



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 67 of 2012**

**IN THE MATTER OF THE INSURANCE ACT, CAP 487**

**AND**

**IN THE MATTER OF UNITED INSURANCE COMPANY LIMITED  
(UNDER STATUTORY MANAGEMENT)**

**SAMMY M. MAKOVE,**

**COMMISSIONER OF INSURANCE .....1<sup>ST</sup> APPLICANT**

**KENYA REINSURANCE CORPORATION**

**(STATUTORY MANAGER) .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**KIRAGU HOLDINGS LIMITED..... RESPONDENT**

**RULING**

1. United Insurance Company Ltd (hereinafter “UIC”) was a household name in public service insurance industry in the 1990s. One would not then fail to mention UIC when talking of public service insurance. However, as fate could have it, the number of claims arising out of accidents in our notorious roads depleted its coffers and on 15<sup>th</sup> July, 2005, Sammy M. Makove, the Commissioner of Insurance (hereafter “the 1<sup>st</sup> Applicant”) appointed Kenya Reinsurance Corporation (hereinafter “Kenya Re”) as the Statutory Manager under Section 67C of the Insurance Act, Chapter 487 of the Laws of Kenya (hereafter “the Act”). As at that time, it would seem UIC had enough assets which if prudently realized would have left it up, sound and running. Its immovable assets run into billions. However, the litigation that followed could not allow anything meaningful to take place. That management was severally extended until 14<sup>th</sup> March, 2012 when the 1<sup>st</sup> Applicant made yet another application for such extension. In a ruling delivered on 28<sup>th</sup> March, 2012 this court expressed its extreme displeasure with the way the statutory management had so far been carried out. However, for reasons given, the same was extended with tight conditions.

2. On 4<sup>th</sup> April, 2012, Kiragu Holdings Limited (hereinafter “the 1<sup>st</sup> Interested Party”) one of the shareholders of U.I.C took out a motion on notice. In the said motion expressed to be brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Section 67 C of the Insurance Act, the 1<sup>st</sup>

Interested Party sought orders for the revocation of the appointment of Kenya Re as the statutory manager of UIC and in its place appoint one Mr. Nguru Wachira. It also sought an order that the new statutory manager, in addition to carrying out the statutory duties under Section 67C of the Act do also undertake a forensic audit of the tenure of Kenya Re as the statutory manager of UIC. A prayer to stay the sale of the assets of UIC pending the hearing of the application was declined because the court felt that any further delay in the realization of the assets and settlement of the claims was prejudicial not only to the company and the claimants but would also be against public policy of expeditious disposal of disputes.

3. The grounds upon which the application was brought were set out in the body of the motion, the Supporting and Further Affidavit of Peter J. Kiragu Mwangi sworn on 03/04/2012 and 04/05/2012, respectively. It was contended on behalf of the 1<sup>st</sup> applicant, had obtained orders extending the statutory management of UIC without disclosing to the court the material breaches of Section 67C committed by Kenya Re during the six and a half (6½) years period it had been the statutory manager, that it was proper to replace Kenya Re as the Statutory Manager of UIC and undertake a forensic audit of its tenure as it had failed and neglected to discharge its duties under Section 67C of the Act, that it had conducted itself in a manner prejudicial to the company, its policy orders and the general insuring public by selling strategic assets of the company and failing to apply the proceeds therefrom to the benefit of the company or as directed by the applicant, that it had contravened Section 67C (10) of the Act, that it was paying itself fees and expenses of Kshs.2million per month and that the applicant had misled the court into extending the statutory management of UIC by Kenya Re.

4. In the said Affidavits, Peter J. Kiragu Mwangi deponed that Kenya Re had failed to discharge its duties in terms of Section 67C of the Act and had instead mis-conducted itself as follows:-, that the alleged lack of documentation that had delayed the management was caused by Kenya Re itself in the negligent and haphazard manner in which it took over the management of UIC on appointment, that the United Towers belonging to the company had been sold for Kshs.242million out of which a sum of Kshs.7,260,000/- had been paid out corruptly leading to criminal prosecution of the officials of Kenya Re in HCCC No.6 of 2009 which is now pending in a subordinate court, that Kenya Re had connived with Kenya Commercial Bank for sale of some property in breach of the moratorium declared on 15/7/07 in Gazette Notice No.6821, that Kenya Re had used a list of unverified claims of Kshs.2.3billion for the 1<sup>st</sup> Applicant to institute a winding up cause No.2 5 of 2006 to wind up some of the properties of UIC were sold without being valued and that the applicant had admitted in his affidavit of 14/3/12 that Kenya Re had sold UIC's properties totaling Kshs.252million which was used to offset day today running of the company and never invested the funds in government treasury bills as directed by the 1<sup>st</sup> Applicant on appointment.

