



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. CIVIL APPLICATION NO. 436 OF 2013
IN THE MATTER OF CONCORD INSURANCE COMPANY LIMITED (UNDER STATUTORY
MANAGEMENT)

AND

IN THE MATTER OF ORDERS BY A. MABEYA J ON 14TH MARCH 2013

AND

IN THE MATTER FOR AN APPLICATION FOR LEAVE TO COMMENCE INTERPLEADER
PROCEEDINGS AGAINST CONCORD INSURANCE COMPANY LIMITED (UNDER
STATUTORY MANAGEMENT)

GEORGE NGURE KARIUKI.....APPLICANT

Versus

CHARLES OSORO MAKONE,
THE STATUTORY MANAGER,
CONCORD INSURANCE COMPANY LIMITEDRESPONDENT

RULING

Leave to commence proceedings

[1] I am faced with an application dated 7th October, 2013, seeking;

- a) The leave of the Court for the Applicant to commence proceedings against the Respondent.
- b) To file such proceedings as shall be permitted by Court within twenty-one (21).
- c) Preservatory Orders to preserve:

a. The sum of Kenya Shillings Fifty One Million (Kshs. 51,000,000/=) held by M/s W.J Ithondeka & Co. Advocates pursuant to the Sale of all that property known as Land Reference Number 3734/809 (Original 3734/808/1); and

b. The Original Titles to properties known as Kajiado/Olchoro-Onyore/10490-10567, Kajiado/Olchoro-Onyore/10568-10711 and Kajiado/Olchoro-Onyore/10712-10803 (hereinafter referred to as suit properties) held by M/s Wakini Kiarie & Co. Advocates .

c. That the costs of this Application be in the cause.

[2] The application is premised upon two affidavits sworn by the Applicant, George Ngure Kariuki, on 7th October, 2013 and 6th June, 2014 respectively and the grounds set out in the body of the application. The Applicant's claim is that he injected capital into Concord Insurance Company Limited (hereinafter "the Company") in the form of the suit properties and cash in the sum Kshs. 35,000,000/= with the legitimate expectation that he would be allotted 6, 995, 000 shares in the Company. Shares were allotted to the Applicant. But a dispute arose out of said share allotment and was referred to arbitration by Mr. Justice G.V Odunga. The arbitral tribunal in its final award made on 28th May, 2012 by the Sole Arbitrator, the Hon (Rtd) Justice A. Ringera found the said allotment of shares to the Applicant was ultra vires and unlawful. The Applicant contended, therefore, following the award, he was entitled to reinstatement to the status quo ante and absolution from any loss, which meant a refund of the capital injection of Kshs. 35, 000, 000/= and return of the suit properties to the Applicant.

[3] The Applicant further contended that the Company's Board of Directors in a resolution made on 13th September, 2012 resolved to re-transfer the suit properties to the Applicant and to refund the cash he had injected to the Company, which resolution was lawfully passed by the Board. The Applicant deposed that he had written to M/s Wakini Kiarie & Co. Advocates, who acted on behalf of the Company in the transfer of the property known as LR/ No. 3734/809, on re-transfer of that property and the Kshs. 35, 000,000/=. Instead of doing so, the Advocates informed the Applicant that the Respondent had made rival claims to the cash and suit property and that they required an order of court to transfer the suit properties to the Applicant. In his submission, the Applicant stated the action of the Respondent was a violation of his constitutional right to property which can only be resolved in a suit against the Respondent, hence, this application for leave to file the intended suit. The Applicant is apprehensive he will suffer irreparable loss, if the Respondent obtains title to the suit properties, for; it is likely to dispose of the suit properties and utilize the proceeds of such sale to the detriment of the Applicant.

The Respondents opposed the application

[4] The Respondents opposed the application, filed grounds of opposition dated 11th October, 2013 and two Replying Affidavits sworn by Stephen Ligunya and Charles Osoro Makone sworn on 11th October, 2013 and 6th May, 2014 respectively. The Respondent believes the application before the Court was misconceived and lacked merit, and therefore an abuse of the court process. According to the Respondent, there was a Moratorium on the Company declared by the Statutory Manager on 6th February, 2013 which was yet to be lifted. Further, the court issued an order barring all proceedings against the respondent during the currency of the Moratorium. They submitted further; that the money held by M/s W.J Ithodeka and Co. Advocates pursuant to the sale of the property known as LR/ No. 3734/809 (Original 3734/808/1) was before the Hon. Justice Mabeya for determination and was therefore subjudice. They also urged a related argument that the issues raised by the Applicant are res judicata as they were fully canvassed and determined during the arbitration process. The Respondent further contended that the duty of the statutory manager was to trace and account for all the liabilities of the Company and not to dispose of assets, therefore, any claim by the Applicant against the Company must by law and of necessity await the end of the statutory period. As such the Applicant's fears were misguided and unfounded.

