



IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
MISCELLANEOUS CIVIL SUIT 545 OF 2006

**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.....APPLICANT**

**VERSUS**

- 1. KENYA REINSURANCE CORPORATION (STATUTORY MANAGER,**
- 2. UNITED INSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

Section 67C (2) (i) of the Insurance Act Chapter 487 of the Laws of Kenya provides:-

***“(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 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;”***

On 15<sup>th</sup> July, 2005, the Applicant placed an insurance company by the name United Insurance Company Limited (hereinafter “the company”) under statutory management. The public notice dated 15<sup>th</sup> July, 2005 and exhibited as “SM1(a)” did not specify the period for which Kenya Reinsurance Corporation Limited was to act as the statutory manager of the company. However, in law, such appointment cannot exceed 12 months but can be extended by the High Court. By Gazette Notice No. 6821 dated 15<sup>th</sup> July, 2005, a person by the name Johnson Githaka, referring himself as the statutory manager declared a moratorium on the payment by the company of its policyholders and all other creditors for a period of 12 months from the date of the notice. This is so notwithstanding that the person appointed statutory manager was a corporation known as Kenya Reinsurance Corporation Limited. The appointment of the statutory manager seems to have been variously extended by the High Court, the last of such being on 15<sup>th</sup> September, 2011 when it was extended for 6<sup>th</sup> months.

The Six (6) months period was due to expire on 14<sup>th</sup> March, 2012 whereby, the Applicant, Mr. Sammy M. Makove made an ex parte application by way of Motion under a Certificate of Urgency dated 14<sup>th</sup> March, 2012 seeking the extension of such appointment of the statutory manager for another period of one (1) year. The applicant also sought an order that there be a mention of the matter within six (6) months. That is the motion that was argued ex parte before me on 14<sup>th</sup> March, 2012 and is the subject of

this ruling.

The application is brought under Section 67C (3) of the Insurance Act and Order 51 of the Civil Procedure Rules. It is supported by the Supporting Affidavit of the applicant himself. The applicant set out the mandate of the statutory manager to include:-

***“(i) Tracing, preserving and securing of the properties of United Insurance Company Limited (hereinafter referred to as”the company”)***

***(ii) Valuation and audit of the properties of the company.***

***(iii) Recovery of debts and sums of money due and owing to the company***

***(iv) Evaluating the solvency and liquidity of the company.***

***(v) Making necessary recommendations on the restructuring of the company and whether the company ought to be revived or liquidated.”***

The applicant contended that the last extension of the Manager’s appointment was on 15<sup>th</sup> September, 2011, that in observance of its role the manager had submitted its status report in December, 2011 whose conclusions were, inter alia, that the company has assets that can offset all the liabilities and regain solvency to the tune of Kshs.1.3 billion, that having studied the manager’s report together with the Auditors report, the applicant had made a decision that the revival process of the company be attended to by disposing off the immovable assets of the company and the proceeds thereof be applied to settle the liabilities of the company, that the manager’s mandate be extended to oversee that process of disposal of immovable property and settlement of liabilities, that the process of realization of the immovable properties will involve 3<sup>rd</sup> parties and is expected to take more than six (6) months, that the process of settlement of the claims may also take a further period of six (6) months, that due to the unavailability of documents the process of tracing and preserving the company assets was difficult, that in addition the manager has taken other judicial processes to preserve the said assets, that it was therefore imperative that the mandate of the manager be extended to be able to accomplish the aforesaid task and that unless the mandate was extended, all the gains so far achieved will be brought to an abrupt end, in that the moratorium will be lifted and there will be unrestrained unstructured attachments leading to the possible collapse of the company and the rendering of the spirit and intent of Section of Section 67C of the Insurance Act.

When Mr. Milimo appeared before me on 14<sup>th</sup> March, 2012, I asked him to address me on four issues:-

- 1)Whether the law allowed the applicant to make the application *exparte*.
- 2)Why the application was being made at the last minute.
- 3)For whose benefit the order for extension of the manager’s appointment was being made.
- 4)Who will be affected by the orders that the applicant was seeking.

