

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
Winding Up Cause 19 of 2007

IN THE MATTER OF INVESCO INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF COMPANIES ACT

NEPTUNE CREDIT MANAGEMENT LTD. PETITIONER

RULING

On 18th March 2009, this court made the following order:

“This court in the circumstances gave order to directors of Invesco Insurance Company Limited and specifically Joseph Gitau Mburu to deposit in a joint interest earning account to be opened in a reputable bank by counsel for the petitioner and counsel for the regulator the proceeds of the sale of 340900 shares of Equity Bank which is the sum of KShs.58 million. The said directors were ordered to deposit the said amount by Monday, 16th March 2009 at the close of the bank business. It is for the above reasons that the court reaffirms its decision directing the directors of the defendant to comply with this court order issued on 12th March 2009. The petitioner and the regulator shall have the costs of this application against the said directors of the company.”

Joseph Gitau Mburu, a former director of Invesco Assurance Company Limited (*hereinafter referred to as the applicant*) was aggrieved by the said decision of this court. By an application dated 25th March 2009, purportedly made pursuant to **Rule 203** of the **Winding Up Rules** and **section 3A** of the **Civil Procedure Act**, the applicant sought to set aside, vary and/or vacate the said orders of this court issued on 18th March 2009. The grounds in support of the application as stated on the face of the application. In essence, it was the applicant’s case that the court had issued the said orders in his absence. The applicant complained that he had not been personally served with the application that resulted in the said order being issued against him in his capacity as a director of the company. The applicant contends that he was not personally represented at the time the orders were issued nor was he a party to the proceedings. He denied having sold the shares in question and further denied having benefited from the proceeds of the sale of the said shares. The application is supported by the annexed affidavit of the applicant, Joseph Gitau Mburu.

In response to the application, the 1st respondent Messrs. Neptune Credit Management Ltd. filed notice of preliminary objection. In the said notice, the 1st respondent contended that the firm of Gichuki Kingara & Co. Advocates were strangers to the proceedings by reason that the applicant was represented by Messrs. Watta & Associates Advocates. The 1st respondent urged the court to strike out the application filed by the said firm. The 2nd respondent, the Insurance Regulatory Authority (*incorporating the Commissioner of Insurance*) filed grounds of opposition to the application. The 2nd respondent stated that the application was premature, incompetent and otherwise an abuse of the court process. The 2nd respondent argued that the applicant was represented at the time the application was heard by the court and hence the issue of personal service could not arise. It was the 2nd respondent’s contention that the applicant participated in the proceedings in his capacity as a shareholder and a director of the company. The 2nd respondent was of the view that the applicant had not made out a case for the setting aside, variation or vacation of the orders issued by this court on 18th March 2009.

At the hearing of the application, I heard the rival submissions made by Mr. Kingara for the applicant, Mr. Sagana for the 1st respondent, Mr. Orowe for the company and Miss Gichuki for the 2nd respondent. The issue for determination by this court is whether the applicant made an appropriate case for this court to set aside, vary or vacate its orders of the 18th March 2009. This court has unfettered discretion to set aside, vary or vacate any of its orders if it is established that the person to whom the orders were directed was not served to attend to the proceedings. In the present application, having evaluated the facts of this case, and rival arguments made by learned counsel, it was clear to this court that the applicant participated in the proceedings that resulted in the order of 18th March 2009 being issued by this court. When the parties to the application appeared before this court on 12th March 2009, Mr. Watta informed the court that he was acting for the members of Board of Directors of the Company. He applied for an adjournment on the ground that the board of directors of the company had not met to enable it give him instructions to defend the application. The court rejected Mr. Watta's application for adjournment and ordered the hearing of the application to proceed as earlier scheduled. Mr. Watta participated in the proceedings. The court rendered its said ruling against the applicant.

In the said application, the applicant had been made a party to the proceedings in his capacity as a director and shareholder of the company. The applicant was specifically mentioned in the application. Mr. Watta did not tell the court that he lacked appropriate instructions to act on behalf of the applicant. It is therefore clear that the allegation by the applicant that the court had issued an order against him when he was not a party to the proceedings is untrue. In the affidavits that the applicant has sworn subsequent to the said order, it is evident that the applicant has intimate knowledge of the affairs of the company. Such knowledge could only have been acquired by the applicant in his capacity as a shareholder and a director of the company.

It was not disputed that the directors of the company, and specifically the applicant sold the 340,900 Equity Bank shares owned by the company during the pendency of this winding up proceedings. Under **section 224** of the **Companies Act**, once a winding up cause has been filed, the property of the company cannot be disposed off or dealt with adversely without the court's say so. In the present application, the applicant admits that the directors of the company sold the said shares during the period when they were in control of the affairs of the company after the High Court had thrown out the Insurance Regulatory Authority from statutory management of the company. The Insurance Regulatory Authority was later reinstated by the Court of Appeal into the management of the company.

The applicant complained that the court could not have issued the said order that he deposits the proceeds of the sale of the said shares without proof of the actual amount that the shares had allegedly been sold. That may be so. The principle which the court was upholding when it issued the said order is the fact that no property of the company, whether disclosed or undisclosed, should be adversely dealt with without the sanction of the court. In the present application, it was clear that the said shares owned by the company were illegally sold by the directors and shareholders of the company, and specifically, the applicant. The applicant was represented by counsel during the hearing of the application that resulted in the order in question.

I find no merit with the applicant's application dated the 25th March 2009 and hereby proceed to dismiss it with costs to the respondents.

It is so ordered.

DATED at **NAIROBI** this 27TH day of **MAY** 2009.

L. KIMARU

JUDGE