[5] The Respondent denied the validity of the Board resolution dated 13th September, 2013 as the same did not set the manner in which the sum of Kshs. 35, 000,000/= would be refunded. In addition, there were no legal and enforceable documents and or board resolutions before the court or in the Company's

records showing that the board resolved to borrow Kshs. 35,000,000/= from the Applicant or that the Applicant agreed to lend to the Company the amount being claimed in the instant application, or that the Board resolved to allot to the Applicant any shares with respect to his financing the capitalization of the Company. It was the submission of the Respondent that the court must be careful not to issue orders that may adversely affect the interest of policy holders and the economy of the country.

DETERMINATION

[6] Mr. Mbabu and Mr. Lungunya, Counsel for the Applicant and Respondent, respectively, made powerful submissions on this application. The submissions and affidavits filed contain sufficient material to determine this application. I have considered the said material and the rival submissions of the parties. According to Mr. Mbabu, the Court may grant leave to a person to institute proceedings against the Company where the Statutory Manager intends to act or acts unlawfully or against the interest of another party. In his submission, the Respondent was about to act against the interest of the Applicant with respect to the suit properties and the cash injected into the Company. It was therefore the argument of learned counsel to the Applicant that a Moratorium should not shield a statutory manager from rival claims over the properties and assets that the Applicant was trying to recover, since the Applicant had proved that he had interest in such assets. Mr. Mbabu therefore urged the Court to allow the application and orders sought.

[7] The learned counsel to the Respondent put forward equally powerful rejoinder and argued that any proceedings brought against the Company during the tenure of the Statutory Management may inhibit the Statutory Manager from carrying out his obligations. He added that the court cannot grant leave for the institution of the proceedings since the moratorium herein was still in place after it was extended by the Court. According to Mr. Lungunya, following the extension of the moratorium, the Court became *functus officio* on the issue of leave to institute proceedings. The learned Counsel holds the view that the Applicant can only come to court through the same suit in which the moratorium was issued and not by way of a separate suit. He also argued that the main role of the statutory manager was to trace and preserve the assets of the Company and this included any properties in dispute. The Respondent appealed to the Court to find that the balance of convenience favors the refusal of the application and urged the Court to deny the orders sought.

Issues

[8] From the arguments presented by parties and the pleadings, I should determine whether the court should: 1) grant leave for the Applicant to institute a separate suit against the Respondent; and 2) preserve the suit property. The necessity to apply for leave to commence suit against Concord Insurance (under statutory management) arises out of three situations. First; the Company is under statutory management which was declared in gazette notice no. 2194 dated 6th February 2013. Second; the statutory manager declared a moratorium on the payments by the said insurer to its policy holders and all other creditors for a period of 12 months. Third; on the 18th March, 2013, the Court granted an order whose effect is to bar all proceedings of whatever form against the Company. It is important to note the moratorium herein was extended by Havelock J on 4th February, 2014 and is in force at the time of this ruling.

Unique circumstances

[9] This case presents unique circumstances of law and fact. The Company in question is an insurance Company but under statutory management under the Insurance Act, Chapter 487 of the Laws of Kenya. The Statutory Manager was appointed by the Commissioner for Insurance under section 67C (2) of the Insurance Act and assumed the management control, and conduct of the affairs and the business of the Company. But I need to make a distinction; Statutory Management of a Company under the Insurance Act should not be confused with winding-up and liquidation of a Company under the Companies Act. The two are different processes. Liquidation should be understood within the process of winding-up a Company and is governed by PART VI of the Companies Act whereas Statutory Management is governed by the Insurance Act, and is an intermediate process of a temporary nature where a Statutory Manager appointed by the Commissioner merely takes over the management of the Company in place of

