REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 172 OF 2011

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF: THE INSURANCE ACT CAP 487 LAWS OF *KENYA*

AND

IN THE MATTER OF: THE COMPANIES ACT 486 LAWS OF KENYA

AND

IN THE MATTER OF: THE DECISION BY THE COMMISSIONER OF INSURANCE

MADE ON THE 24TH JANUARY, 2011 AND 1ST MARCH, 2011

BETWEEN

REPUBLIC……..…..……APPLICANT

-VERSUS-

COMMISSIONER OF INSURANCE ……1ST RESPONDENT

INSURANCE REGULATORY AUTHORITY.....2ND RESPONDENT

B.C. PATEL & COMPANY….....INTERESTED PARTY

EX-PARTE

GEMINIA INSURANCE CO. LTD

J U D G M E N T

In the Notice of Motion dated 28th July 2011 and filed in Court on 2nd August 2011, the Exparte Applicant Geminia Insurance Co. Ltd has approached this court pursuant to leave granted on 22nd July 2011 seeking the following orders:-

1. Judicial review orders of certiorari do issue to remove into the High Court and quash the decision of the Respondents and/or the 1st Respondent made on 24th January, 2011 directing the Applicant to rotate its Auditor every five years.

2. Judicial review orders of certiorari to remove into the High Court and quash the decision of the Respondents and/or the 1st Respondent made on 1st March, 2011 and contained in the letter dated 1st March, 2011 seeking to implement international best practice and corporate good governance in the application of matters set out under the Insurance Act Cap 487.

3. Costs of the application be provided for.

The Application is supported by the statutory statement of facts dated 20th July 2011 and the verifying affidavit sworn by Stanley Munga Githunguri, the Chairman of the Board of Directors of the Exparte Applicant on 28th July 2011.

The brief facts of this case are that the Exparte Applicant ***(hereinafter referred to as the Applicant)*** is an Insurance Company licenced to undertake insurance business under the Insurance Act, Cap.487 Laws of Kenya *(hereinafter referred to as the Act).*

The Applicant contends that it has been in the Insurance business for over 30 years and over the years it has been appointing the firm of M/s B.C. Patel & Co., the Interested Party herein under Section 161 of the Companies Act to be its auditor and this appointment has always been approved by the Commissioner of Insurance *(1st Respondent)* under Section 56(4) of the Insurance Act.

In the year 2010, the Applicant appointed the same firm of auditors to be its auditor for the Year 2010/2011 which appointment was approved by the 1st Respondent in letter dated 24th January 2011 which also contained the Respondent's recommendation in the following terms:

"We recommend that you rotate the Auditors as the current Auditors have been with you for over 20 years".

In letter dated 14th February 2011 responding to the 1st Respondent's letter dated 24th January 2011, the Applicant reiterated their position that they have been appointing M/s B.C. Patel Co. as its auditors due to their professionalism, competence, efficiency and thoroughness in their work and sought to be allowed to continue enjoying the services of the said auditors.

In his response in letter dated 1st March 2011, the 1st Respondent stated as follows:

"*Kindly note that international best practice and good corporate governance requires rotation of auditors every five years. Kindly therefore comply with our position as stipulated in our letter of 24th January 2011……..."*

It is the Applicant's case that the two letters of 24th January 2011 and 1st March 2011 read together contains a decision by the Respondent requiring the Applicant to rotate its auditors while as no such requirement exists in the Insurance Act. The Applicant was aggrieved by the alleged decision which in its view denied it the right to appoint auditors of its choice and violated the principles of legitimate expectations. That the alleged decision was unreasonable and unlawful as it violated the Applicant's right to fair administrative action guaranteed under Article 47 of the Constitution of Kenya 2010.

Given the foregoing, it is the Applicant's prayer that the decisions in letters dated 24th January 2011 and 1st March 2011 should be removed to this court for purposes of being quashed through orders of Certiorari.

The application was opposed by the Respondent through a replying affidavit sworn by Sammy M.

Makove, the Commissioner of Insurance and Chief Executive Officer of the Insurance Regulatory Authority *(2nd Respondent*).

In the said replying affidavit, the 1st Respondent contends that no decision was made in letters dated 24th January 2011 and 1st March 2011 refusing to approve the Applicant's appointed auditors which would warrant intervention of the court by issuing orders of certiorari or otherwise. The 1st Respondent averred that in the two letters, he merely reminded the Applicant of the universally acclaimed good corporate governance practice of rotation of auditors which corporate governance principle would only be considered in future applications for approval of auditors for the subsequent financial years not for Year 2010/2011.

It is the Respondent's case that in approving the Applicant's Auditors and indicating to them what the best practice was for their future action in view of the impending corporate governance guidelines for Insurance and Reinsurance Companies designed to take effect on 1st July 2011, the 1st Respondent was exercising his statutory powers under Section 3A of the Insurance Act and did not make any decision which was unfair, discriminatory, irrational, capricious or illegal. The Respondents maintained the position that the 1st Respondent's actions were done in good faith, in accordance with the law in furtherance of the objectives of the Insurance Act.

