



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 866 of 2009**

**WWW BID INVESTMENT CO. LTD. .....PLAINTIFF  
VERSUS  
TAUSI ASSURANCE COMPANY LTD.....DEFENDANT**

**R U L I N G**

This application seeks an injunction to restrain the Defendant from offering the 240,000 additional shares purchased by the Plaintiff to any other shareholder pending the hearing of this application, and thereafter pending determination of this suit. It further seeks an injunction restraining the Defendant from offering the additional shares as per the Defendant's letter dated 16<sup>th</sup> November, 2009 or any other rights issues, or any how pending the hearing of this application and thereafter pending determination of this suit. The application is brought by a Chamber Summons dated 26<sup>th</sup> November, 2009 and taken out under Order XXXIX Rule 2 of the Civil Procedure Rules, the Companies Act, and the inherent powers of the Court.

The application is supported by annexed affidavit of Rahul Bid, a Director of the Plaintiff Company, and is based on the following grounds –

- (a) *That pursuant to Legal Notice No. 97 of 2007, the Defendants resolved to increase its authorized share capital to Kshs.300,000,000 by issuing 3,000,000 shares of Kshs.100/= each.*
- (b) *That the Defendant offered to the Plaintiff 247,037 shares at Kshs.100/= each, totaling 24,703,700 being the pro rata shares due to the Plaintiff by virtue of its shareholding.*
- (c) *That the Defendant also offered for sale the additional shares being rights not taken up by the existing shareholders.*
- (d) *That the Plaintiff duly paid for the allocated shares and accepted the offer for unsubscribed additional shares and applied for an additional 240,000 shares on the prescribed form of acceptance and made requisite payments.*
- (e) *That despite the Plaintiff having accepted the Defendant's offer, the Defendant, in breach of the agreement, rejected the Plaintiff's payment and refused to allocate to the Plaintiff 240,000 shares.*
- (f) *That despite the Plaintiff's objections, the Defendant is determined to rescind the sale of additional shares to the Plaintiff and has refused to honour the sale agreement.*
- (g) *That if this application is not heard forthwith and the orders sought granted, the Plaintiff shall*

*suffer injury and irreparable harm.*

Opposing the application, the Defendants filed a replying affidavit sworn by Lina Kantaria, the Defendant's Company's Secretary at the material time. In that affidavit, she deposes that although she was neither authorized by the Board of Directors nor the Shareholders, it was her opinion that application for untaken rights would give an indication to the Board of Directors of the extent of the interest in the untaken shares by the shareholders who had taken the rights. The offer of the shares, under the Memorandum and Articles of Association of the Defendant Company, could only be made in accordance with a resolution by the shareholders or the Directors of the Company, and no such resolution had been made with respect to the untaken rights. In the event, when the Board of Directors subsequently met on 12<sup>th</sup> November, 2009, and considered the issue, it nullified the Form of Application for additional shares which she had sent out as the same was neither authorized by the Board of Directors nor the Shareholders and decided to deal with the issue of untaken rights and she informed all shareholders, including the Plaintiff, by a letter dated 16<sup>th</sup> November, 2009 accordingly. She further deposes that having considered the issue of untaken rights, the Board of Directors resolved, pursuant to the powers conferred upon it by the Memorandum and Articles of Association, that the untaken rights would be allotted pro rata to the shareholding, and therefore, offered to the Plaintiff 77,763 shares on the basis of its current proportion of the shareholding. The Plaintiff declined to take up that offer and instead chose to file this suit.

Each party filed written submissions and cited numerous authorities which I have considered. In my view, the only problem in this matter arises from the issue of what is titled "Application for additional shares" which accompanied the "Form of acceptance and application for additional shares". In order to place the matter in context, I find it prudent to go back to Legal Notice No. 97 of 2007, under which Insurance Companies dealing with general insurance business were required to have a paid up capital of at least Kshs.300,000,000/= in order to qualify for registration as Insurers. Pursuant to that notice, the Defendant Company, at its General Meeting held on 22<sup>nd</sup> July, 2009, resolved to make a Rights Issue of 1,250,000 ordinary shares of Kshs.100/= each in the capital of the Company to the existing shareholders on pro rata basis to their existing holdings. In accordance with that resolution, the Plaintiff Company was allocated 247,037 ordinary shares of Kshs.100/= each. The Company was informed that if it wished to subscribe for all or any of the ordinary shares allocated to it, then it should return an enclosed Form of Acceptance to the Defendant Company's registered offices by not later than 31<sup>st</sup> October, 2009, together with payment in full for the shares accepted.

The Form of Acceptance which was sent to the shareholders was accompanied by a Form of Application for additional shares. The latter Form read as follows -

*"In the event that any shareholder does not take up his/her full entitlement to shares under this Rights Issue, I/We hereby apply for ..... additional ordinary shares of Kshs.100/= each at a price of Kshs.100/= per share. I/We enclose my/our cheques in full payment for such shares.*

Signature(s) ..... Date ..... 2009

Name of Registered holder(s) .....

Address .....

