



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 213 OF 2010

IN THE MATTER OF THE COMPANIES ACT

AND

IN THE MATTER OF THE INSURANCE ACT

AND

IN THE MATTER OF STANDARD ASSURANCE KENYA LIMITED

AND

SAMMY M. MAKOVE

THE COMMISSIONER OF INSURANCE APPLICANT

AND

RSM ASHVIR CONSULTING LTD

(STATUTORY MANAGER STANDARD ASSURANCE KENYA LIMITED)

R U L I N G

1. For the determination of the Court is the application dated 8th September, 2011 filed on even date and brought under the aegis of the *Judicature Act*, the *High Court (Practice and Procedure Rules (Vacation Rules)*, **Sections 3, 4 and 67(c)** of the *Insurance Act*, **Section 3A** of the *Civil Procedure Act*, **Order 51 Rule 1** of the *Civil Procedure Rules* and the inherent jurisdiction and power of this Honourable Court. The orders that the applicant seeks are inter alia:

“i. This Honourable Court do grant some interim orders for a moratorium for such period as this Honourable Court may determine pending the hearing and determination of the Notice of Motion inter parties;

ii. This Honourable Court be pleased to extend the moratorium expiring on 9th September, 2011 for a further period of six (6) months;

iii. This Honourable Court be pleased to re-appoint and re-instate RSM Ashvir

Consultants Ltd as Statutory Managers of Standard Assurance Co. Ltd for a period of six (6) months with effect from 9th September, 2011.”

2. The application is predicated upon the grounds that the Commissioner of Insurance and the Insurance Regulatory Authority require the appointment of a Statutory Manager and that the aforementioned have nominated the reinstatement of **RSM Ashvir Consultants Ltd**, whose tenure was terminated by the appointment of **Harrison Muriithi Mugo** vide a Court ruling by Apondi, J delivered on 29th July, 2011. It is also averred that the re-instatement and re-appointment of **RSM Ashvir Consultants Ltd** would facilitate determinative action with regard to the affairs of the insurer.
3. The Application is further supported by the Affidavit of **Sammy Mutua Mukove**, the Commissioner of Insurance and the Chief Executive Officer of the Insurance Regulatory Authority, sworn and filed on 8th September, 2011. It is deponed that the said **Harrison Muriithi Mugo**, the appointed Statutory Manager, has not submitted the requisite report and that the moratorium expired on 20th January, 2011, when the Court, by an Application by the aforementioned dated 27th January, 2011, extended the moratorium for a further thirty (30) days to facilitate the appointment of a new Statutory Manager and the submission of the report.
4. In response to the Application, **Wilson Kipkoti**, a director at Standard Assurance Kenya Limited, filed a Replying Affidavit sworn on 11th September, 2011. He reiterated that the application is misconceived and incompetent to the extent that it seeks to review the Orders of the Court, which is an abuse of the process of the Court as it appears to urge the Court, to hear an appeal against its own Orders. It is also contended that the Statutory Manager that the Applicant proposes be appointed had its tenure effectually terminated by the ruling of Apondi, J dated 29th July, 2011. Further, it contended that the matter is now pending the hearing and determination of the Court of Appeal vide Civil Appeal No. 258 of 2010, which the applicant has not prosecuted to date.
5. Having perused the Application herein, the affidavits and the submissions by counsel for the parties, it is the onus of the Court to make a determination on two issues, namely; (1) the reinstatement and reappointment of RSM Ashvir Consultants Ltd as the Statutory Managers for Standard Assurance Kenya Ltd and (2) the extension of the moratorium. With regards to the first part of the application, it is worthy of note that there is a variegated history with regard to the issue. The proposed statutory manager i.e. RSM Ashvir Consultants Ltd (hereinafter referred to as the “RSM”) were first appointed by the Commissioner of Insurance in accordance to and pursuant to **Section 67(C)(2)** of the *Insurance Act, (Cap 487, Laws of Kenya)* on 11th March, 2009 for 2 years. The tenure of the RSM was extended for a further three (3) months from 11th March, 2010 vide an application by the Applicant dated 8th March, 2010. Being aggrieved by the extension of the tenure of the RSM, the Director of Standard Assurance Kenya Ltd, Mr. Wilson Kipkoti filed two applications viz *Civil Application No. 213 of 2010* and *No. 216 of 2010*. The applications sought the prohibition of the extension of the term of the RSM and also a review of the Orders issued by the Court on 10th March, 2010 respectively. The Court delivered its Rulings on the two applications on 11th June, 2010, in which the appointment of the RSM was terminated. The reasons for the termination of the tenure of the RSM are laid out explicitly in the Ruling of Apondi, J.
6. On 29th July, 2010 Harrison Muriithi Mugo was appointed as the Statutory Manager for a period of six (6) months. On 27th September, 2010, the Applicant being aggrieved by the said Ruling delivered on 29th July, 2010 filed *Civil Appeal No. 258 of 2010* and subsequently *Civil Application No. NAI 227 of 2010* dated 10th August, 2010 seeking Orders for stay of proceedings pending appeal. The latter application is spent given that the tenure of Harrison Muriithi Mugo expired on 20th January, 2011. On 27th January, 2011, Mr. Mugo, then Statutory Manager filed an application for the extension of tenure for a further six (6) months, which application was determined on 10th August, 2011, extending the moratorium and tenure for a period of thirty (30) days for Mr. Mugo to comply with the provisions of **Section 67(C)(6)** of the *Insurance Act*, of which compliance was made on 9th September, 2011. The tenure of Mr. Mugo was not extended any further.