the Board of Director in order to determine whether the Company should be revived or liquidated. See section 67C (6) of the Insurance Act which requires the Statutory Manager to submit a report on the financial position and the management of the insurer with recommendations as to whether: - a) the insurer is capable of being revived; or b) the insurer should be liquidated. Statutory management is entirely run by the Commissioner of Insurance as the appointing authority. Also the purposes of the processes, statutory management and winding-up are different. But under section 123 of the Insurance Act, statutory management may graduate to winding-up if; 1) the Report of Statutory Manager made under section 67C (6) of the Insurance Act recommends the Company should be liquidated; 2) the Commissioner of Insurance on the basis of the report of the Statutory Manager makes recommendations for liquidation of the Company; 3) the Board of Directors of the Company makes a decision on the recommendation that the Company should be liquidated; and 4) the Commissioner files a petition to wind-up the Company in Court under section 123 of the Insurance Act. Section 123 of the Insurance Act, however, recognizes a petition by the Commissioner is not necessary if there is already a winding-up of an insurance Company by the Court. Of great significance, winding-up of an insurance Company commenced under section 123 of the Insurance Act is governed by the Companies Act. I say this because there has been a misconception that a winding-up of an insurance Company under section 123 of the Insurance Act is a different type of winding-up from the other companies.

[10] The entire foregoing rendition is necessary in this case because the power of the Court to grant leave to an Applicant to institute legal proceedings against an insurance Company which is under statutory management is not derived from section 228 of the Companies Act but rather from section 67C (10) of the Insurance Act. The said section empowers the Statutory Manager to declare a moratorium on the payment by the insurer of its policy-holders and other creditors for purposes of discharging his responsibility. But it should be understood that a moratorium by the Statutory Manager will need the superadded authority of the Court of stay of legal proceedings against the Company as is the case here. The moratorium at first instance only postpones the payment of a debt or performance of some obligation towards policy-holders or creditors of the Company. It is the Court, on the application of the Statutory Manager, which stays particular or any or all forms of proceedings against the Company during the tenure of lawfully declared moratorium. That tethering of the right to seek redress through court, is what confers the Court the general power to review or vary such of its order and grant leave. The leave of Court in a sense creates an aperture in the stay order and allows a party access to justice. For clarity, the words leave or permission of Court inherently bear connotation of review or variation, and I doubt, where one applies for leave, he will be required to use the terms "review" or "vary" in order to receive a remedy from a court of law. Such strict and technical approach has been exorcised from our judicial sense and dispensation of justice by Article 159(2) (d) of the Constitution. In this case, Mabeya J on 18th March 2013 extended the moratorium herein and specifically in order number 4 stayed proceedings against CONCORD INSURANCE COMPANY in the following manner:

“(4) THAT all proceedings whatever nature or form against Concord Insurance Company Limited (under Statutory Management) be and are hereby barred during the currency of the moratorium declared by the Statutory Manager.”

This order of stay of proceedings is the one the Applicant seeks variation to open the way for him to file suit for a claim of refund of his money as well as re-transfer of his property by the Company. I have held that leave to institute proceedings where a moratorium has been ordered is permissible under the Insurance Act and the Court should be guided by the law on review or variation of court orders. I should, however, state that the Insurance Act does not provide the criteria or principles which should guide the discretion of the Court in granting leave to commence proceedings against the Company. I also think there is a dearth of judicial authorities on the subject except in the case of **IN THE MATTER OF CONCORD INSURANCE COMPANY [2014] eKLR** leave was granted to a third party to file suit against the policy-holders- which may be slightly different circumstances. However, despite lack of criteria which governs the grant of leave, I think, the practice on grant of leave to institute proceedings under the Insurance Act should follow after the one prescribed under section 228 of the Companies Act. Therefore, the principles which guide the Court in determining whether to grant leave to institute proceedings under section 228 of the Companies Act would apply in this case with such adaptation as is necessary. This approach is supported by the constitutional policy that there should be no wrong suffered

without a remedy.