The Plaintiffs in this case completed the above Form and applied for 240,000 shares which are the subject matter of this litigation. They returned the Form to the Defendant Company and enclosed a cheque for Kshs.24,000,000/= being the full payment for those shares. When the Defendants received that Form and the accompanying cheques, they wrote back to the Plaintiff stating, *inter alia* –

*“We have noted your interest in purchase of additional shares and request you to make payment only after a formal offer is made. In the meantime we are hereby returning the above cheques.”*

In their response by a letter dated 6<sup>th</sup> November, 2009, the Plaintiffs wrote to the Defendants as follows –

*“RE: Rights Issue*

*Please find enclosed a copy of RTGS for Kshs.24,703,700/= for the Rights issued as requested by you.*

*We return our cheques for the additional shares and request you to let us have your confirmation ...”*

The above correspondence was followed by a meeting of the Board of Directors on 12<sup>th</sup> November, 2009. On 16<sup>th</sup> November, 2009, the Defendant Company wrote to the Plaintiff Company as follows –

*“RE: Application for additional shares of 240,000 and cheques No.541 for*

*Kshs.24,000,000/= drawn on Fina Bank*

*At the meeting of the Board of Directors of Tausi Assurance Company Ltd. held on the 12<sup>th</sup> November, 2009 IT WAS RESOLVED “that the Form of Application of additional shares attached with 1<sup>st</sup> letter of offer of Rights Issue was sent by the Company Secretary without the mandate of the Board of Directors and therefore it be and is hereby nullified”. We therefore return you the above cheques.*

*We are sorry for any inconvenience caused to you.”*

On the same date, the Defendants sent to the Plaintiffs another letter by which the Plaintiff was informed that it had been allocated 77,763 ordinary shares of Kshs.100/= each on the Rights Issue of 299,861 ordinary shares on a pro rata basis at Kshs.100/= per share.

It is against this background that the Plaintiff alleges that it purchased 240,000 shares from the Defendant and that the latter should be restrained from offering those shares to any other shareholder. The issues to determine are therefore whether the Plaintiff has satisfied the conditions for the grant of an interlocutory injunction. In order to answer that question, it is necessary to evaluate the relationship between the parties in order ascertain whether there was a contract between them for the sale/purchase of the 240,000 shares. First it is noteworthy that the Form which the Plaintiff completed for the purchase of 240,000 shares was nullified as having been sent by the Company Secretary without the mandate of the Board of Directors. The issue as to whether the Secretary’s actions can bind the Company will depend on

whether she had the authority, actual or ostensible, to do so.

Clause 6 of Defendant Company's Articles of Association places the Company's shares under the absolute control of the Directors, who may allot or otherwise dispose of the same to such persons as they think fit. The Plaintiff relies on the case of THE ROYAL BRITISH BANK v. TURQUAND (1856) 6 E & B 327 for the proposition that the actions of the Secretary were binding on the Company. Generally speaking, Turquand's Case gives comfort to those outsiders dealing with the Company to the extent that such outsiders are not bound by any irregularities that may take place in the course of the indoor conduct of the Company's business. The Plaintiff in this case was not quite an outsider but an insider to the extent that its representative in the Board of Directors was one Dilesh Bid who used to sit in the Board of Directors. What did he know about the Company's operations? Is he a complete outsider or an insider or partly the one or the other? We need to know his position before determining whether or not the Company Secretary in this instance could be taken to have authority over the Company's shares which, by the Company's Constitution, were under the absolute control of the Directors. Evidence will be required to settle that issue.

Assuming that she had the authority to transact in relation to the Company's shares, did the Form of Application for additional shares give rise to the contract between the Plaintiff and the Defendant? In its application, the Plaintiff asserts that it purchased 240,000 shares from the Defendants. However, the circumstances of this case do not seem to point to a contract. In the first place the Plaintiff seems to treat that Form as an offer which it accepted by sending a cheque for Kshs.24,000,000/=. With respect, the very wording of that Form cannot convert it into an offer. At its very best, it is only an invitation to treat whereby the Defendant invited offers from the shareholders, which the Defendant would then accept, in order for any binding contracts to arise. The Applicant rightly captured that perspective of the Form when in its letter dated 3<sup>rd</sup> November, 2009 addressed to the Defendant's Company Secretary, it stated in part as follows –

*"... We have made a formal offer and paid for our offer as required by you ..."*

It was, therefore, for the Plaintiff and others to make offers which the Defendant would then accept and ask for dues on the shares offered to be bought. Any other conclusion would lead to disastrous consequences. In the first instance, it was not certain, at that point in time, how many shares would be available for the Rights Issue. Secondly, even if that number was known, it was not known how many shares the respective shareholders would bid for. If the bid by the Plaintiff had, for instance, exceeded the total number of shares available, would it have still insisted that it had a contract with the Defendant for all those shares? If so, from where would the Defendant have obtained the excess shares? It makes sense that the shareholders made the offers which the Defendant accepted and allotted shares on a pro rata basis, so that each shareholder could get a portion proportionate to its shareholding. In my view, there was no contract between the Plaintiff and the Defendant for the purchase of 240,000 shares, but only an offer by the Plaintiff to buy those shares which offer was open to the Defendant to accept or not to accept.

Having so found, I further find that the Defendant has not satisfied the first condition as laid down

in GIELLA'S CASE that an applicant should establish a prima facie case with a probability of success. Since there was no contract for the purchase of those shares, there cannot be a *prima facie* case. Secondly, if the Plaintiff were to suffer any loss, it would be the loss of a definite number of shares whose value is known and/or can be established, and it has not been suggested that the Defendant would not be able to pay, in monetary terms, the value of such shares. Finally, I note that the Defendant Company was in a hurry to raise some urgent capital in order to comply with the requirements of Legal Notice No. 97 of 2007 as to capitalization of the Company before 14<sup>th</sup> June, 2010. In view of the above observations, if I were to consider the balance of convenience, I would find still in favour of the Defendant.

I accordingly find that the grant of the interlocutory injunction sought in this matter is not deserved and this application is hereby dismissed with costs.

It is so ordered.

**Dated** and delivered at **Nairobi** this 13<sup>th</sup> day of May, 2010.

**L. NJAGI**  
**JUDGE**