5. That the Applicant and Kenya Re were not interested in carrying out their mandate under Section 67C of the Act in that, between 31/08/06 and 06/05/2010 they were actively engaged in an effort to wind up UIC, that when that failed and the shareholders and directors of the company were involved for in UIC between 06/05/2010 and 26/02/2011 the effort of tracing and preserving assets and verifying genuine claims with a view to reviving the company were accomplished. He produced various reports which in his view were available to the 1<sup>st</sup> Applicant but the latter had not disclosed the same to court on 14<sup>th</sup> March, 2012. Mr. Kiragu expressed his apprehension that if Kenya Re was left to continue with the statutory management, the intention of Parliament as envisaged in Section 67 C will not be met and that it was proper to appoint Mr. Nguru Wchira as the new statutory manager in the stead.

6. Mr. Rugo learned Counsel for the 1<sup>st</sup> Interested Party submitted on all the prayers including the one for stay. He submitted that Section 67C(5) of the Act did not permit Kenya Re to realize any of the assets of UIC except to trace, secure and preserve the assets of that company, that the 1<sup>st</sup> Applicant had wrongly expanded Kenya Re's mandate to include realization of the company's assets with the condition that it be invested in government securities, that what was required was between Kshs.200M and 300M to re-liquidate the company, that the 1<sup>st</sup> Applicant had admitted failure to disclose material facts to the court including the various reports disclosed to him, that for seven (7) years since appointment, Kenya Re had been profiteering on UIC without discharging its duties under Section 67C of the Act, that such profiteering amounted to Kshs.204M. That the Applicant had lied in an affidavit filed in the Court of Appeal in 2008 wherein he had stated that Kenya Re had finalised its duties as per law but had continued

to charge management fees even after that date. Counsel submitted that the court has jurisdiction under Article 165 of the Constitution to grant the orders sought. He urged that the application be allowed.

7. Kiki Investments Ltd and Mumbu Holdings Ltd also shareholders of UIC participated as 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, respectively. They were represented by the firm of W.J. Ithondeka & Company. In a Replying Affidavit sworn by George Ngunjiri Kariuki on 18<sup>th</sup> May, 2012, they contended that the 1<sup>st</sup> Applicant had acceded to the shareholders being involved in the statutory management through membership in the workings of the working committee, that the company's assets had been shown to exceed Kshs.1,371,631,067/- by a report of Deloitte and touché dated 31/12/2010, that it had been envisaged in their report that within one (1) year immovable properties of the company would be realized and thereby revive UIC. They contended that the departure between the 1<sup>st</sup> Interested Party themselves was the insistence of the former that the statutory management of the UIC be continued by another manager to audit the ills of Kenya Re, that they were opposed to the appointment of a different statutory manager as Section 67C of the Act empowered the 1<sup>st</sup> Applicant to appoint a statutory manager for purposes of preservation of assets of the company for the benefit of the public.

8. Curiously however at the hearing, Ms. Ithondeka who appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties did not urge the case of her clients as above. She supported the submissions of Mr. Rugo to allow the application of the 1<sup>st</sup> Interested Party. She submitted that, the original intention was to revive UIC but Kenya Re had engaged in acts of liquidating it. She referred to the documents contained in Mr. Mumut Sialo's Replying Affidavit wherein Kenya Re recommended the winding up of UIC based on a qualified report on unverified claims. She termed this as bad faith. She submitted that having condemned UIC to a winding up process, Kenya Re should not be allowed to take up ownership of the revival process that Kenya Re had wrongfully excluded the shareholders of UIC from the programme and was acting contrary to Article 10(c) of the Constitution of Kenya. She urged that Kenya Re be made to account for its actions.

9. Mr. Harrison Kinyanjui filed a Replying Affidavit on behalf of policy holders. The Replying Affidavit was sworn by Simon Kimutai on 14<sup>th</sup> May, 2012. In that affidavit, it was contended that the policy holders had filed HC Misc No.1345 of 2005 and obtained orders stopping the sale of the assets of UIC, that these proceedings should have been commenced in HC Misc 545 of 2006 and they are therefore an abuse of the court process, that it is too late now to appoint a new statutory manager. That the appointment of the statutory manager is a statutory duty and it was not clear how the procurement of the proposed manager was arrived at.