Grant of leave

[11] Leave to institute proceedings against a Company where stay of proceedings has been ordered is premised upon certain conditions being met by the Applicant. There are ample judicial authorities on this subject. The over-arching principle is a constitutional one; the right to have a dispute resolved in a court of law. This called the right of access to justice and to fair hearing enshrined in Article 48 and 50, and the latter is inviolable as per Article 25 of the Constitution. Leave to institute proceedings in the face of a moratorium is, therefore, the enabler of the right of access to justice. But, the Court must be satisfied that sufficient cause has been shown to open up the moratorium and grant leave to institute proceedings. The discretion is exercised on a case to case basis. Sufficient cause will depend on a number of factors; and although the list is not to be and is not exhaustive, the following matters are important consideration in an application for leave to institute proceedings:

- a) ***The strength of the applicant's case:*** - Here, the nature and merits of the case should be considered. This ground also encompasses the seriousness of the issue or issues at hand.
- b) ***Possibility of the resolution of the dispute during the course of the Statutory Management;***
- c) ***Whether the resolution of the dispute is necessary for the carrying out of the Statutory Management;***
- c) ***The nature of the proceedings and its impact on the Statutory Management; and***
- d) ***Delay in commencing the proceedings.***

The strength of the Applicant's case

[12] The strength of the Applicant's case is the linchpin of an application for leave to institute proceedings against the Company. The strength of the Applicant's case must be considered in light of rights or liabilities which the intended proceeding or action is set to determine. The foundation thereof is the factual situation of the case. In this case, the Applicant is not a policy-holder and it doubtful whether he is a creditor. His relationship with the Company started when he injected about Kshs. 35, 000,000/= into the Company's capitalization and also transferred three properties known as: 1) **Kajiado/Olchoro-Onyore/10490-10567**; 2) **Kajiado/Olchoro-Onyore/10568-10711** and 3) **Kajiado/Olchoro-Onyore/10712-10803** to the Company on the understanding that he would be allotted 6,955,000 shares in the Company. However, the allotment of shares pursuant to the said agreement was declared ultra vires the Company in the final arbitral award made by Ringera J (retired), thus, unlawful, null and void. Accordingly, the said allotment of shares was expunged from the Company's record. The Arbitral award, however, did not decide on whether or not the Applicant should be refunded the capital injection of Kshs. 35, 000, 000/= or whether the suit properties transferred to the Company should be re-transferred to the Applicant. Ownership of these properties is an outstanding legal issue. Therefore, I am not able to accede to the argument by the Respondent's counsel that the issues raised herein are res judicata. The argument is so settled. The next question is: What is the fate of the funds and the suit properties?

[13] Following the finding of Ringera J (retired) in the arbitral proceedings, the entire agreement for allotment of shares became nothing in law and the law sees it as if it never took place. The words of Lord Denning in the case of **MCFOY v UNITED AFRICA CO. LTD, 1961] 3 ALL E R 1169 AT 1172**, are quite apt when he stated that anything that is said to be a nullity is void *ab initio* and is as though it never existed. And that nothing can be done subsequently based on what is a nullity because one cannot put something on nothing and expect it to stay there. It will collapse. The funds injected to the Company and the properties which the Applicant had transferred to the Company were on the basis of the agreement which was declared a nullity. Questions abound- and I will not answer them at this preliminary stage- whether the Company can claim any ownership in the circumstances of the case or whether any

proprietary interest on those properties passed from the Applicant to the Company in the circumstances of this case. And better still, whether the Applicant was divested of ownership of his property where its original acquisition is not in question and it has not been claimed or found that he acquired the properties unlawfully. After considering these questions, prima facie, the Applicant's case is based on a violation of a right to property under Article 40 of the Constitution which makes his case very strong and exceptional. Using any reasonable measure, the issues being raised by the Applicant are not frivolous or hopeless; they are serious issues. But before I close on this issue, let me determine the other grounds.

Possibility of the resolution of the dispute during the course of the Statutory Management