7. The Applicant, in making its case for the reappointment of SRM, submitted it through learned counsel Mrs. Kambuni, that such was a temporary stop gap measure as SRM was well versed and acquainted with the issues at hand, but it would also be in the public interest to have a statutory manager in place. The Applicant relied on the authorities of **Piedmont Investments Ltd v Standard Assurance H.C.C.C No. 806 of 2003, Commissioner of Insurance & Others v Kensilver Express Ltd & 3 Others Civil Application No. 4 of 2008, SuperiorFones Communication Ltd v Piedmont Investments Ltd & Others Civil Application No. 79 of 2010 and Insurance Regulatory Authority v Neptune Credit Management Ltd & Another Civil Application No. NAI 294 of 2008.** It was also submitted that the ruling by Apondi, J on 10th August, 2010 was not a bar to the present application, so that the Court would not be sitting on appeal of itself in reinstating the RSM on an interim basis.
8. From the foregoing, it is evident that Apondi, J made two determinations with regard to the issue of reappointment of the RSM. In his Ruling delivered on 11th June, 2010, the learned Judge reiterated *inter alia*;

“Having heard those serious allegations against the Statutory Manager, this Court had expected the counsels on record appearing for the respondents to give an explanation or justify what the Statutory Manager has done. Unfortunately, none of them addressed the serious issues that have been raised in their submissions. The allegations which have been raised against the Statutory Manager impact directly on good governance and efficiency of the Statutory Manager. In the absence of any explanation by the respondents’ counsels this Court is of the considered opinion that the Statutory Manager has not performed his duties with diligence, efficiency and good governance. While this Court appreciates the power and authority that have been conferred on the Commissioner of Insurance, it is important that while making an appointment of a Statutory Manager, he must bear in mind the interest of the policy holders, the shareholders and the creditors of the company. It is only when a company operated efficiently and profitably that it will be able to discharge its duties to the shareholders and the policy holders. An efficient company will also be able to pay up its creditors and eventually assume reasonable corporate responsibility in the business world. Though this Court had extended the term of the Statutory Manager for three (3) months, I am now of the considered opinion that it is not in the public interest or that of the policy holders and shareholders that the Statutory Manager should continue to be in the office. In exercise of my powers, I hereby decline to extend the powers of the Statutory Manager to manage the affairs of Standard Assurance Co. Kenya Ltd. In the same breath, I hereby grant the Statutory Manager a period of thirty (30) days in which he should submit a report of all the activities of the company. In addition to the above, I hereby direct the Commissioner of Insurance to identify a suitable and qualified person to take over as Statutory Manager for a period of six (6) months.”

On 29th July, 2010, the learned Judge in his Ruling held *inter alia*:

“For the avoidance of doubt, this Court hereby directs that since all interested parties are in agreement over the said candidate, then he should be the Statutory Manager for the next six (6) months from today.”

On 10th August, 2011, the learned Judge determined *inter alia*:

“Thereafter the Commissioner of Insurance should take the necessary steps in regulating Standard Assurance Co. Kenya Ltd.”