10. Curiously again, the submissions of Mr. Kinyanjui went contrary to what was deponed by his clients in the aforesaid Replying Affidavit. He submitted that since there was a judgment in HC Misc 1345 of 2006 stopping the sale of the assets and this had not been disclosed to the court, the application by the 1<sup>st</sup> Interested Party should be allowed. He submitted that it is only fair that the shareholders be involved in the process of revival. He urged that the application be allowed.

11. The application was opposed by the 1<sup>st</sup> Applicant and Kenya Re vide the Replying Affidavit of Sammy M. Makove sworn on 18/04/12 and the Further Replying Affidavit of Mumut Ole Sialo sworn on 29<sup>th</sup> April, 2012. It was contended by the 1<sup>st</sup> Applicant and Kenya Re (hereinafter collectively referred to as "the Respondents") that the application was bad in law for having been filed without leave of court. That the 1<sup>st</sup> Applicant's mandate under the law was to promote the insurance sector, that that is the reason he had acceded to the shareholders request to be included in an ad hoc committee exploring the possibility of reviving UIC, that the orders sought would have the effect of frustrating the work so far done by Kenya Re. It was further deponed that the issues raised presently had been raised in previous suits, namely **NBI HCCC Nos.714 of 2007, HC Misc 1345 of 2005 (OS), HCCC No.1415 of 2005 (OS), WU petition No. 22 of 2006, HCCC No.418 of 2008, HCCC No. 748 of 2009 and Anticorruption case No. 6 of 2009**. It was further deponed that Kenya Re is a sound Re-insurer, that as at the time of placement under statutory management, the charged properties of UIC did not form part of its assets, that Kenya Re had fast-tracked the recovery efforts from debtors. The sum total of the Replying and Further Affidavits of Mumut Ole Sialo was to deny each and every allegation by the 1<sup>st</sup> Interested

Party. Indeed he gave long explanations on each of the allegation leveled against Kenya Re.

12. Mr. Milimo, learned Counsel for the Respondents framed a total of 26 issues which in his view fell for determination in these proceedings. He submitted that the Interested parties having not sought and or granted leave to be enjoined in these proceedings, the application was a nullity. That the issues raised in the application were wholly or substantially in issue in previously filed suits and the application was therefore res judicata or subjudice the named suits. That the Affidavit in support was irregular for relying on evidence that was unauthentic, that there was inherent bad blood between the directors of UIC and Kenya Re, that the fate of over 11,000 claimants lied with Kenya Re and not the shareholders. Counsel took issue with the positions taken by his colleagues Ms Ithondeka and Mr. Kinyanjui whose submissions were contrary to the depositions of their client's respective affidavits. He further submitted that the matters raised in the Applicant's affidavits had been fully controverted. Mr. Millimo was of the view that Section 67C is not exhaustive as to the powers of the statutory manager, that by use of the words "shall include" the list is not conclusive or exhaustive, that under the terms of Kenya Re, it was mandated to sell the assets of UIC and invest the proceeds in government securities. In his view, the court lacked jurisdiction to grant the orders sought and that the authorities relied on by Mr. Rugo were not applicable to this case. Counsel urged that the application be dismissed.

13. Mr. Rugo for the 1<sup>st</sup> Interested Party ably responded to the submissions of Mr. Milimo but I need not reiterate the same here.

14. I have examined the Affidavits on record, the written submissions of the parties and the able highlights thereon by Counsel. I have also considered the authorities relied on by Counsel. I am alive to the fact that this application was argued in a span of about ten (10) months. Learned Counsel ably put their clients' respective positions and referred to voluminous documents and authorities. My view however, is that the application raises four (4) critical issues for determination. These are, firstly, does this court have jurisdiction to revoke and replace a statutory manager appointed under Section 67C of the Insurance Act? Secondly, is the 1<sup>st</sup> Interested Party properly before court? Thirdly, what is the position of the submissions of Ms Ithondeka and Mr. Kinyanjui in view of the contradiction between their submissions and their client's respective Replying Affidavits? Fourthly, is the application Res Judicata or sub-judice?