Mr. Milimo, learned Counsel for the applicant submitted that Section 67C (3) of the Insurance Act allowed the applicant to make the application *exparte*, that the only condition was whether the application was justified, that the said condition had been met, that there had been a challenge in identifying the immovable assets of the company, the assets had not only been ascertained but also valued, that the claims lodged has been verified at Kshs.1,326,542,679/= (counsel referred the court to page 3 of the Auditors Report). Counsel further submitted that the company had been categorized as solvent and the only barrier between the claimants and payment was the liquid cash that could only be obtained from disposal of the immovable assets. He submitted that the application was made on the last minute because the applicant was of the opinion that such an application could only be made after the expiry of the term and not before. He was of the view that the claimants had been given a hearing upon lodging the claims

and that at this stage the parties involved in the extension of the mandate under Section 67C 3 was the Court and the statutory manager. To Mr. Milimo the beneficiaries of the order sought were the claimants, that the same was being made for the paramount consideration of settling the claims and finally that no one was to be affected by the order being sought. Finally, Mr. Milimo submitted that failure to extend the orders would throw the company into a mess as there would be no management. He therefore urged the court to allow the application.

I have considered the Affidavit in support and the submissions of counsel. 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.

As regards the making of the application ex-parte, I am not with Mr. Milimo when he submits that the applicant is entitled to make the application ex-parte. I have already set out in No. (4) above the categories of the people whom I think are likely to be and who indeed are affected by the applicant's exercise of the powers donated by Section 67C. My understanding of the law has always been that, when a party is likely to be affected either positively or negatively by an order of the court, such party should and must be notified before any such order can be made. Such notification MUST be by way of service of the process that will lead to the proceedings that will end up in the subject order. Section 67C (3) of the Insurance Act provides that:-

***“The appointment of a manager shall be for such period, not exceeding twelve months, as the Commissioner shall specify in his instrument of appointment 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”.***

From this provision, whilst the original act of appointing a statutory manager does not require the involvement of any other party except the applicant in exercise of his discretion, the extension thereof requires the involvement of the High Court. In my view, since under the Constitution of Kenya 2010, the High Court derives its authority from and it exercises such authority and its jurisdiction for and on behalf of the public (people of Kenya), it must as of necessity hear that public since its order will affect a substantial part of such public who I have set out above.

Accordingly, I hold that at any time when the applicant seeks to have the appointment of a statutory manager extended by the High Court under Section 67C (3), such application must be served upon the public so as to give members of the public who are likely to be affected by any order to be made thereby

to file any representations. Otherwise, how will the court know that the extension of the appointment is justified under Section 67C (3) of the Act without hearing the parties to be affected by its order.

On this issue therefore, I do not agree with the Applicant's contention that the claimants are deemed to have been heard by virtual of having presented their claims to the statutory manager. What of the shareholders of the company? What if the company is being run in a manner not beneficial to either the claimants or the company itself as is envisaged under Section 67C (5) of the Insurance Act? In my view, the Court can only come to an informed decision as to whether an order for extension of the manager's appointment is justified under Section 67C (3) of the Act after all the parties I have set out above have been given an opportunity to be heard and have so put forth their respective cases. In this case, this does not seem to have been done because of the view the applicant has held which in my view is wrong. Accordingly, I hold that the applicant was not entitled to make the application ex-parte and should have advertised in the daily newspapers of his intention to make the application.

The other issue which the court raised and was argued by Counsel for the Applicant was whether the applicant was justified in making the application at the last minute. Mr. Milimo learned Counsel for the applicant submitted that the application could not be made at an earlier date because the applicant could not seek to extend time for a period that had not yet expired, that since the order of 15<sup>th</sup> September, 2011 had extended the appointment for six (6) months from the date of issue, i.e. 15<sup>th</sup> September, 2011, thereby expiring on the 14<sup>th</sup> March, 2012, the correct time to make the application was on the last date. I hold a different view. For the reasons I have set out above about the necessity of serving the public with the application, it is imperative that an application under Section 67C (3) be made in good time to enable the court consider the pros and cons of extending the appointment of the statutory manager. The Court is not supposed to act mechanically to accept the reasons advanced by the Commissioner on face value to extend the appointment without considering the extent to which the statutory manager has acted to the best interests of the public by the time of making the requisite application.

Accordingly, it was wrong for the applicant to have made the application on the last day. The leisurely days when the High Court was expected to endorse actions of state organs and/or officials as regards their actions and activities affecting the public without any question are long gone. We now derive our power and judicial authority from the people of Kenya for whom we have to exercise that authority. Once the court has a feeling that its authority will not be exercised for the benefit of the public, it will and should, as the Constitution requires, put down its tools and wash its hands and require such an applicant to notify those to be affected by the order by effecting service of the application accordingly. In this case, those likely to be affected were never served.