To advance their respective positions, the parties herein filed written submissions which their advocates highlighted before me on 7th February 2012.

Having considered the prayers sought in the Applicant's Notice of Motion alongside the submissions made by counsel for the respective parties, I find that it is not disputed that the Respondents are a public officer and statutory body respectively who are amenable to judicial review. The 1st Respondent is the Commissioner of Insurance and Chief Executive Officer of the 2nd Respondent, the Insurance Regulatory Authority a body corporate established under Section 3 of the Insurance Act.

As it is not disputed that the Respondents are amenable to judicial review, I find that the only issues that arise for determination by this court are the following:

(1) Whether the contents of letters dated 26th January 2011 and 1st March 2011 amounted to decisions.

(2) If the answer to the 1st issue is in the affirmative, whether those decisions were made by the Respondents irrationally, capriciously, in bad faith and contrary to the law and whether the said decisions were unreasonable.

(3) Whether the corporate Governance Guidelines for Insurance and Reinsurance Companies amounted to subsidiary legislation with the force of law and whether they were being applied retrospectively.

(4) Whether the Applicant has demonstrated that it is deserving of the orders sought.

Mr. Wandabwa for the Respondent argued in his submissions that the two letters did not amount to a decision as they did not oblige the Exparte Applicant to remove the Interested Party as its auditor but only hinted at international best practice of rotating auditors every five years.

Mr. Mogeni for the Exparte Applicant submitted that though the letter of 24th January 2011 taken on its own may not amount to a decision, when it was read together with the letter dated 1st March 2011 the two letters amounted to a decision which was made contrary to the law, and which sought to apply international best practice and principles of good governance as contained in the Corporate Governance Guidelines for Insurance and Reinsurance Companies retrospectively even before they were gazetted. It was Mr. Mogeni's position that the said decisions were made outside the 1st Respondent's jurisdiction under Section 3A of the Act and that they should be quashed by orders of certiorari.

In order to resolve the issue of whether or not the two letters amounted to decisions capable of attracting the judicial review remedy of certiorari, it is important to try and establish what is meant by the term ***'decision'***. In the Concise Oxford English Dictionary, 11th Edition, the word ***'decision'*** is defined as ***"a conclusion or resolution reached after consideration……..the action of deciding….."***.

In the case of Transouth Conveyors Ltd –Vs- Kenya Revenue Authority & 2 Others C/Appeal No.89/07 consolidated with C/A No.92 and 136 of 2007 the Court of Appeal quoted with approval the definition given by F.H. Lewin in a journal of the Royal Institute of Public Administration on the topic of Decisions and Decision making where the author defined decision as ***"a deliberate act that generates commitment on the part of the decision maker towards an envisaged course of action of some specificity".***

In the letter dated 24th January 2011, the 1st Respondent informed the Applicant that he had approved the appointment of the Interested Party as its auditor for the Year 2010 under Section 56(4) of the Insurance Act.

It is important to note at this juncture that Section 56(4) of the Act required Insurance Companies to appoint auditors annually who had to be approved by the 1st Respondent.

At the end of the letter, the 1st Respondent recommended that the Applicant should rotate its auditors as the approved auditor had served the Applicant for over 20 years.

In my view, this letter did not amount to a decision directing the Applicant to change its auditors every five years as alleged in Prayer I of the Notice of Motion. It was just a recommendation which even Mr. Mogeni conceded in his submissions that the Applicant was not obliged to comply with. Since the letter did not amount to a decision, the remedy of certiorari was not available to the Applicant since there was no decision to remove to this court for quashing as sought in Prayer I.

In the 2nd Prayer, the Applicant sought orders of certiorari to quash the decision of the 1st Respondent contained in the letter dated 1st March 2011 seeking to implement international best practice and corporate good governance in the application of matters set out under the Insurance Act.

Looking at the letter dated 1st March 2011, I find that the same qualifies to be a decision within the meaning approved by the Court of Appeal in the Transouth Conveyors Limited Case (Supra) since the 1st Respondent appears to have made a specific commitment that the Applicant should comply with the requirements that it rotates its auditors every five years in accordance with international best practice and good corporate governance.

The question that immediately comes to mind which must be answered and in order to determine whether such a decision warrants the court's intervention by way of judicial review is - ***Did this decision by the 1st Respondent adversely affect the Applicant and if so, was it made illegally, irrationally, unreasonably or in bad faith?***

In my view and with much respect to Mr. Mogeni for the Applicant, from the material placed before this court, the Applicant has not demonstrated how the said decision adversely affected its interests or legal rights and no basis was laid for its submission that the said decision was unreasonable, irrational and made contrary to the law. I make this finding for the following reasons:-

To start with, the 1st Respondent was statutorily mandated under Section 3A of the Act to formulate and enforce standards for the conduct of Insurance and Reinsurance business in Kenya in order to ensure effective supervision, regulation and control of the Insurance Industry in Kenya. The Applicant was one of the players in the Insurance Industry and all policies and standards formulated by the 1st Respondent under Section 3A of the Act was applicable to it.