15. The position taken by the Respondents (Commissioner of Insurance and Kenya Re) is that Section 67C gives the Commissioner of Insurance exclusive power to intervene in the management of insurance companies. That the High Court cannot purport to arrogate itself any powers whatsoever under that Section other than to extend the period of appointment of a statutory manager under Section 67C (4). The 1<sup>st</sup> Interested Party thinks otherwise. In Mr. Rugo's view, the powers given to the High Court under Article 165 of the Constitution allows the High Court to exercise more powers under Section 67C of the Act, other than rubber stamping the appointment of a statutory manager by extending the period of management after the first twelve (12) months of appointment.

16. Section 67C of the Act falls under Part VIA which deals with provisions relating to inspection and control of insurance companies. The Section sets out the power of the Commissioner of Insurance to intervene in the management of insurance companies. That section provides that:-

***"(1) This section applies and the powers conferred by subsection (2), may be exercised in the following circumstances –***

***(a) if the insurer is found to have failed to meet the minimum solvency margin required under Section 41 of the Act;***

***(b) if the insurer has failed to submit any of the accounts, returns, statements, actuarial valuations or other reports under part VI for over six months after the end of the financial year to which they relate;***

***(c) if the insurer having failed to comply with any requirement of this Act, has continued that failure, or having contravened any provision of this Act, has continued that contravention for a***

*period of six months after notice of such failure or contravention has been given to him by the Commissioner;*

*(d) where, having regard to the financial circumstances of the person registered, the Commissioner is satisfied that the person cannot carry on the business, or any part of the business, for which he is registered, as the case may be, in a satisfactory and efficient manner;*

*(e) if an account due by the insurer under a judgment entered into in an action in Kenya arising out of a policy of insurance issued by the insurer or a contract of reinsurance entered into by a reinsurer, has remained unpaid for three months after the date of the final adjudication in that action;*

*(f) if the business of the insurer is wholly or is unproportionately reinsured with another person;*

*(g) if an insurer is unable to pay his debts within the meaning of Section 220 of the Companies Act;*

*(h) if the insurer is found to have made adequate reserves or to have understated the level of this liabilities;*

*(i) if the insurer is discovered to have submitted or provided any accounts, returns, statements, books, records, correspondences, documents or other information relating to his business which is fall or misleading; or*

*(j) if the Commissioner discovered, whether on an inspection or otherwise, or becomes aware of any fact or circumstance which, in his opinion, warrants the exercise of the relevant power in the interest of the insurer, its shareholders, policy holders or reinsurer or in the public interest.*

The power to appoint a statutory manager is donated by subsection (2) thereof which provides that:-

*“(2) The commissioner may with the approval of the Board*

*(i) appoint any person (in this Act referred to as “a manager”) to assume the management control an conduct of the affairs and business of an insurer to exercise all the powers of the insurer to exercise all the powers of the insurer to the exclusion of its board of directors, including the use of its corporate seal.*

.....

.....”

From the foregoing, it is clear that the power to appoint the statutory manager is very specific. It is to be exercised by the Commissioner with the approval of the board of the Insurance Regulatory Authority.

17. The role of the court under that Section is spelt out in subsection (3) which provides:-

*“(3) The appointment of a manager shall be for such period, not exceeding twelve months as the commissioner shall specify in his instrument and may be extended by the High Court upon the application of the commissioner if such extension appears to the High Court to be justified.”*

In a ruling I delivered in March, 2012 when the commissioner applied to extend the appointment of Kenya Re, I stated as follows:-

*“The power given to the applicant under Section 67C of the Insurance Act is supervisory in nature. Those powers are exercisable when in the opinion of the applicant an Insurer falls under the circumstances enumerated in Section 67C (1) (a) to (j). Apart from being supervisory, I am of the view that those powers are draconian for the reasons that:-*

**1)the law has not set out how and when those powers can be challenged by any person affected by their exercise,**

**2)the law has not stated for how long a statutory manager is to remain in position after appointment in that his/its appointment can continue to be extended ad infinitum,**

**3)the law has not set out procedures or given the avenue of challenging the duties of the statutory manager when those duties are not being or have not been exercised properly,**

**4)once they are exercised by the applicant, they affect not only the company involved but also the shareholders of such company who are thereafter excluded from the decision making process of the company, the insuring public who, trusting the company in question must have taken policies with such companies, the claimants who in our reckless traffic society must have suffered injuries or death and may have lodged or have pending claims against the company.**

