



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1345 of 2005 (OS)

IN THE MATTER OF THE INSURANCE ACT, CAP 487

AND

IN THE MATTER OF THE ENFORCEMENT OF

**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 84 OF THE CONSTITUTION
OF KENYA**

AND

IN THE MATTER OF RULE 10 & 11 OF THE

**CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL) PRACTICE AND RPOCEDURE RULES 2001**

AND

IN THE MATTER OF THE INSURANCE (THIRD PARTY RISKS) ACT, CAP 405

AND

IN THE MATTER OF THE COMPANY'S ACT, CAP 486

AND

IN THE MATTER OF

KENSILVER EXPRESS LTD.....1ST PLAINTIFF

SIMON KIMUTAI CHEPKWONY.....2ND PLAINTIFF

PETER NJUGUNA NJATHI.....3RD PLAINTIFF

NANCY WANJIRU KIMANI.....4TH PLAINTIFF

VERSUS

THE COMMISSIONER OF INSURANCE.....1ST DEFENDANT

THE MININSTER FOR FINANCE.....2ND DFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

THE STATUTORY MANAGER

UNITED INSURANCE COMPANY LIMITED.....4TH DEFENDANT

RULING

I: SUBJECT

1: The subject of this application is Insurance Law. It concerns the Insurance Act Cap. 487 Laws of Kenya.

2. The United Insurance Company of Kenya had a very large portfolio of policy holders. Unlike other insurance company in the insurance industry who ventured into several insurance world, United Insurance Company had 80% of its work in insuring motor vehicle-commercial insurance. In Kenya, this is a high risks insurance undertaking as the accident rates are fairly high. The said insurance company collected premiums from its policy holders and invested it in immovable assets such as land. Thus 70% of their investment was in land instead of 30%.

3. It was therefore not a surprise that the said insurance company collapsed. The Commissioner of Insurance appointed a statutory manager being Kenya Re-Insurance. I have been informed by the statutory manager that the reasons Kenya Re insurance company was chosen was because it had all the activies, the assessors and the knowledge to be able to manage the company (United Insurance) well without having to go out and source for assistants.

4. The effect of United insurance company collapsing was that the respective insurance policy holders were being sued directly. Most had been to civil jail for none payments of the claims. Some declared themselves bankrupt in order to escape from being auctioned.

5. The statutory manager was to declare a moratorium namely that all cases and proceedings be stayed together with any action of executive against the insurance company until the stationary manager organizes itself and calls a creditors meeting on how best to make payments. This was not effectively done.

6. Kensilver Express Ltd and 3 Others filed this originating Summons of 12.9.06 whereby they sort this courts declaration and orders as to:-

- i) Whether the plaintiff insurance policy with United Insurance company was valid
- ii) Whether the Commissioner of Insurance was negligence in discharging his duty in permitting the said United Insurance Co. Ltd collapse
- iii) Whether the statutory manager was correctly appointed; whether they are permitted to sell the assets of the insurance company.
- iv) Whether the moratorium issued should cover those who have judgments against court process and execution against it.

7. To this end the applicants filed a chamber summons of 12.9.05 whereby they sought under a certificate of urgency to enjoin the statutory manager, to allow other representative to be enjoined to the suit including third parties to be allowed to advertised the existence of this suit in the daily press and to be granted an injunction against the statutory manager to stop selling the insurance company assets.

II: PROCEDURE

8. The applicants of 12.9.06 was assigned to Kihara Kariuki J to hear by the Hon. The Chief justice. Due to his heavy work load as duty judge he requested his lordship to assign the continuation of the hearing to another judge. On 16 January 2007 the Hon. Chief Justice assigned this file and file No.1663/2005 for hearing before me. There is also other files related to this in existence. By now several 3rd parties interested applicants had prayed to be enjoined to the suit.

9. On 24 January 2007, I gave direction that the hearing of this application proceeds under order 17 r 10 Civil Procedure Rule as there was given good cause for another judge to continue with this matter.

10. The parties conceded that there be a stay of all proceeding in court against any defendant sued as a result of holding an insurance policy that in effect would now not be honoured. That any execution against them personally would be stopped.

11. It was clarified to parties and agreed that all cases pending in court or to be later filed to court would continue to full hearing and determination. This was for the purpose of preserving evidence in court. It is at the stage after judgment has been delivered that all proceeding and suits are stayed pending the hearing of the application before this court.

12. The orders of this court was duly advertised in the print media. Any suit per se and or to be filed was to be referred to the applicants advocate for notification. The parties came for hearing on 5.2.07 interparties.

