



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 33 OF 2009

BLUE SHIELD INSURANCE COMPANY LTD.....PLAINTIFF

Versus

ALICE W. KARIUKI.....1ST DEFENDANT

MORTGAGES BANK LTD.....2ND DEFENDANT

RULING

Power of Statutory Manager to appoint advocates

[1] I find it to be problematic for one to argue on one hand, that, a Statutory Manager under the Insurance Act does not have power to appoint other advocates in replacement of those on record in suits existing prior to his appointment. And, on the other hand, that, for purposes of **FRESH SUITS** the Statutory Manager can commence action by appointing new advocates. There is a contradiction there which is what the court has been called upon to resolve and surely it will.

[2] The following issue was formulated by the court with the consent of the parties for determination:

Whether, the Statutory Manager by the name of Eliud Muriithi had power under his terms of reference to appoint M/S Wanjao & Wanjau Advocates to act for the Plaintiff in place of M/S Malonza & Company Advocates.

[3] The firm of Wanjau & Wanjau Advocates, Malonza & Co Advocates as well as the 1st Defendant filed submissions herein. I have considered the arguments therein. Parties also filed judicial authorities which are to the point and I have considered all of them. Wanjau & Wanjau Advocates say they were properly appointed by the Statutory Manager of the Plaintiff Insurance Company, which is under receivership. The appointment was made pursuant to the Terms of Reference as well as the powers and responsibilities of the Statutory Manager under the Insurance Act and specifically section 67C. Therefore they should be allowed to come on record as advocates for the plaintiff. The 1st Defendant supported the application by Wanjau Advocates to come on record in place of Malonza & Company Advocates based on the same reasons advanced by Wanjau Advocates. She however, popped out a small fact; that the Statutory Manager deposed that Malonza & Company Advocates were not giving him updates or the status of the case and had even discovered that the said firm of advocates had received Kshs. 500,000 and they did not inform or account to him.

[4] Malonza & Company argued that the Terms of Reference given herein do not in any manner, express or implied, give the statutory manager power, mandate or jurisdiction to remove Advocate who were previously acting in existing suits. Equally the terms of reference aforesaid do not donate expressly or by implication any mandate, power or jurisdiction to the statutory manager to appoint other advocates in replacement of those on record in suits existing prior to his appointment as such. But, for purposes of FRESH SUITS the statutory manager can commence action by appointing new advocates. Apart from the terms of reference aforesaid, the statutory manager can only derive his powers, duties and responsibilities from Section 65c (5) of the Insurance Act. On the other hand a statutory manager appointed under Insurance Act cannot equate himself to a Receiver Manager appointed under the Companies Act. The two statutes are different hence powers and duties of the Managers under the respective statute ought to be interpreted differently so as to achieve the objects of the respective statute. In the circumstances of this case, the statutory manager should be seeking from Malonza & Co. Advocates monies received on account of execution of consent decrees in the two matters or an account which monies will be remitted to him upon agreeing on the statement of account. The conduct of the statutory manager is a clear breach and violation of the Terms of Reference bequeathed to him. Thus the application for change of Advocates is an abuse of the court process disguised as an instrument of recovering the monies due contrary to the Terms of Reference. Allowing the application will amount to empowering the statutory manager to act ULTRA VIRES the terms of reference. The orders sought in the application do not amount to any act of recovery of money due to the company as the Decrees have already been executed and monies are being held by the Advocate. Such recovery from the advocate can only be initiated by a different action and not in the current proceedings. Contracts (including provision of legal services) entered into by the Plaintiff and other parties did not die upon it being placed under statutory management. Instructions continue until there is a proper change of Advocates under Order 9 Rule 9 of the Civil Procedure Rules but on costs due to M/s Malonza & Co. Advocates addressed first. The decisions cited by M/s. Wanjao & Wanjau Advocates are not applicable to circumstances of this case and are distinguishable. Thus the Application should be dismissed.

The determination

[5] The subject of powers and responsibilities of a Statutory Manager under the Insurance Act, Chapter 487 of the Laws of Kenya has sufficiently been decided upon in a great number of cases. There is, therefore, no dearth of judicial authorities in this subject; they are a legion but I will not multiply them except I am content to cite a few just to emphasize the correct position of law. But, as it has been said time and again by legal practitioners that there is nothing clear in law, even this subject where there is no shortage of judicial authorities is still under sharp and intense legal discourse as is evidenced in the submissions herein.

The Issue

[6] The issue for determination as formulated by the court with the consent of the parties is as hereunder:

Whether, the Statutory Manager by the name of Eliud Muriithi had power under his terms of reference to appoint M/S Wanjao & Wanjau Advocates to act for the Plaintiff in place of M/S Malonza & Company Advocates.