**5)The law has not provided for any remedies for anyone who is hurt or affected by the exercise of those powers or in the event the manager fails to act in good faith.**

**That, in my view is the nature of the applicant's powers under Section 67C. “**

**18.** I still hold the same view. Looking at the Insurance Act, there is no express solution given to those issues raised in that decision. But I think that the solution is implied in Section 67C (3). That subsection requires that a statutory management can only be extended beyond twelve (12) months by the High Court and only if the High Court thinks such extension is justified. Does the power given to the High Court under that subsection extend only to rubber stamping the appointment of the manager by extending the same every time the commissioner applies as submitted by Mr. Millimo? Is the exercise of the power under Section 67C (2) absolute and only exclusive to the commissioner? What if the statutory manager so appointed “misbehaves” or fails to carry out his functions properly or at all or carries out his responsibilities under subsection (5) thereof fraudulently? I think the reason why Parliament required that any extension of statutory management be made by the High Court, was a recognition that there needed to be an independent authority to satisfy itself that the letter and spirit of Section 67C is being met before an extension of such management is sanctioned. Parliament required an independent body to supervise and review the actions of the commissioner and the manager after the initial period of twelve (12) months of statutory management. My view is that, it is because of Parliament's recognition that the High Court is the body that is constitutionally mandated to exercise supervisory jurisdiction over persons and other bodies that it enacted the said subsection (5) of Section 67C of the Act. That jurisdiction is under Article 165 of the Constitution. In sub-articles (6) and (7) of that Article it is provided that:-

**“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause 6, and may make any order or give any direction it considers appropriate to ensure the fair administration of justice” (Emphasis supplied).**

**19.** It must be noted that while exercising the powers given under Section 67C of the Act, the commissioner is exercising a quasi-judicial function. His decision affects citizens of this country. It affects not only the rights of the subject Insurance Company, but also the rights of the shareholders of such company, its employees as well as policy holders and claimants. It is upon the commissioner to ensure that the manager appointed under Section 67C (2) of the Act, undertakes its or his functions or responsibilities set out in Section 67C (5) of the Act diligently and effectively. That those responsibilities are undertaken within the limits permitted by law. If the commissioner fails to do so, the High Court will decline the extension of the appointment when an application is made under Section 67C (3) of the Act. In addition to that, my view is that in exercise of its supervisory role under Article 165 (6), the High Court is permitted constitutionally to **“make any order or give any direction it considers appropriate”** under

Sub Article 7 thereof. In my view, the “**any order**” or “**any direction referred**” to in Sub-Article 7 would include in an appropriate application, the revocation of the appointment of the statutory manager in question. In this regard therefore, my view is that since the jurisdiction of the High Court under Section 67C(3) is supervisory, that jurisdiction as read together with Article 165(6) and (7) of the Constitution will include the power to revoke an appointment. As regards, appointment of a new manager, since Section 67C(2) is geared towards giving a failed Insurance Company an alternative management, probably the High Court may not have the expertise to know the appropriate and qualified person to act as the statutory manager. For that reason, I opine that the court can only give a direction to the Commissioner to appoint a qualified person to act as such upon revoking the one appointed by the Commissioner and who has fallen foul of the law. Accordingly, I answer issue number one(1) in affirmative, that this court has jurisdiction to revoke an undesirable or a statutory manager who has failed to effectively carry out his functions under Section 67C of the Act.

20. On the second issue, Mr. Millimo took issue with the positions taken by Ms Ithondeka and Mr. Kinyanjui both appearing for the 2<sup>nd</sup> and 3<sup>rd</sup> interested Parties and the policy holders, respectively. Whilst the said parties filed Replying Affidavits which basically opposed the application by the 1<sup>st</sup> Interested Parties, their counsels, in their submissions supported that application. Mr. Milimo submitted that such was unprofessional and that they should be admonished. Ms. Ithondeka and Mr. Kinyanjui did not directly respond to these submissions.

21. I have looked at the Replying Affidavits filed on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Party and the policy holders. It is clear from the Replying Affidavits of George Ngure Kariuki who swore that Replying Affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Party that he did not support the application. In paragraphs 13, 14, 17, 18 , 19, 20 and 21 of the said Affidavit, the deponent urged that Kenya Re be left to complete the statutory management of UIC. On the other hand, Simon Kimutai in his Replying Affidavit of 14<sup>th</sup> May, 2012 on behalf of the policy holders was categorical in paragraphs 21, 22, 23, 24 and 39 that the application by the 1<sup>st</sup> Interested Party should be dismissed.