It was submitted by the applicant that the application was being made for the benefit of the claimants. Mr. Milimo observed that the time being sought was meant to give time to the statutory manager to consolidate and sell the company's assets and pay the claims. On this issue, since there is no evidence on record to the contrary, I am inclined to accept that the extension of the order will be for the benefit of the claimants and the insuring public for the reason that there will be structured settlement of the claims thereby discharging the company as well as the policy holders from all such claims that might have arisen before the manager was appointed.

On the question as to who will be affected by the order of extension, Mr. Milimo Counsel for the applicant submitted that no one would be affected by the order of extension sought. I do not agree with Counsel. I have already held that once a statutory manager is appointed under Section 67C (2) of the Insurance Act, there are various persons who are affected by such appointment. In my view, the very same persons who are affected by the appointment of a manager, to wit, the shareholders of the company, the claimants and the insuring public, they are likewise likely to be affected by an order extending such appointment. For the owners of the company, it will mean extended exclusion from its running, for the insureds and the claimants it will mean an extended period of anguish and uncertainty as to settlements of their claims.

Mr. Milimo gallantly argued that the manager had superbly carried out its duties whose result was evident in the eventual identification of the immovable assets, preservation and valuation of the same. He

pointed out that if the order is not granted, the company will be without management and it will be a free for all for the claimants, thereby defeating the letter and spirit of Section 67C. In my view, that may be so. But there are certain issues that have heavily weighed down on this Court when considering the subject application. These issues are probably what this Court considers to be the matters to be considered when considering an application to extend the appointment of a statutory manager under Section 67C (3) of the Insurance Act. These are:-

**(a) For how long has the statutory manager been in charge?**

**(b) Since appointment, what has the manager achieved? Has the manager been diligent enough as to be trusted with an extension? In other words, from what he has achieved as manager, is it prudent to extend his mandate?**

**(c) In totality, is the spirit and intention of Section 67C being met or will it be achieved by such extension?**

In this case, the statutory manager has been in charge since 15<sup>th</sup> July, 2005, a period of over six (6) and a half years! In my view that is an unacceptable long time for a company to be under management. I have seen on record a milliard of applications by persons calling themselves insureds who have made applications to be joined in these proceedings because of the execution proceedings they are facing elsewhere. That is but a fraction of the many who may have been prejudiced by the long period taken in the management of the company. Since management of a company under Section 67C is not for free, or so I believe, the Commissioner must of necessity insist on diligence on the part of a manager he has appointed under Section 67C (2) of the Insurance Act. In my view, it cannot be left to the manager to decide when and how to carry out his duties under the law. He is being paid for it and if so, he must not only deliver, but must be seen to deliver! Indeed, that is a requirement of the law. Section 67C (4) of the Insurance Act provides:

**“(4) A manager shall, upon assuming the management control and conduct of the affairs and business of an insurer, discharge 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.” (Emphasis supplied)**

In this case, can it be said that there has been diligence in the execution of the manager’s duties under the law having in mind that it has taken the manager six (6) years to render a report to the applicant? I do not think so. Six years is so inordinate that both a court of equity as well as law will frown on an attempted extension of such a management. This is so, when one juxtaposes the original period which Parliament gave for such appointment to be in force, i.e. twelve (12) months vis avis the period the management has been in force to date. The reason advanced as to why it took that long for the manager to carry out its mandate and responsibilities under Section 67C (5), is the alleged unavailability of the documents relating to the assets. That may be so, but there is no evidence on record to show the following:-

**1) Who was in possession of or was withholding the documents from the manager and how did the manager finally retrieve the same?**

**2) What action did the manager take to expedite the retrieval or possession of the documents in question?**

**3) What legal action, if any, did the manager and/or the applicant take to safeguard the position of the manager to carry out its responsibilities under the law in light of the aforesaid ‘unavailability’ of the documents?**

In view of the foregoing, the view that the court takes is that the appointment of the manager over the company has taken unnecessarily long. There is in my view no plausible explanation that has been given to explain the long delay in accomplishing its mandate under the law. The status report by the manager dated 30<sup>th</sup> November, 2011 was being submitted in December, 2011, over six years after appointment! I do note that at page 18 of the Statutory Manager’s Status Report, there are expenses that are incurred

during management. This is so notwithstanding that the company is not trading and for all we know, the said expenses are offset from the assets of the company which are supposed to sort out the outstanding claims. Accordingly, the shorter the management period the better.

