



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 363 of 2008**

**JOHN KIPKEMBOI KILEL .....PLAINTIFF**

**VERSUS**

**WILFRED RIITHO NJERU AS INTERIM LIQUIDATORY OF  
LAKESTAR INSURANCE CO. LTD.....DEFENDANT**

**R U L I N G**

In respect of 3 applications dated 1/7/08 seeking orders to restrain activities of the interim liquidator, he permanently be restrained and also he be restrained from having access or withdraw monies held in the account No.0112061694500 with Co-operative Bank and Treasury Bill account No.0118561694500 pending the hearing and determination of this suit and that the defendant be ordered to render a true and accurate account of his activities from the time he was appointed by the court, and that court do appoint auditor/liquidator to audit the accounts of the company.

Application dated 29/7/08 seeking orders basically to vacate discharge and set aside the injunctive orders granted on 1/7/2008 and application dated 8/8/08 by the plaintiff seeking order that the court do appoint the firm of Waithaka Kiarie of Buyer & Co. auditing firm to do auditing of Lakestar Insurance Co. under liquidation.

The grounds upon which the applications are based are stated in the application. The agreement is that the defendant was appointed by court in the year 2003. He is guilty of mismanagement of the business of the company and he should be removed under the **Companies Act**.

The supporting affidavit of John Kipkemboi Kilel, the plaintiff and the contributor to Lake star Insurance Co. Ltd. shows that on 27/7/2003 the company, Lakestar, was ordered to be wound up and the defendant, Wilfred Riitho Njeru was appointed as interim liquidator by court. Prior to this appointment the Commissioner of Insurance had appointed a statutory manager, Hellen Olima, who had reported that:-

- a) *The company's bank accounts held Kshs.1,337,945/=***
- b) *The company held fixed assets; L.R. 209/13453 valued at Kshs.144,000,000/= and L.R. 1899/3 valued at Kshs.20,000,000/=.***

This report is exhibited. Further the interim liquidator has proceeded to dispose off goods. Property No.209/13403 whose value was estimated at Kshs.145,830,724/= was sold at Kshs.59 million which was an under value in December 2005. Also property L.R.18995/3 valued at Kshs.20 million was sold for

Kshs.6,650,000/=. Furthermore, the liquidator has not acted in good faith. He has made secret profits, he has been incompetent and unable to file auditors reports every 6 months as required. He has failed to render proper books of account.

In replying of the affidavit of Wilfred Riitho to the application dated 1/7/2008, since the defendant's appointment 5 years ago the defendant has not disclosed the manner he has liquidated the assets of the company. The creditors were pressing and upon inquiries the plaintiff found the defendant had sold the above assets for Kshs.59,000,000/= in February and for Kshs.6,650,000/= in May 2004.

There was fraudulent dealing evidenced by such undervalue. The defendant also disposed off the assets without sanction of the court. The defendant filed an affidavit sworn on 24/7/2008. He said he was dissatisfied with interim orders the consequences of which the bank accounts were frozen and this has brought the liquidation process to a halt at a time when he was preparing final accounts for submission to court.

He accuses the respondent of indebtedness to the company to the tune of Kshs.34,774,865/79. He is not a contributor nor is he entitled to orders he obtained **HCC No.1016 of 2002**, there is a decree against the applicant in that sum. The orders given on 2/7/2008 were temporary restraining the liquidator from having access to the business of the Lakestar Insurance Co. Ltd, in liquidation.

The liquidator accuses the plaintiff of misrepresentation, non disclosure and misleading the court. He seeks to discharge the injunctive orders against him as liquidator. There is also application dated 8/8/2008 was seeking orders for application to be heard during court vacation. This application is now spent. However the application dated 1/7/08 where ex parte orders were granted and the second application dated 29/7/08 was seeking to discharge the orders granted on 1/7/08.

In both applications both applicants challenge the other accusing them of fraud, misrepresentation and illegality. Mr. Kipkepkemboi is said to owe the company of large sums of money. **Section 238** provides that a liquidator appointed by court may on a cause shown be removed by court. The powers of liquidator are provided under **Section 241** and it is provided that **Section 241 (1)** the liquidator in a winding up by court shall have power with the sanction either of the court or of the committee of inspection.

In this case where there is no committee of inspectors the liquidator is directed by court under **Section 241 (2)** to call the moveable and immovable property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company and to sell or sell the same in parcels and other powers. The applicant being the defendant in this case seeks to discharge orders issued by this court on 1/7/08:-

***“That the defendant’s activities as liquidator of Lakestar Insurance Co. be temporarily be and is hereby restrained and also from having access and/or withdraw moneys held in the account numbers 011201694500 and TB A/C 0118561694500 with Co-operative Bank of Kenya Ltd. pending inter partes hearing.”***

The applicant in application dated 29/7/08 swears that the orders aforesaid were premised on material non-disclosure and fundamental misrepresentation. The assets of the Company were sold by public auction and with court sanction. This is not true. Court order was issued by Hon. O.K. Mutungi, J. in his ruling dated 29/4/04. Furthermore, the liquidator has supported his affidavit by exhibits.

I have perused both affidavits of the applicant/plaintiff and the liquidator. I find no reason why the liquidator should be removed from his position. The applicant is not telling the true story. He is indebted to the company and he should repay the decree. The ruling delivered by Hon. Justice Waki (as he then was) on 27/5/2003 at page r:-

***“The Statutory Manager however states that Kilel (plaintiff) within a space of 3 years between 1998-2001 irregularly, irresponsibly and in blatant abuse of his position took unsecured loans from the company amounting to Kshs.26,294,385/10.***

***The siphoning out of such sums within a short period without repayments exposed and weakened the financial base of the company.”***

The court does not find a person of such character fit to take over the affairs of the company. The liquidator swears that the orders were made when he was in the process of preparing final accounts for submission to court.

Upon considering all matters raised in both applications I have come to the conclusion that:-

- 1. The application dated 1/7/2008 is to be dismissed as it is based on misleading information and non-disclosure of material facts;***
- 2. The application dated the 29/7/08 is allowed with costs to the liquidator;***
- 3. The liquidator is hereby ordered to file final accounts within the next 3 months from the date of this order.***

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 21<sup>st</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**