22. However, in their submissions, Ms. Ithondeka and Mr. Kinyanjui eloquently supported the application by the 1<sup>st</sup> Interested Party. This was obviously contradictory. The counsels had contradicted the express averments of their clients. I am aware that counsels are allowed to compromise their clients’ positions. They can record consents or settlements binding their clients with or without instructions. What happens when the position is contrary to the expressly stated position of a client on oath? Which one is the court to act on? That of the party or its counsel? A party cannot be allowed to take two contradictory positions in the same suit or proceeding. One cannot approbate and reprobate at the same time in the same proceeding. Indeed under Order 2 Rule 6, a party is not allowed to depart from his previous pleading. That rule provides:-

**“6(1) No party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.**

**(2) subrule (1) shall not prejudice the right of a party to amend or apply for leave to amend his previous pleading so as to plead the allegations or claims in the alternative.”**

23. Although this applies to pleadings, I dare state that it is applicable in all actions taken by a party in a proceeding. Applying this principle to the present case, although the submission of counsels are not a pleading, the end result is the same, that the parties have taken inconsistent positions in the same proceeding. That is a position that is untenable in law as a party cannot approbate and reprobate at the same time. My view is that, since the counsels did not indicate that they had withdrawn their clients’ respective Replying Affidavits, I will go with those statements made on oath and disregard the submissions of counsel made from the bar. Accordingly, the submissions of Ms Ithondeka and Mr. Kinyanjui supporting the application are hereby struck out and expunged from the record.

24. The third issue is whether by failing to file an independent application or to be joined in these proceedings, the application by the 1<sup>st</sup> interested party is fatally defective. As I have already found out

above, Section 67C only permits the Commissioner of Insurance to approach this court under Section 67C (5) to seek the extension of a statutory management. Does that prevent any other party who is aggrieved by either the action of the Commissioner or the Statutory Manager from approaching the court for an appropriate remedy? I do not think so. I have already held that this court in its supervisory jurisdiction can be approached by any party for appropriate orders. In this regard, I hold the view that, so that the court is not misled; the appropriate proceedings in which the parties are to approach the court would be those proceedings in which the court is already seized of the matter for the extension of the statutory management. I hold that view because it is therein that the court would have exercised its mind whether the statutory management should be continued with or not. Further, it is in those proceedings that the court is exercising its supervisory jurisdiction and therefore a proper forum to agitate issues affecting the management of the subject company. Of course, if no application for extension has been filed, an affected party may commence its own separate proceedings.

25. Mr. Milimo contended that there is no entity in law known as Interested Party and that the application by the 1<sup>st</sup> Interested Party was a non-starter. To him, there is either a party making an application or responding to the same. I have looked at our Civil Procedure Act and rules and I agree with Mr. Milimo that there is no reference to an entity known as **“Interested Party”**. However, I am aware that in Judicial Review proceedings under Order LIII, there is permitted the joining to those proceedings by interested parties. An Interested Party has been defined in **BLACKS LAW DICTIONARY, 9<sup>th</sup> Edn, 2009** as:-

**“A party who has a recognizable stake (and therefore standing) in a matter.”**

That being the case, it would seem that a party who has in an interest in the outcome of a proceeding by reason of the fact that he will be affected by the same is an interested party. In view thereof, can the absence of such term as Interested Party in our rules bar a party from participating in a proceeding in which he/she has recognizable stake under such style as Interested party? I do not think so. My view is that, a party who has a standing in a matter can be joined in any such proceedings and participate by whatever name called provided his/her interest is discernible. In this regard I would consider Mr. Millimo’s objection to be a technical objection which Article 159 2(d) will frown at. Accordingly, I see nothing wrong in the 1<sup>st</sup> Interested Party being joined in these proceedings by that name. Mr. Millimo’s arguments do not persuade me.