The law: statutory and judicial

[7] The relevant law is Section 67C of the Insurance Act. The starting point is section 67C (2) (i) which provides that the Commissioner may, with the approval of the Board -

“...appoint a competent person familiar with the business of the insurer (in this Act referred to as “a manager”) to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the

exclusion of its Board of Directors, including the use of its corporate seal:

And some of the responsibilities of the Statutory Manager so appointed are set out in Section 67C (5) of the Insurance Act which provides that;

The responsibilities of a manager shall include-

- (a) ***Tracing, preserving and securing all the assets and property of the insurer;***
- (b) ***Recovering all debts and other sums of money due to and owing to the insurer;***
- (c) ***Evaluating the solvency and liquidity of the insurer;***
- (d) ***Assessing the insurer's compliance with the provisions of this Act and regulations made or directions issued thereunder;***
- (e) ***Determining the adequacy of the capital and reserves and the management of the insurer and recommending to the Commissioner any restructuring or reorganization which he considers necessary and which, subject to provisions of any other written law, may be implemented by him on behalf of the insurer; and***
- (f) ***Obtaining from any former principal officer, director, secretary, officer or employee of the insurer any documents, records, accounts, statements, correspondence or information relating to its business.***

[8] I should state some few preliminary albeit important legal matters. The Terms of Reference given to a Statutory Manager must draw and not derogate from the Act. The Terms of Reference given to the Statutory Manager fully complied with the law. Equally, I wish to state that, the list of responsibilities in section 67C (5) of the Act is not exhaustive. Back to substantive matters. The phraseologies “... ***to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its Board of Directors, including the use of its corporate seal...***” and “...***Recovering all debts and other sums of money due to and owing to the insurer***” have received sufficient judicial pronouncement. See the renditions in the cases below:

As per Kimaru J, who, in interpreting the above section in the case of **Piedmont Investments Limited vs. Standard Assurance Kenya Ltd (Under Statutory Management) Ufanisi Capital and Credit Ltd, Superior Fones Communications Ltd Civil Case 806 of 2003** observed that;

“...The powers and responsibilities to be exercised by the Statutory Manager are all the powers of the institution (Charthouse Bank Ltd) to the exclusion of its boards of directors including the right to appoint and fire an advocate to act on behalf of the bank. It means the statutory manager was appointed in order to protect the interests of the bank, its depositors and other creditors, thus the law allow the statutory manager in protecting such interest to have the full authority and capacity to appoint advocate to act on her behalf and to act for the institution”.

Again as per Kimaru J in the case of **Charthouse Bank vs. Nation Media Group Ltd & 3 Others [2006] eKLR** where he held that;

“...it is only the statutory manager who had legal capacity to institute or proceed with a suit on behalf of the institution that had been placed under statutory management...”

As per Warsame J (as he then was) in the case of **Kenya Commercial Bank Limited vs. Charterhouse Bank Limited [2007] eKLR** that;

“...In the premises, I hold that the appointment of M/s Ochieng, Onyango, Kibet and Ohaga Advocates is proper and legitimate. They are properly on record for the respondent bank. I too hold the statutory manager has properly exercised her powers and responsibilities in employing and/or appointing the firm of M/s Ochieng, Onyango, Kibet and Ohaga Advocates. Having been properly appointed by the Statutory Manager in exercising of her statutory powers conferred by the Banking Act they ought to remain on record. That choice by the statutory manager has to be respected by the court, as it is no business of the court to appoint Advocates for the parties. Without doubt the firm of Odera Obar & company Advocates must give way...”

Warsame J in the above case of **Kenya Commercial Bank Limited vs. Charterhouse Bank Limited** continued:-

“The statutory manager was sought to be introduced simply because she was appointed the statutory manager of the bank. She in essence assumed the management, control and conduct of the affairs of the bank to the exclusion of its Board of Directors. That situation has not changed, despite the attempt by Mr. Odera Obar Advocate to introduce extraneous matters to this litigation. In my view the experimental and rather exotic arguments of Mr. Odera Obar was plainly and perfectly answered by Justice Waweru in his ruling dated 5th January 2007. Faced with the peculiar, ingenious and exoteric submissions of Mr. Odera Advocate, the judge had this to say:

“I have already held that the management control and conduct of the affairs and business and exercise of all the powers of the defendant to the exclusion of its board of directors must include defending any court proceedings that may be brought against the defendant including the present proceedings. In other words, the statutory manager is the proper person to defend the present proceedings and not the directors of the defendant. The statutory manager is thus already a party in the proceedings and cannot be said to be a person not already a party in the suit... As already observed, it is the duty of the statutory manager to defend the suit, should she be so minded. Equally it will be her duty to abide by any order or decree that may be issued in favour of the Plaintiff”.

Further rendition by Warsame J which is quite useful that:-

“It is my humble view that the issue of the management, control and conduct of the affairs and business and the exercise of all the powers of the respondent has already been agitated and conclusively determined. It is the Central Bank of Kenya which placed the respondent Bank under statutory management and appointed Miss Rose Detho as the Statutory Manager with all the statutory powers. In discharging her responsibilities she is empowered to appoint an Advocate in these proceedings to assist and defend in the performance of her mandate and duties.”.

