



**No.2997**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO.218 OF 2009**

**JOSEPH MBUTHIA GICHURU..... PLAINTIFF**

**VERSUS**

**KENYA REINSURANCE CORPORATION LTD..... DEFENDANT**

**(THE STATUTORY MANAGER, UNITED INSURANCE COMPANY LIMITED)**

**RULING**

This application was canvassed before **Lenaola J.** by way of written submissions. However before he could craft and deliver the ruling, he left the station on transfer. The task of writing the ruling then fell on his successor, **Waweru J.** On 27<sup>th</sup> July, 2010, **Waweru J.** indicated that he would deliver the ruling on 11<sup>th</sup> March, 2011. However, this was not to be. He too was subsequently transferred from the station. He went though, with the file to craft the ruling. But this was not to be as on 17<sup>th</sup> November, 2011, he returned the file without the ruling. He had been unable to write the same due to his busy schedule at his division in the High Court of Kenya at Nairobi. He therefore requested this court to decide on the way forward on the application.

On 30<sup>th</sup> November, 2011, I caused the application to be mentioned before me. I invited the parties to address me on fate of the application. Counsel for the applicant took the view that since all the parties had filed and exchanged written submissions, the court should act on the same, craft and deliver the ruling. I then so ordered.

The application the subject of this ruling was filed by the applicant on 3<sup>rd</sup> July, 2009. It seeks orders that:-

- (i) Pending the hearing and determination of this suit the defendant/Respondent, their servants and/or agents, or otherwise howsoever, be restrained from disposing of all that property known as LR. Number KAJIADO/KAPUTEI NORTH/1124 (hereinafter called “**the suit property**”)
- (ii) Specific performance to issue against the Defendant/Respondent compelling them to attend the Land Control Board, PURKA, to seek its consent to transfer the suit property to the Plaintiff/Applicant, and in lieu thereof, the Deputy Registrar of this Honourable Court does execute all relevant documents to enable the granting of such consent by the board.
- (iii) **IN THE ALTERNATIVE**, and without prejudice to the foregoing, that the Respondent

pays the amount of KShs.3,750,000/- paid by the Plaintiff/Applicant to United Insurance Company Limited, (hereinafter called “**the Insurance Company**”) comprising the entire purchase price together with interest at current bank rates to be calculated from the 11<sup>th</sup> February, 2005 until such date as this amount shall be settled by the defendant, plus costs and interests calculated at current bank rates from 11<sup>th</sup> February, 2005 to date.

(iv) The costs of this application be awarded to the Plaintiff/Applicant.

The circumstances giving rise to the application as can be gleaned from the supporting affidavit are that on or about 11<sup>th</sup> February, 2005, the applicant allegedly entered into a sale agreement with the Insurance Company for the purchase of the suit property for the consideration of KShs.3,750,000/-. Apparently, the applicant paid the full purchase price, and thereafter the Insurance Company executed a transfer and issued the title documents of the suit property to the applicant’s then advocates. However before the transaction could be finalized, the Insurance company was placed under statutory, management. The Statutory Manager is the respondent herein. Upon the insurance company being placed under statutory management, the latter failed to attend the Land Control Board in Purka to obtain consent to transfer the suit property to the applicant. The refusal by the respondent to attend the Land Control Board and obtain the necessary consent to transfer the suit premises exposed the applicant to the risk of losing the consideration already paid for the transaction. It is for these reasons that he has come to court seeking the aforementioned orders.