Section 3A does not specify what matters or factors the 1st Respondent should consider when setting up

standards and policies for the Insurance Companies to follow with the objective of executing his mandate under the Act which mandate included the protection of the interests of policy holders and beneficiaries of Insurance contracts (the general public) and promoting the growth and development of the Insurance sector.

It is also worth noting that under Section 56(4) of the Act, the 1st Respondent is given unfettered discretion in deciding whether or not to approve an auditor appointed by an insurance Company. The Act does not specify or limit the considerations that should guide the 1st Respondent in deciding whether or not to approve an auditor's appointment.

In a nutshell, it is my finding that Section 56(4) read together with Section 3A of the Insurance Act gives the 1st Respondent wide discretion to formulate policy guidelines to enforce standards and make decisions that would promote the growth and stability of the Insurance Industry for the benefit of all players in the Industry who included the Applicant. The two provisions of the law also gives the 1st Respondent the power to decide what criteria or guidelines to use in considering applications for approval of auditors under Section 56(4) of the Act. However, such power or discretion has to be exercised fairly and in accordance with the law.

In this case I am satisfied that the 1st Respondent's impugned decision contained in letter dated 1st March 2011 was made in accordance with the powers bestowed on him by Section 3A as read with Section 56(4) of the Act in execution of his mandate to ensure stability growth and development in the Insurance Industry.

In my opinion, seeking to implement best international practices and principles of good corporate governance in the insurance sector was not only reasonable but was also good public policy made to protect the public interest in the industry which was also beneficial to all players in the Industry including the Applicant. I beg to disagree with Mr. Mogeni that the 1st Respondent was seeking to implement the said best practices and good corporate governance principles on the Applicant retrospectively since it is conceded that the 1st Respondent had already approved the Applicant's preferred auditors for the Year 2010/2011 and there was no direction to change their auditor for that financial year.

The direction to comply with the requirement to rotate the auditors in accordance with international best practice was aimed at future applications for approval of auditors for subsequent financial years.

In making reference to international best practice and principles of good corporate governance, the 1st Respondent was in my view being fair and reasonable by putting the Applicant on notice that in future those are some of the factors he was going to consider when deciding whether or not to approve auditors appointed by the Applicant.

I am also of the view that the 1st Respondent's decision besides having been made in accordance with the law was also rational and fair since it did not infringe on the Applicant's freedom to choose auditors for the subsequent years. The said decision would have been irrational, capricious and illegal if it purported to direct or suggest to the Applicant who it should appoint as its auditors for subsequent years besides the Interested Party. The 1st Respondent left it open for the Applicant to appoint a different auditor but of its own choice.

The decision by the 1st Respondent stands the test of reasonableness as propounded in the case of Associated Provincial Picture Houses Ltd –Vs- Wednesbury Corporation [1947] EWCA CiviI and it does not therefore warrant this court's intervention by way of judicial review. It is a decision that the 1st Respondent was competent to make under the law and it cannot by any stretch of imagination be said to have been so unreasonable that no reasonable body or authority placed in the same position as the 1st Respondent could not have made or was so unreasonable as to be described as having been made in bad faith.

On the last issue as to whether the corporate governance guidelines for Insurance and Reinsurance companies was subsidiary legislation which had the force of law, I will simply address this issue by stating that by their very title, these were just guidelines issued by the 1st Respondent under Section 3A of the Act to help the insurance companies to manage their affairs better or more effectively. They were not expressed to be rules or regulations. They did not amount to subsidiary legislation since they were not made by the relevant Minister under Section 180 or 197E of the Act.

They did not therefore require Gazettement under Section 27(1) of the Interpretation and General Provisions Act (Chapter 2 Laws of Kenya) in order to give them the force of law. In my understanding, the said corporate governance principles were just guidelines formulated by the 1st Respondent apparently with the participation of industry players who included the Applicant for the sole purpose of enforcing standards for the conduct of the insurance business in Kenya. They were not rules or regulations which had the force of law as correctly pointed out by Mr. Mogeni Counsel for the Applicant.

In conclusion, it is my finding that the Applicant herein has not demonstrated that the decision of the 1st Respondent in letter dated 1st March 2011 was either unfair, arbitrarily, irrational or unreasonable and that it adversely affected any of its interest or exposed it to legal injury or unfair treatment to its detriment. The Applicant has also not proved that the said decision was made contrary to the law.

In the premises, I am satisfied that the Applicant has not demonstrated that the intervention of this court by way of judicial review is warranted in this case. The Applicant has failed to prove that it is deserving of the orders sought in either Prayer 1 or Prayer 2.

Consequently, I find no merit in the Notice of Motion dated 28th July 2011 and it is hereby dismissed with costs to the Respondents.

Dated, **Signed**and**Delivered** by me at Nairobi this 28th day of March, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

Mr. Kandie holding brief for Mogeni for Applicant

Mr. Githinji holding brief for Mr. Wandabwa for the Respondents

N/A for Interested party