



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI COMMERCIAL COURTS COMMERCIAL TAX DIVISION)**  
**CIVIL CASE 31 OF 2009**

**JOHN K. NJUGUNA & JOHN K. THEURI *t/a***  
**KINYANJUI NJUGUNA & CO. ADVOCATES.....PLAINTIFF**

**VERSUS**

**STANDARD ASSURANCE (K) LTD..... 1<sup>ST</sup> DEFENDANT**

**NIC BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

Application dated 15/5/09 by Notice of Motion is brought under **Section 348** of the **Companies Act, Rule 3, 4 and 9 (p)** of the **Companies (High Court) Rules, Section 67 (c)** of the **Insurance Act, Section 3A, Order 50 Rule 1, Civil Procedure Code** seeking leave to the Statutory Manager of the Standard Assurance (K) Ltd. to be joined as a party to this suit. And that there be stay of court order made on 4/5/2009 during the currency of the moratorium declared by Statutory Manager on 11/3/09.

The application is grounded on the grounds stated and is supported by affidavit of Ashif Kassam, the Managing Director of HLB Ashur Consulting Ltd., the appointed Statutory Manager of the first defendant. He swears that on 11/3/2009 he declared a moratorium on payment by the company of creditors and policy holders for a period of 12 months from the date of declaration.

By court order made on 16/3/2009 all proceedings were stayed. Order may by court on 4/5/2009 would have the effect of defeating the purpose of Moratorium and would defeat protection afforded by order made on 16/3/2009. The applicant would suffer loss and would not be able to defend suits which will compromise any chances of reviving the company.

There is a replying affidavit sworn by John Kariuki, a partner with plaintiffs/respondents firm. He swears that the application is incompetent. That prayer No.3 does not exist, no review or setting aside is sought. That there is a defendant and no substitution has been sought. This matter is already finalized and there is nothing for trial or determination on issues and the applicant has not sought to re-open the proceedings afresh. And the Statutory Manager as constituted is irregular and incapable to be in office.

The respondent states that prayer 3 serves no purpose. The amount will be released after end of Moratorium. It is not disclosed that the garnishee order *nisi* and judgment was obtained on 11/2/2009 and

served on judgment-debtor on 13/2/2009. It is also sworn that at the time Moratorium was declared the amount of money with the garnishee was already attached and not accessible to the decree-debtor.

Further to this affidavit, the said John Kariuki filed a further affidavit sworn on 17/9/2009 stating that the alleged Statutory Manager, HLB Ashuir Consulting Ltd. does not exist, see exhibit JK-1 and that a consent was entered as by consent order made on 2/7/2009. And that after valuation a balance of Kshs.19 million from amount garnished is outstanding. And the amount deposited is Kshs.18 million leaving a balance of Kshs.1 million.

There is a supplementary affidavit of Ashif Kassam now he depones that he is Managing Director of RSM Ashuir Consulting Ltd. formerly known as HLB Ashuir Consulting Ltd. He has attached a certificate of change of name at the office of Registrar of Companies made on 25/3/2009. He further swears that the company was appointed to act Statutory Manager on March 11, 2009.

I have given consideration to the affidavits filed by both parties. It appears to me irregular that Statutory Manager as provided under **Section 67 (c)** should be an incorporated body as opposed to a person. In this case the work of a Statutory Manager is being done by the Managing Director of the Corporation. In any case this suit is completed and was completed before the said appointment. The garnishee order was issued in February 2009 thus the execution was already completed and the funds out of the hands of decree-debtor.

In these circumstances, I do not see any merit in enjoining the so called Statutory Manager as a party. This litigation should be brought to a close in the manner I do not grant order numbered 2 in the application. Regarding prayer 3 in the application, the said Statutory Manager has not displayed his appointment Gazette Notice 3148 of 27/3/2009 is information advertised by the said Chairman, "HLB Ashuir Consulting Limited."

This is not sufficient evidence of appointment. Again on 2/7/2009 the parties, judgment-creditor and counsel for garnishee recorded a consent for the settlement of part of decree. It was agreed by consent that any other money standing to the credit of the defendant at the garnishee bank be released to the defendant.

The prayers sought in this application is consistent with the above consent order. In my view, the present application is seeking orders not sustainable and I do find no merit in the same.

I hereby dismiss application with costs to respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED** at Nairobi this 8<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**

**LATER:**

It is now pointed out to the court that the consent order provides (No.3) "failure to the agreement, the payment already made to abide the outcome of the defendants' notice of motion dated 15/5/09, the ruling of which is written above. The garnishee shall forthwith release the sum of Kshs.18 million upon the payment of which the garnishee shall be discharged and shall be deemed to have settled the garnishee order absolute dated 4/5/2009. The said sum has already been released to the advocates of both parties and is deposited with Family Bank.

It is hereby ordered that:-

1. *The said sum shall together with interest 9% be released to the decree holder forthwith;*
2. *The garnishee is hereby discharged and garnishee order absolute is hereby deemed settled;*
3. *Motion filed by garnishee dated 8/5/2009 is hereby marked settled with no order as to costs;*
4. *Any money standing on the credit of the defendant in the garnishee bank shall be paid to it.*

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 9<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**