9. The Court in making these determinations, was cognizant of the wide powers of the Insurance Regulatory Commission and the powers and authority conferred upon the Commissioner of Insurance vide the provisions of the Insurance Act, more particularly **Section 67(C)(2)** thereof. The Court also acknowledged that it does not play any role in the day-to-day running of the affairs

of an insurance or indeed any, company. However, the learned Judge reiterated that, as provided for under the Court's inherent jurisdiction and powers conferred upon it under **Section 3A** of the *Civil Procedure Act* and Article 165(6) of the Constitution of Kenya, the Court plays a supervisory role over any regulatory body, to ensure that it complies with the law and any other mandated obligations conferred upon it vide the statute. That being said, Apondi J. in making his determination with regard to the termination of the tenure of the RSM was informed of its lack of diligence, efficiency and good governance. The applicant responded and complied with the Orders issued and appointed **Harrison Muriithi Mugo**, albeit filing an appeal against the said Ruling. The appeal challenges the appointment of the aforementioned individual and the involvement of the Court in the affairs of the Commissioner of Insurance and the Insurance Regulatory Authority.

10. The present Application seeks to reinstate the RSM whose tenure was terminated vide the Court's Ruling of 29th July, 2010. The reasons, as mentioned above, are occasioned and informed by the performance (or lack of) of RSM. The Applicant has also filed *Civil Appeal No. 258 of 2010*, which is still pending hearing and determination by the Court of Appeal. It would therefore seem that the Applicant, in a procedure tantamount to the abuse of the process of the Court, is seeking to have this Court sit on appeal of its own decision. By seeking to have the RSM reappointed and/or reinstated, this Court would be reviewing and/or overturning the Rulings of Apondi, J of 29th July, 2010 and 10th August, 2011. The present Application is not one for review and/or setting aside the Rulings, but to reappoint the RSM, whom the Court had already determined did not act in the best interest of the public, the shareholders, policy holders and creditors. The upshot is that the Applicant is trying to pursue parallel means in seeking the same remedies against the Respondent, namely: (1) *Civil Appeal No. 258 of 2010* and (2) the present Application. The Applicant, in pursuing its Application before this Court, is engaging different Courts of competent jurisdiction at the same time so as, to achieve a perceived similar outcome. This would amount to subjection of this Court in a matter sub judice, which, in itself is a gross abuse of the judicial process of the Courts. In the case of **Nishit Yogendra Patel v Pascale Mirreile Baksh & Another** referred to in **Magnate Ventures Ltd & Another v City Council of Nairobi & 2 Others** [2013] eKLR, the Court held that:

“On that admission, we are of the view that the application before us is an abuse of the Court process, as stated earlier, by pursuing same remedies in parallel courts which are competent to deal with the application. Such conduct must be deprecated and discouraged.”

11. The Applicant in the affidavit sworn on 4th April, 2012 at paragraph 3 depones that;

“3) THAT I pray for the appointment and reinstatement of RSM Ashvir Consulting Ltd as Statutory Managers on a temporary basis pending the hearing and determination of the substantive appeal, Civil Appeal No. 258 of 2010 which is pending before the Court of Appeal.”

It is evident therefore that the Applicant is pursuing this matter in the Court of Appeal, and yet, at the same time, the instant Application. The Court, in dismissing an application similar to the present one in **Magnate Venture Ltd & Another v City Council of Nairobi & 2 Others** (supra), held that:

“The Applicant should have been pragmatic enough to follow the Rules of law, and procedure, especially as set out under Section 1A (3) of the Civil Procedure Act, to allow for the expeditious, proportionate and affordable resolution of this matter. In my view, by filing the instant application, pending the hearing and determination in the Court of Appeal of Civil Appeal No. 254 of 2009, the Applicant would be abusing the process of the Court, by pursuing the same remedy in two parallel and competent Courts. Such decision follows the Court of Appeal's Ruling in **Nishit Yogendra Patel v Pascale Mirreile Baksh & Another (supra).”**

I Have no difficulty in adopting such finding in this Application by the Applicant dated 8th September, 2011, as amended on 5th April, 2012 and I hereby dismiss the same. However, in the interests of Standard Assurance Co. Kenya Ltd, the policy holders, shareholders and creditors, the moratorium is extended for a further period of 6 months from the date hereof to enable the Commissioner of Insurance and the Insurance Regulatory Authority, to nominate and appoint a Statutory Manager, providing such is not RSM Ashvir Consultants Ltd. In all the circumstances, there shall be no Order as to costs.

DATED and delivered at Nairobi this 25th day of September, 2013.

J. B. HAVELOCK

JUDGE