On the second principle, I have already found that the manager has not been diligent. However, from the status report dated 30<sup>th</sup> November, 2011, it would seem that finally the manager has been able to achieve something. It has managed to trace, preserve and secure the assets and property of the company, albeit so late in the day. The properties of the company, though not all, having been traced and secured may be the only positive thing the applicant is reporting to court about the management so far. I have seen a schedule of immoveable properties set out in the status report as well as various court orders by different courts securing some of the said properties. To that extent, the application may be said to be merited.

Finally, is the spirit of Section 67C being met? To my mind, the spirit of Section 67C is to secure the position of both the insuring public as well as claimants under the business of an Insurance Company, the subject of the management. Looking at the reasons for which an insurance company has to be placed under management under Section 67C (2), one cannot fail to find that statutory management arise from financial impropriety or financial incapability of such an insurance company in carrying out insurance business. By appointing a statutory manager, the Commissioner of Insurance is meant to safeguard the position of the company, the policy holders and the claimants or the public in general. Having found that the manager has been able to trace and secure some immoveable properties of the company, it might safely be held that the spirit of Section 67C is partly being met. It was submitted for the applicant that by extending the period of management, the manager will be able to carry out the process of disposal of the company's assets and pay up claims.

Before concluding this ruling, I need to comment on certain issues which came out when considering the application. The manager has complained in the report that documents were unavailable leading to a delay in carrying out their mandate under the law, that some law firm was withholding large sums of money allegedly for legal fees which the manager feels was exorbitant, that there was a sum of Kshs.70 million which went missing in April, 2007.

From these complaints by the manager, it would seem that the statutory manager is toothless when it comes to enforcing compliance with its directives for purposes of carrying out its mandate and obligations under Section 67C (5) of the Insurance Act. It is clear from the status report of the manager dated 30<sup>th</sup> November, 2011 and presented to the applicant that the manager faced several challenges which it could not surmount.

Firstly, there is the issue of missing documentation. The manager may have known those who had possession of or who could have assisted in tracing the same but it could do nothing in terms of compelling production of the same or compliance with its directives. Since Section 67C of the Insurance Act is meant for the public good, rather than appointing a manager who becomes ineffective in his carrying out his duties under Section 67C, and who continues to expend the little that there may be in the subject company, the applicant should urge Parliament to amend the law and include therein penal provisions in the event there is interference or attempted frustration of the manager's mandate under the law.

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.

Thirdly, as regards the monies missing from the accounts of the company and proceeds from properties disposed off by the company's shareholders, the manager needs to do more than just to complain or report of the missing funds. The said sum of Kshs. 70 million may be petty cash to the manager but to the company and the claimants, it may not be so. In my view, the manager should investigate and report to the court of the whereabouts of these monies since it was appointed to safeguard the very same assets of the company and not just to report of their loss without explaining the effort it has put in tracing and/or recovering the same. Several assets of the company are reported to have been disposed off, the manager

should in my view explain where the proceeds therefrom were applied to. Some of these and other issues need to be properly addressed by the applicant.

From all that I have set out, it is obvious that the manager has not performed its duties to the satisfaction of this court. This Court therefore is not prepared to accede to the applicant's request for an extension of the appointment of the manager for a period of one (1) year. However, for the reason that assets of the company have been ascertained and the applicant has indicated that if the appointment is extended, claims may start to be paid shortly, I will exercise my discretion and allow the application on the following terms:-

- 1) The appointment of Kenya Re-Insurance Corporation Limited as the statutory manager of United Insurance Company Limited is hereby extended for a further period of Six (6) months from the date hereof.
- 2) There be a mention within three (3) months from the date hereof to ascertain the steps the manager has taken in the realization of the assets of the company, overcoming the challenges observed above and progress in the settlement of the claims.
- 3) The report of such progress be filed by the applicant in court within ninety (90) days of the date hereof and in any event before the mention date.
- 4) This matter be mentioned on 9<sup>th</sup> July, 2012, to consider the progress made.

Orders accordingly.

**DATED** and delivered at Nairobi this 28<sup>th</sup> day of March, 2012

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