



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....PLAINTIFF**

VERSUS

IN THE MATTER OF COMPANIES ACT.....DEFENDANT

RULING

Notice of motion dated 25.09.08 seeks order for temporary injunction against the Statutory Manager to restrain disposing/transfer of the company property and any transfer of shares or membership of the company until determination of this cause.

The application is based on grounds written on the application. The company was placed under statutory management on 29.02.2008. The company's Statutory Manager declared moratorium on all payments and has further obtained exparte declaratory orders against all executions, attachment and/or guarantee proceedings against its assets or monies held in its bank accounts and that the company is now seriously floating its shareholding membership and/or its assets to prospective buyers/partners and /or equity investors in complete disregard of this Winding Up cause or creditors interest herein.

The creditors stand to suffer great prejudice and irreparable damage if orders sought are not granted. The affidavit in support shown by Bryan Yogo, Managing Director of the applicant/petitioner company has annexures marked "BY 2" and "BY 3"

Information Memorandum June 2008 whose preamble at page 3 states "The memorandum is prepared to provide critical information to prospective strategic partner or equity investor. A similar document was prepared and produced in April 2008" The document is addressing the demands of prospective investors. It is shown that annexures "BY 2" and "BY 3" are evidence of the proposed sale.

Again it appears that the Action of the Commissioner of insurance in placing the company under Statutory Management is questioned and is subject of Judicial Review Application No. 84/07

Before the commencement of submissions, the applicant informed the court that no notice has been served as required under rule 29 of company Winding Up rules. It is to be noted that such notices has to be served not later than four O'clock in the afternoon of the same day appointed for the hearing of the petition

At this stage there already several parties who have filed notice of intention to appear therefore the

applicant's submission is not correct.

The other issue raised by counsel for applicant is that the regulator i.e. Commissioner of insurance is not entitled to participate in winding up proceedings. However, the Insurance Act Cap 487 Section 121 permits the Commissioner to be heard on the petition where it is not filed by him.

There are two Preliminary objections raised by M/s Simba for the company that the petition against the company being an Insurance company under Insurance Act is incompetent and cannot lie against the company and therefore the petition is an abuse of process of court.

The process of winding up of an insurance Co. is set in the Insurance Act. The procedure starts at Section 167 C (2) where the commissioner is empowered to appoint 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.

The duties and powers of the Manager set out under that section subsection (6) states

"The manager shall within a period of 12 months from the date of his appointment prepare and submit to the commissioner a report on the financial position and the management of the insurer with recommendations as to whether the insurer is capable of being revived or insurer should be liquidated. The final decision is of the Minister.

In case he decides on liquidation section 123 of the Act come into operation, such as winding up petition would be filed by the commissioner in accordance with the Companies Act Cap 486. One of the grounds for filing petition by the commissioner is under 123 (1) C- inability to pay his debts within the meaning of section 219 Companies Act.

Where winding up petition is filed by other persons, a copy shall be served on commissioner and he will be entitled to be heard in that petition therefore the commissioner's Advocate is entitled to participate in this petition Supplemental provision Section 125 provide that rules made under Section 344 of the Companies Act namely "The companies (High Court) Rules" may regulate the procedure and the practice to be followed in the proceedings with respect to the winding up of insurers under the insurance Act.

The conclusion to be made is that the provision of Companies Act are applicable in winding up proceedings of Insurance companies.

The powers given to the Manager appointed are contained under Section 67 C Subsection 2 I, ii, iii, iv, subsection 4 thereof demands that he discharge his duties with diligence and in accordance with sound insurance principles and financial principles and in particular with due regard to the interests of the insurer its policy holders and the insuring public in general.

The responsibilities include the matters set out subsection 5 (a) to (f) namely presenting all the assets of the insurer necessary all debts due and owing to the insurer evaluating the insolvency and liquidity of the insurer, assessing insurers compliance with premiums of the Act and Regulations, determining the adequacy of capital and reserves and recommending to the Commissioner any organization which he considers necessary and which he may implement on behalf of the insurer. There is no powers given for disposing of assets of the company.

67c (6) demands that the Manager shall with a period of 12 months from the date of his appointment prepare and submit a report on the financial position and the management of the insurer.

His report must recommend whether the insurer is capable of having revived or the insurer should be liquidated. The report which he has exhibited does not make these recommendations.

The decision it is to be said again is for the Minister. The applicant complaint is that the petition

herein was filed by applicant on 22.11.07 and advertised 17.01.2008 on the Daily Nation Newspaper.

The commissioner did not appoint the Manager until 29.02.08. The petitioner was already scheduled for hearing in the High Court.

When a petition has not been filed by the commissioner section 121 states "Where a petitioner for the winding up of insurer is presented by a person other than the commissioner, a copy of the petitioner shall be served on the commissioner and the commissioner shall be entitled to be heard on that petition. It is my view that the law does not contemplate a situation where the High Court is handling a winding up of a company and at the same time the Commissioner of Insurance is proceeding to appoint a Manager in the same case for same company as provided under section 67 c of insurance Act.

In that case the commissioner is only entitled to appear and participate in the hearing of petition which is already before the court.

The conclusion is that the appointment of the Manager the said Geoffrey Njenga in this case is unlawful. His management of the company business is not in accordance with the law. It is an abuse of the process to put in place management of the company in the hands of Statutory Manager where the Winding Up is already before the court.

The applicant states that the activities of the Manager has caused loss. He declared moratorium on all payments and has obtained an exparte orders against all execution attachment or garnish proceedings against the assets of the company assets and monies in the bank. And is now floating the company shareholding, membership and assets to prospective buyers and equity investors in complete disregard to this winding up cause or creditors interest therein. He has sold assets of the company while the W. u is in progress.

The manager proposes public process of a private company which is against the law. The assets that are of valued over kshs. 1 billion in value are to be sold at kshs.46 million which is about 1/3 value of the price. It is submitted that the activities of the Manager are not accordingly to law and are only causing great loss to the company and the applicant who is a creditor.

In view of what I have said above, the appointment of the manager in the first place was an interference of the court process and it should therefore be terminated. He has no authority to take any action either to revive the company or to liquidate the same.

It was for the Minister to decide on such matters. In any case the Applicant says there is no reason to put the company into statutory management as the company has assets (more than Kshs. 1 billion).

I have considered all material laid before the court and it is my considered opinion that the appointment of manager was not justified and therefore he has no authority to carry on the business of the company. His appointment is void, null and invalid.

I therefore grant orders as prayed under prayer 2 in the motion. Temporary injunction is granted restraining the Manager Geoffrey Njoro from his disposing and/or transferring any of the property of the debtor/company or transfer of shares or membership of the company until the determination of his Winding Up cause.

Costs shall go to the Applicant/Petitioner.

Orders accordingly.

DATED this 17th day of October 2008.

JOYCE N. KHAMINWA

JUDGE