III: APPLICATION 12.9.05

13. The effect of the orders of the court by consent was that of only one issue, being No.7, should be determined:-

“A temporary injunction issue to restrain the Kenya Reinsurance Company Ltd while acting in the capacity of manager of United Insurance Co. Ltd. be restrained from selling by private treaty, public auction or otherwise, however any of the assets of United Insurance Co. Ltd during the pendency of its appointment as such statutory manager of United Insurance Co. Ltd with leave of the court in these proceeding until the determination of the plaintiffs originating summons.”

a) Arguments by the applicant

14. The applicant stated that the statutory manger had exceeded his powers and had gone beyond its mandate in selling the assets of the insurance company. If the building where the offices are houses and computers are sold how can the insurance company make payments due to it. Section 67 (5) (c) does not permit the said insurance company to exceed its mandate.

b) Argument by the respondent.

15. It was imperative stated the statutory manger advocate to sell the assets in order to ensure that there are payments to meet the demands and needs of the creditors. If there is no sale of assets payment would not be effected and section 67 (5) (c) would require to be complied with.

III FINDING

16. I find in this application that the statutory managers mandate is being questioned. This indeed is

one of the question the originating summons wishes this court to determine. That the statutory managers mandate has exceeded that which is required.

17. I further note that Insurance companies have Insurance that are taken out with Kenya-Reinsurance company to protect them from such risks. The question rises as to where there may be a conflict of interest that the Kenya Reinsurance Company be a statutory manager at the same time the actual Re-insurance company. These are all questions to be answered and determined in the Originating Summons.

18. I hereby agree with the arguments put forward by the applicants. I accordingly grant the application as prayed in prayer 7. That there be an injunction to issue restraining the Kenya Reinsurance Company Ltd from disposing of the assets of United Insurance Company without leave of the court.

19. There will be costs to the applicants.

Dated this 15th day of February 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

J.H. Kinyanjui for Harrison Kinyanjui & Co. Advocate for the plaintiff

M.W. Kamau Advocate for the 1st, 2nd and 3rd Respondent

(Attorney General)

N. Mungai for Muniu, Mungai & Co. Advocates for the 4th Respondent

24.1.07

Coram: Hon. Lady Justice M.A. Ang'awa

Court clerk: Paul Kamau

J.H. Kinyanjui for Harrison Kinyanjui & Co. Advocates for the plaintiff

M.W. Kamau advocates for the 1st, 2nd and 3rd Respondent

(Attorney General)

N. Mungai for Muniu, Mungai & Co. Advocates for the 4th Respondent

I

Signed	
1. N. Nani Mungai	1. "By consent, all pending application under this suit

<p>Muriu Mungai & Co. Advocates for 4th defendant in Hccc1345/05</p>	<p>Hccc1345/05 and Hccc 1663/05 by all plaintiffs and interested parties seeking orders of stay are hereby withdrawn with no orders as to costs.</p>
<p>2. E.N. Gichovi holding brief for S.W. Ndegwa & Co. advocates for 1st – 102nd applicant in Hccc Misc. No.1663/05</p>	<p>2. The application dated 15 January 2007 for contempt be and is hereby withdrawn on condition that Kennedy Ngumbao t/a White Stores Auctioneers <u>unconditionally releases</u> KAQ 148R to Benjo Service Line company, the applicant by close of business today 24 January 2007.</p>
<p>3. R. W. Chege for Sam Wanjau and Julius Nganga for R.W. Chege & Associates Advocates</p>	<p>3. Costs in the cause</p>
<p>4. Kamau L.W. for C.N. Kimani & Co. Advocates for 140th Intended Interested party in misc. No.1663/05</p>	
<p>5. H. Kinyanjui J. Harrison Knyanjui & Co. Advocates Plaintiffs 1 – 4 and additional ones in Hccc1345/2005</p>	
<p>6. Bitta E.O. for Attorney General for 1st, 2nd and 3rd respondent</p>	
<p>7. Okoth M.M. for respondent in Hccc1345/05 (Mutisya & Co Advocates</p>	
<p>8. P.N. Ngaga for J.M. Njenga & Co. Advocates for Joyce Wairimu in Thika RMCC No.802/98</p>	<p>Application granted and orders accordingly M.A. Ang'awa Judge 24.1.07</p>