[14] The Respondent argued that the responsibility of the Statutory Manager is to trace and account for all the liabilities of the Company and not to dispose of assets; therefore, any claim by the Applicant against the Company must by law and of necessity await the end of the statutory period. As such the Applicant's fears that he will suffer prejudice were misguided and unfounded, the Respondent argued. Should the Applicant await the tenure of the Statutory Management to run its course? The argument by the Respondent is seemingly attractive except it is short of one thing; it does not offer the Applicant any guarantee that he will get back his property. It becomes more stealth when the Respondent denies the propriety of the Applicant's entitlement to the properties in question as well as the resolutions on the refund or re-transfer of the funds or properties respectively. The Statutory Manager has not given any report or recommendation which is favourable to the Applicant. In such circumstances, it becomes very difficult to fathom ***Possibility of the resolution of the dispute during the course of the Statutory Management***. But I will say something more about this aspect. The list of responsibilities of the Statutory Manager under section 67C (5) & (6) of the Insurance Act are not to be and are not exhaustive in any way. Other law especially on trust will regulate the fiduciary position of the Statutory Manager to all persons who are involved or connected to the Company. For instance, where the Company has received property from another and has only possession of but not title to the property, which is the case here, is responsible for keeping it safe until it is returned to the owner. Such is Bailment and the Statutory Manager assumes obligations of the bailor. In tracing, identifying, collecting and preserving the assets of the Company, the Statutory Manager invariably should be able to also trace, identify, preserve and return any property which the Company has possession of but does not belong to it. The latter aspect completes the work of the Statutory Manager. Whereas I agree with the Respondent that selling of the assets of the Company is not a responsibility of the Statutory Manager, but what I see in practice in Kenya is on the contrary; some Statutory Managers who have been appointed to manage the Company for purposes of revival have most of the times sold off or literally cannibalized the assets of the Company to the detriment of the policy-holders, creditors and shareholders. All said and done, this is not a case where a Court of law would commit the Applicant to the decisions of the Statutory Manager. I reject the argument that he should wait the tenure of the moratorium to run its course. The issues raised will only be resolved in a judicial inquiry unless the Company makes an impeachable resolution in accordance with the report and recommendation of the Statutory Manager and the Commissioner of Insurance as provided for in the Insurance Act. A Moratorium under the Insurance Act should not be used to defeat rights of a third party to claim properties which he says are his except that the Company is holding them unlawfully. It bears repeating what was stated in the case of **IN THE MATTER OF CONCORD INSURANCE COMPANY [2014] eKLR**, albeit in different circumstances, that;

“Section 67C (10) of the Insurance Act was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance Company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance Company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the Company from payments by the insurer (Company) of its policy-holders and other creditors, and not necessarily to the policy-holders or other creditors against liability from third parties.” (Emphasis added)

Whether the resolution of the dispute is necessary for the carrying out of the Statutory Management;

[15] This question has been answered by what I have already stated above that:

In tracing, identifying, collecting and preserving the assets of the Company, the Statutory Manager invariably should be able to also trace, identify, preserve and return any property which the Company has possession of but does not belong to it. The latter aspect completes the work of the Statutory Manager.

The nature of the proceedings and its impact on the Statutory Management

[16] The nature of intended proceedings is recovery of property from the Company which it is claimed does belong to the Company but to the Applicant. Statutory Management of the Company cannot be complete unless the issue of ownership of the suit properties is determined by the Court or resolved through a resolution of the Company on the recommendation of the Statutory Manager and the Applicant accepts the resolution. Paragraph 15 above has a direct bearing on this question, and resolution of the issues herein is most desirable and necessary for effective management of the Company.

Delay in commencing the proceedings.

[17] Nothing would make the Court consider the Applicant is an indolent suitor. He has been enthusiastic in the quest for remedy of his grievances and he has taken necessary steps in good time. There is no delay in bringing this application.

In the final analysis

[18] The Applicant's case is a strong one and of a nature which can only be resolved through a judicial inquiry; hearing and in a Court of law. The proposed action is not likely to affect the Statutory Management adversely. In fact judicial determination of issues in the proposed action is necessary for the Statutory Management and/or the issues at large between the parties as those issues concern ownership of the suit properties. Accordingly, I allow the Applicant to file the proposed suit against the Company within 30 days. Meanwhile, the Statutory Manager or his successors shall trace, identify, collect to his custody and preserve the suit properties herein, i.e. ***1) the sum of Kenya Shillings Fifty One Million (Kshs. 51,000,000/=) held by M/s W.J Ithondeka & Co. Advocates pursuant to the Sale of all that property known as Land Reference Number 3734/809 (Original 3734/808/1); and 2) the Original Titles to properties known as Kajiado/Olchoro-Onyore/10490-10567, Kajiado/Olchoro-nyore/10568-10711 and Kajiado/Olchoro-Onyore/10712-10803 held by M/s Wakini Kiarie & Co. Advocates.*** The Respondent shall bear Costs of the suit.

Dated, signed and delivered in open court at Nairobi this 29th day of September, 2014

F. GIKONYO

JUDGE