In response, the respondent takes the view that the application should be dismissed on the grounds that on appointment, the respondent took control of all the affairs of the Insurance company and to that extent, it was not meant to authorize and or complete any new and or ongoing transactions. The respondent is therefore a stranger to the transaction and was not involved in its alleged completion which happened when the company was already under statutory management. In any event the respondent’s appointment was under specific terms and reference including to “**to determine the extent and authenticity of the liabilities of the company**”. To that extent, the transaction if at all, it was genuine was frustrated by fraud as the respondent was not party to it and did not receive the proceeds of the sale, part of which were made while the company was under Statutory Management. The transfer purportedly signed on 25<sup>th</sup> October, 2005 was fraudulent as it was signed by people without authority to transact on behalf of the respondent and it is clear that the applicant knew that the Insurance company was under Statutory Management. From the foregoing it is clear that before authenticating the transaction, the respondent cannot during the currency of the management of the Insurance company grant the consent. Further, with the appointment of the respondent, a moratorium on the payment of all creditors by the Insurance Company was declared. The moratorium has been extended to date. The claim for a refund of the unverified sum of KShs.3,750,000/- is misplaced during the currency of the moratorium. It is further deponed that the Insurance company was now undergoing winding up proceedings in winding up cause No.22 of 2005. As such there cannot be any payment or execution or transfer of any property due to the provisions of section 224 as read together with 225 of the Companies Act. The applicant is therefore enjoined to await the outcome of the winding up cause.

Having read and considered the application, rival affidavits and respective written submissions and authorities cited, my take on the application is that it must fail, as it does not meet the threshold of granting temporary injunction set out in the celebrated case of **Giella Vs. Cassman Brown & Co. Ltd. & Anor. (1973) E.A.378**. The factors to be considered while granting or refusing to grant an order of temporary injunction are that the applicant must show a prima facie case with probability of success. Secondly, a temporary injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. Above all, it is a discretionary and equitable remedy.

Applying the first consideration to the circumstances of this case, the applicant’s claim is solely against the Insurance Company with which he entered into a sale agreement. The respondent was not a party to the same. I cannot therefore see how the applicant can succeed against him. The Insurance

Company was put under statutory management on or about 15<sup>th</sup> July, 2005. That is common ground. The terms of reference for the said appointment are limited to tracing, preserving and securing all the assets and properties of the company. Those duties do not include the sale or disposal of the assets belonging to the company unless the sale is initiated by the statutory manager for purposes of improving the company's liquidity. It is also common ground that upon placing the Insurance company under statutory management, a moratorium was declared barring the settlement of all claims as against the Insurance Company pending the hearing and final determination of a winding up cause. That being the case, I do not see how the applicant can maintain a claim for the refund of the purchase price or for an order of specific performance. Indeed in **HCCC. No.748 of 2009, Re United Insurance Company Limited, Kimaru J.** ordered

***“that no statutory notices, demands and claims of whatever nature or form shall be effective against United Insurance Company Limited (under Statutory Management) its property or its policy holders during the currency of the moratorium declared by the Statutory Manager on 15<sup>th</sup> July, 2005”.***

If this court therefore was to accede to the prayers in the application this court shall be rendering the aforesaid order void, and as correctly submitted by counsel for the respondent, shall further go against the spirit of the Statutory Management exercise which is aimed at facilitating professional and sound management of the Company and protection of its assets and its policy holders premiums. This shall not be in the best interest of the public.

The applicant talks of sanctity of contracts and that courts must enforce such contracts. That may well be so. However, contracts can only be enforced against parties to them. According to the applicant, the respondent who is the Statutory Manager is obligated under the terms of reference to pay up or settle any claim in relation to the Insurance Company with any party validly entered into. I do not think that this submission is correct as I have already demonstrated above. The contract was between the applicant and the Insurance Company, not the respondent. Much as the Insurance Company has been placed under statutory management of the respondent, the latter is a separate and distinct legal entity from the Insurance Company. Pursuant to the doctrine of privity of contracts, the Insurance Company is the only party that can legally effect the completion of the said contract. Accordingly, the applicant's prayer for specific performance cannot hold.

For all the foregoing reasons, I am satisfied that the applicant has not made out a prima facie case to warrant the grant of temporary injunction.

Further, I do not think that the applicant has established that he will suffer irreparable injury incapable of being compensated by an award of damages if the injunction is refused. This was a contract of sale of land. The amount paid as consideration is known. Damages awardable if at all can be computed with ease. The applicant's claim can thus be settled by an award of damages. For the same reasons, I think that the balance of convenience tilts in favour of refusing the application.

In the premises, I dismiss the application with costs to the respondent.

**Dated and delivered at Machakos, this 16<sup>th</sup> day of January, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**