26. Though appearing as an Interested Party, is the application by the 1<sup>st</sup> Interested Party competent in the absence of any leave to join the proceedings? I note from Order 1 of the Civil Procedure Rules that under Rule 10 thereof, a party can join or be joined in any proceedings at any stage of such proceedings. However, a closer look at that rule shows that an order of the court is required for such joinder. A court must be convinced either by way of an application or on its own motion that a party is necessary before making an order of joinder. It is only after a party has been joined in a proceeding that it can purport to participate and seek relief in such a proceeding. There is no dispute that the 1<sup>st</sup> Interested Party did not seek leave to be joined in these proceedings. No order of joinder was ever made. To that extent the 1<sup>st</sup> Interested Party is a stranger to these proceedings. It cannot properly agitate any cause before this court. Whilst I appreciate that the 1<sup>st</sup> Interested Party has a serious legal standing in this matter having raised very serious issues of law and fact, I am afraid it did not approach the court in accordance with the law. A party who approaches a court of law through a window or backdoor cannot expect to be entertained howsoever serious his interest may be. In this case, there having been no leave sought and/or granted, the 1<sup>st</sup> Interested Party’s application is incompetent.

27. The final issue is whether the issues raised by the Interested Party’s application are res judicata or sub-judice. As already stated, the issues in the application by the Interested Party are quite serious. They range from allegations of misconduct, corruption, incompetence to outright plunder of the assets of UIC. There has been detailed deposition for and against those allegations. I dare state here that, proof of any of such allegations will have a damning effect on the exercise of the powers of the commissioner under Section 67C of the Act as relates UIC. It will have far reaching consequences to both the Commissioner and Kenya Re

28. I have critically looked at the pleadings filed in the following cases:-

- a) HCCC No. 714 of 2007 Kiki Investments Ltd & 2 others –vs- A.G & Anor;
- b) HC MISC Application 1345 of 2005(OS) Kensilver Express Ltd & others –vs- Commissioner for Insurance;
- c) NBI HCCC No.1415 of 2005(OS) Kenya Re-insurance & Anor –vs- Jane W. Michuki;
- d) Milimani W.U Cause No. 22 of 2006 in the matter of United Insurance Co. Ltd.
- e) HCCC No.418 of 2008 KCB –vs- John K. Mbuu; and
- f) Anticorruption case No. 6 of 2009 Republic –vs- Johnson Jackson Gathara.

Briefly stated, the issues raised in the pleadings therein are a challenge to the extension of the continued management of UIC by Kenya Re, that the winding up of UIC was based on wrong information, that Kenya Re had sold the assets of UIC without leave of court, the issue of missing titles, monies and other documents of UIC, the inability or otherwise of UIC to pay its debts, the management of UIC by Kenya Re and the alleged payment of monies belonging to UIC under circumstances alleged to be corrupt. At the beginning of this ruling, I did detail the complaints of the 1<sup>st</sup> Interested Party in these proceedings against the Commissioner and Kenya Re. Indeed, my view of it is that the present application has but summarized all the issues in all the previous cases and agitated them in the present application. A determination of any of such issue will impact in one way or the other, one or more of the previous cases. A careful consideration will show that all the issues raised in the present application are covered in the said cases. Whilst the parties vary from one case to the other, the parties in these proceedings are parties in some of those cases. Indeed, apart from the Anti Corruption Case No.6 of 2006 in all the other cases the Commissioner of Insurance or Kenya Re is but a party. I am of the firm view that whilst some of the issues have already been determined and the matters are pending in the Court of Appeal e.g. in HC Misc appl. No. 1345 of 2005 (OS) or those issues are still pending in those cases. Discussing any of them and making a determination thereof would be a violent breach of Section 6 and/or 7 of the Civil Procedure Rules.

29. In view of the foregoing, I cannot express any view on any of the issues raised. I should however observe that the number of proceedings filed touching on UIC seem to be overwhelming. The earlier the disputes are sorted out the better. One thing I should however note and hold here is that after the management of UIC is completed, any interested party in terms I have held above including the shareholders shall be at liberty to call for a forensic audit of the management by Kenya Re. That is a constitutional right that cannot be stifled. Transparency and accountability is not only a principle under our Constitution but a mandatory requirement in the exercise of public duties. Both the Commissioner and Kenya Re are subject to these principles in their exercise of their powers under Section 67C of the Act. I think I have said enough.

30. The upshot of it is that I find that the application by the 1<sup>st</sup> Interested Party dated 4<sup>th</sup> April, 2012 to be without merit and is hereby dismissed with costs to the Respondent.

Orders accordingly.

**DATED** and **DELIVERED** at Nairobi this 29<sup>th</sup> day of April, 2013

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**A. MABEYA**  
**JUDGE**