Last but not least, Mabeya J in the case of **Sammy M. Makove, Commissioner of Insurance vs. Kenya Reinsurance Corporation (Statutory Manager) And United Insurance Company Limited Miscellaneous Civil Suit 545 Of 2006** stated that;

“.....Secondly, the manager has also complained of Advocates who have either overcharged or withheld monies due to the company, the applicant and or the manager in my view, have power to commence proceedings for recovery of such sum if not to have the fees taxed by the court....”

[9] It is clear from the foregoing judicial authorities and statutory provisions that, a Statutory Manager appointed under section 67C (2) of the Insurance Act in essence assumes the

management, control and conduct of the affairs and business of the Insurance Company to the exclusion of its Board of Directors and the use of its seal. The Statutory Manager steps into the shoes of the Board of Directors and makes all the decisions which the Board would make were it not for the statutory management. Such decisions include filing or defending suit, appointing advocates to represent the company and fire advocates already representing the company. I wish also to add that recovery of debts owed to the company includes recovery through litigation by duly appointed advocates. What I find completely irreconcilable, and I sated this in the opening part of this ruling, is the submission by Malonza & Company Advocates that:-

***“...the Terms of Reference given herein do not in any manner, express or implied, give the statutory manager power, mandate or jurisdiction to remove Advocate who were previously acting in existing suits. Equally the terms of reference aforesaid do not donate expressly or by implication any mandate, power or jurisdiction to the statutory manager to appoint other advocates in replacement of those on record in suits existing prior to his appointment as such. But, for purposes of FRESH SUITS the statutory manager can commence action by appointing new advocates.*”**

These submissions contain a sharp contradiction because, there cannot be a power to appoint advocates for fresh causes only which is different power from firing the existing advocates unless the deed of appointment expressly withholds the power to fire existing advocates. The Statutory Manager holds the same power as any other person who is capable to hire and fire advocates in their causes. And the distinction Malonza & Co Advocates is trying to make between appointment of advocates for purposes of fresh causes and existing advocates has no backing in law or in the deed of appointment; I take it to only causes a temporary shock in this judicial discourse. And, I think, it would be a preposterous proposition in law if it can hold even for the shortest of moments. The only limitation on changing an existing advocate in a case such as this where judgment has been entered is placed by Order 9 rule 9 of the Civil Procedure Rules; it requires such change of advocate to be effected by the Court, either upon application with notice to all the parties, or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The same rule gives such application for change priority so that the issue is resolved first and without causing delay in the matter. The rule cures mischief by unscrupulous clients who would change advocates without notice so as to avoid their obligations towards those advocates. However, the consent by the outgoing advocate should not be unreasonably withheld or used to impede the fair trial of the case, access to justice or right to legal counsel of own choice. I observe in this case, Malonza & Company Advocates have been accused by the Statutory Manager of failure to update him on the status of this case. Those allegations were not controverted. Other than on the basis of the law, but which I have found was misconceived, the said advocates have resisted the application by Wanjau Advocates for leave to come on record on the basis that the decrees herein having been executed, the only feasible thing they suggested was for the Statutory Manager to simply ask for the money to be paid over after accounts are settled between the said advocates and the Statutory Manager. Lack of update or payment of money received by the said advocates is the very basis of the complaint by the Statutory Manager and his decision to change them as the advocates for the plaintiff company. And whether appointment of new advocates is the apt or diligent way of bringing this case to logical conclusion is not a matter for the advocates to decide. The appointing authority, i.e. the Commissioner for Insurance and the Board will, when a report is presented under section 67C (6) determine whether the Statutory Manager ***“discharged his duties with diligence and in accordance with sound insurance, actuarial and financial principles and, in particular, with due regard to the interests of the insurer, its policy-holders and the insuring public in general”*** as required by section 67C (4) of the Insurance Act. The policy-holders or the insuring public in general may also initiate proceedings against the Statutory Manager who did not act diligently in accordance with the law but still, such suit will have to surmount the protective provisions in the Act against personal liability of the Statutory Manager in the discharge of his duties. That notwithstanding, the fear that the Statutory Manager may not be acting diligently does not qualify as a reason for an advocate to resist a change of advocate.

[10] But before I close, there is one very important legal point which Malonza & Company

Advocates brought across: that a statutory manager appointed under Insurance Act cannot is not equal to a Receiver Manager appointed under the Companies Act. The two statutes are different hence powers and duties of the Managers under the respective statute ought to be interpreted in accordance with the parent Act so as to achieve the objects of the respective statute. On this see a work of the court in the case of George Ngure Kariuki vs. Concord Insurance Company (Under Statutory Mngement) [2014] eKLR that:

Unique circumstances

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.

[11] The upshot is that I allow the application by Wanjau & Wanjau Advocates Motion dated 6th November, 2013 and grant them leave to come on record for the plaintiff in place of Malonza & Company Advocates. I make no order as to costs.

Dated, signed and delivered in court at Nairobi this 28th day of November 2014

F. GIKONYO

JUDGE