II

1. N. Nani Mungai
Muriu Mungai & Co. Advocates
for 4th defendant
2. E.N. Gichovi holding brief for
S.W. Ndegwa & Co. Advocates
for 1st – 102nd applicants in Hccc
Misc. No.1663/05
3. R.W. Chege
R.W. Chege Associations
Advocates for Sam Wanjama &
Julius Nganga
4. Kamau LW. For C.N. Kihara
& Co. Advocates for 140th
Intended Interested party in Misc.
No.1663/05
5. H. Kinyanjui
J. Harrison Kinyanjui & Co.
Advocates for plaintiff 1 – 4 and
Additional ones in Hccc1345/05
6. E.O. Bitta for Attorney-
General for 1st,2nd and 3rd
respondent
7. N.M. for respondent in
1345/05 .
Mutisya & Co. Advocates
8. Joyce Wairimu in Thika
Rmcc No.802/98

By consent, all judgments, execution processes including warrant of attachments and arrest against defendants in suits arising out of accidents involving motor vehicles hitherto insured by United Insurance (now under statutory management) and which claims United Insurance Ltd had by operations of statute assured responsibility at all states of such judgments and decrees and warrants be and are hereby stayed until the Originating Summons dated 12.9.2005 in Hccc1345/05 is heard and determined.

2. By further consent, all proceedings instituted against the defendants arising out of accident involved motor vehicles hitherto insured by United Insurance Ltd shall continue and be heard up to the state of judgment upon which the stay orders above shall apply to those sustain no execution shall be levied against such defendants until the hearing and determination of the originating summons aforesaid of Hccc1345/05

Application granted and orders accordingly

M.A. Ang'awa

Judge

24.1.01

1. N.Nami Muriu for

Muriu Mungai & Co. Advocates
for the 4th plaintiff

3.Any party who has obtained concluded any suit referred to in order 2 above shall and do notified the advocate M/S J. Harrison Kinyanjui & Co. Advocates.

St. Elles House (formerly known as Mitchell Colts Houses) 4th floor, Surite 416

Wabera Street

P.O. Box 10024-00100 (GPO)

Nairobi

Tel 020 – 342070

Fax 020 – 34207

2. E.N. Gichovi holding brief for
S.W. Ndegwa

S.W. Ndegwa & Co. Advocates
for 1st – 102nd applicants in Hccc
Misc.1663/05

4. That the orders herein shall be advertised in the “Standard” newspapers and the “Daily Nation News papers.

3. R.W. Chege

R.W. chege Associates for Sam
Wanjau & J. Nganga

5. That thee will be further hearing of chamber summons 12.9.05 on 5.2.07 at 10.00 a.m.’

4.Kamau G.W. for C.N. Kihara & Co. Advocates for 140th
Intended interested party in Misc.
No.1663/05

Application granted and orders accordingly

M.A. Ang’awa

Judge

24.1.07

5. H. Kinyanju

For J. Harrison Kinyanjui & Co.
Advocates for the plaintiff

The other additional plaintiffs in
Hccc 1345/05.

6. Bitu E.O. for Attorney General

For 1st, 2nd and 3rd respondents

Muttisya & Co. advocates for
Okoth N.M. for respondent in
1345/05

P.N. Nyaga for J.M. Njenga &
Co. Advocates for Joyce
Wairimu in Thika Rmcc No.
802/98

Application granted and orders accordingly

M.A. Ang'awa

Judge

24.1.07

“By consent, of all parties the hearing of chamber summons 12.9.05

be and is hereby set down for hearing on 5.2.07 at 10.00 a.m.

The hearing date of 15.2.07 is taken out in Hccc1663/05

1. N. Nami Mungai

Muriu Mungai & Co. Advocates

For 4th defendant

2. E.N. Gichovi holding brief for S.W Ndegwa

S.W. Ndegwa & Co. Advocates for 1st – 102nd applicants in Hccc Misc.1663/05

3. Rosemary W. Chege

R.W. Chege & Associates Advocates for Sam Wanjau & Julius Nganga

4. Kamau L.W & C..N. Kihara & Co. Advocates For 140th Intended Interested Party in Misc.
No.1663/05

5. H. Kinyanjui

J. Harrison Kinyanjui & Co. Advocates for plaitnfif 1 – 4 and other additional plaintiffs inHccc 1345/05

6. Bitta E.O. for Attorney General for 1st, 2nd and 3rd respondents

7. Okoth N.M. for respondent in 1341/05 (Muttisya & Co. Advocates)

8. P.M. Ngaga for J.M. Njenga & Co. Advocates for Joyce Wairimu in RCCC No.802/98 Thika

Application granted and orders accordingly all orders be extracted and served on duty judge.

M.A. Ang'awa

Judge

24.1.07