UAP Insurance acknowledges the negotiated settlement, but now insists that it was founded on a MISTAKE. UAP Insurance explains that the MISTAKE was its failure to obtain the consent and authority of UCHUMI, before executing the negotiated settlement.

(13) By a letter dated 17th September, 2013, UAP Insurance notified Toyoi that it had repudiated the negotiated settlement.

(15) The UAP Insurance described the threat to have it wound-up as an abuse of the process of the court, because it is a company whose assets are worth Billions of Kenya Shillings.

(16) The UAP Insurance also point out that Toyoi are already holding a BOND of Kshs 40,000,000/=.

(17) UAP Insurance has also executed another Bond in the sum of Kshs 100,000,000/=.

The Notice of Toyoi's intention to wind-up UAP Insurance was pegged on the Discharge Voucher for the sum of Kshs 59,632,900/=.

Has the said Discharge Voucher Constituted a Contract between Toyoi and UAP Insurance?

On a *prima facie* basis, the answer to that question is in the affirmative.

The next question relates to whether or not the said contract was a basis sufficient to form the sound foundation for the winding-up Notice.

In principle, the terms of a contract do not, of themselves constitute a foundation for a Winding-Up Notice. If one party to the contract breaches the said contract, the other party would, ordinarily, institute proceedings to enforce the said contract.

The Defendant appears to appreciate that position, because they have lodged a counter-claim against the plaintiff, seeking orders for Specific Performance of the contract.

Meanwhile, the Plaintiff has indicated that it had repudiated the contract.

Whether or not the notice of repudiation would, in law, constitute actual repudiation, is a matter that will have to be determined by the trial court.

But whether or not the Plaintiff will be held to have repudiated the contract, I hold the considered view that the enforcement of a contract is through court proceedings.

Both parties are in agreement, that the process of winding-up a company should not be used for the purposes of collecting a debt.

It does appear to me that although the Defendant accepts that legal position, it was actually trying to force the Plaintiff to pay the proceeds of the Discharge Voucher, through the threat to wind-up the company.

At the moment, the plaintiff has demonstrated, on a *prima facie* basis, that its assets are worth much much more than what the Defendant says is due. That would suggest that the alleged impecuniosity of the company was untrue.

At the same time, the Defendant holds security, in the form of Insurance Bonds. Those securities would become available immediately after the appeal is determined, if such determination confirms the liability of UCHUMI. In the circumstances, the options available to the Defendant appear to be two-fold:-

(a) The company could choose to pursue its counter-claim, and thus seek to enforce the terms of the Discharge Voucher; or

(b) the company could have the appeal prosecuted, hoping that the Court of Appeal would uphold the Judgment.

By specifying those options, I am not advising the Defendant on how to pursue its claims. I am also not suggesting that those two options are necessarily the only avenues available to the Defendant.

The point that I am seeking to emphasize is that it does appear to me that the Defendant acted prematurely by issuing the Notice to wind-up UAP insurance. To that extent, the Plaintiff has demonstrated a *prima facie* case with a probability of success.

I also find that if the Petition to wind-up the company is filed, or its existence is published in the press or the Kenya gazette, the Plaintiff would suffer irreparable loss and damage.

The Plaintiff is an insurance company. It relies on its reputation in order to do its business. That reputation is largely anchored on its perceived financial ability to come to the rescue of its client, upon the occurrence of the insured event. Any suggestion of financial weakness on the part of the insurance company could well spell its death-knell. Therefore, when it appears, that the assets of the Plaintiff are so very much more than would be required to pay-off the Defendant, if the liability is later confirmed, it is only proper that the relief sought be granted. I do therefore grant an interlocutory injunction to restrain the Defendant from instituting winding-up proceedings against the Plaintiff until the suit herein is heard and determined.

The costs of the application are awarded to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT ELDORET,**

**THIS 17TH DAY OF JANUARY, 2014.**

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**FRED A. OCHIENG**

**JUDGE.**