



**Directline Assurance Co Ltd v Macharia & 11 others (Civil Case E328 of 2024)
[2024] KEHC 14374 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E328 OF 2024
A MABEYA, J
NOVEMBER 20, 2024**

BETWEEN

DIRECTLINE ASSURANCE CO LTD PLAINTIFF

AND

**DR SAMUEL KAMAU MACHARIA 1ST DEFENDANT
BASHIR MBURU 2ND DEFENDANT
JULIUS ORENGE 3RD DEFENDANT
KELVIN MOGENI 4TH DEFENDANT
SALOME GITOHO 5TH DEFENDANT
TOY AND SUNA HOLDINGS LIMITED 6TH DEFENDANT
DIAMOND TRUST BANK LIMITED 7TH DEFENDANT
EQUITY BANK KENYA LTD 8TH DEFENDANT
FAMILY BANK LTD 9TH DEFENDANT
I&M BANK LIMITED 10TH DEFENDANT
INSURANCE REGULATORY AUTHORITY 11TH DEFENDANT
ATANAS MAINA 12TH DEFENDANT**

RULING

1. On 4/10/2024, this Court made certain orders including:-
 - a. An order restraining some of the defendants from operating the accounts of the plaintiff.



- b. An order directing the constitution of a temporary board consisting of 2 nominees each of AKM Investments Ltd, Janus Ltd and Royal Media Services Ltd (later amended to Royal Credit Ltd).
 - c. That the said temporary board appoint the bank signatories.
2. On 22/10/2024, the Court again gave a ruling on directions where it expressed dissatisfaction with the state of affairs of the plaintiff. It reiterated the fact that those hitherto managing the plaintiff had acted contrary to acceptable governance parameters. They had applied the assets of the plaintiff to 3rd parties unrelated with the plaintiff contrary to the Insurance Act. It noted that it is because the said acts bordered on fraud that it had issued the far reaching and drastic orders of 4/10/2024.
3. On 29/10/2024, the Court allowed Royal Credit Ltd an extension until 31/10/2024 to submit 2 of its nominees to the 11th defendant for approval to the temporary joint board.
4. The foregoing is the background to the Motion by the plaintiff dated 8/11/2021. The same was brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. It seeks that the interim board of directors consisting of 4 nominees who have been approved by the 11th defendant be deemed to be fully constituted and that, the bankers of the plaintiff do comply with the resolution of the said board.
5. The grounds for the Motion were set out in its body and the supporting affidavit of Sammy Kanyi sworn on 8/11/2024. Most were as per the background set out above and that, the bankers were not sure if the board as constituted was valid and on whether they can act on that board's resolutions. That the Royal Credit Ltd had purported to nominate persons involved in the wrongful and unlawful transfer of Kshs. 400 million from the plaintiff. That the orders sought were necessary for the operations of the plaintiff.
6. The Motion was opposed by the 1st to 6th defendant vide the affidavits of Dr. Samuel Kamau Macharia and Bashir Mburu sworn on 11th and 13th November, 2024, respectively. It was contended that the application was an abuse of the Court process. That the applicant intended to defeat the order of 4/10/2024 through deceit, that it wanted to involve the Court in the day to day running of the plaintiff and was being aided by the 11th defendant. That the application was akin to one for the review of the orders of 4/10/2024 and the plaintiff should have appealed against the said orders instead of lodging the present application.
7. That the order of 4/10/2024 was akin to a receivership; that the deponent of the supporting affidavit to the Motion had no authority to swear the affidavit as the two nominees of Royal Credit Ltd, Bashir Mburu and Antony Macharia had not sat in any meeting to give such authority. That Mr. Kanyi, the said deponent, had brought the Motion to promote his agenda to run the plaintiff without the involvement of Royal Credit Ltd. That the 11th defendant was assisting the plaintiff to exclude Royal Credit Ltd from its Management. That Mr. Kanyi was in a hurry to have the plaintiff transact business in the absence of the Royal Credit Ltd.
8. It was further contended that the shareholding had not been determined and the temporary board was in the nature of receiver manager who should be neutral in its actions. That the 2nd defendant who was a serving director implementing the Toy Project had not been found guilty. That the resolution of the 4 directors was a nullity.
9. That on 1/11/2024, the nominees of Royal Credit Ltd attended a board meeting of the interim board. That however, on 4/11/2024 the Chief Executive Officer of the 11th defendant ordered them out from a meeting in his office on the ground that he had not approved their nomination. That the alleged decision had not reached the two as at the time of making the affidavits. That the application was



- precipitated by Mr. Bashir Mburu's decline to approve certain payments which Mr. Sammy Kanyi had requested.
10. The 1st to 6th defendants relied on the cases of Jimba Credit vs Githunguri HCC No. 144 of 1988, NBI Pet. No. 518 of 2013 JSC vs Speaker of National Assembly & the texts in I.H. Jacob; The Inherent Jurisdiction of the Court, 6th Edn of Commercial Law, Steven Gee QC & 18th Edn; Kerr & Hunters on Receivers and Administrators in support of their various propositions.
 11. Although the 11th defendant did not file any affidavit, its advocate Learned Counsel Mr. Havi supported the application on the grounds that the directors who have been appointed should be allowed to run the company.
 12. Mr. Mbogori and Mr. Kamau Kuria (Sc) Learned Counsels for the plaintiff and the 1st to 6th defendant respectively, orally submitted on the application. I have carefully considered the said submissions.
 13. As stated in my ruling of 4/10/2024 and correctly pointed out by Mr. Kamau Kuria (SC), it is not the business of the Court to micro manage a company. Management of companies is the preserve of the board of directors or the shareholders at the annual or special general meetings.
 14. However, in the present case, before Court is a company which is completely dysfunctional. Shareholding is disputed. It has undergone arbitration and is now pending before the High Court. It is yet to be determined. As a result, no decision/resolution can be made by the shareholders. As regards the former board of directors, they were engaged in actions that were alleged to be illegal under the *Insurance Act*. Although the allegations are yet to be tried, the court found on a prima facie basis that the act of committing Kshs. 700 million for purposes other than those authorized by the Act, that was near fraud (Kshs. 300M was to secure facilities to a 3rd entity while Kshs. 400M was transferred to the account of a 3rd entity).
 15. The said actions when proved have dire consequences. It must be recalled that the plaintiff is an insurer of public service vehicles. Its monies belong to the insuring public. The alleged actions not only expose the policy holders but their beneficiaries too to claims. It is in public interest that the policy holders and their beneficiaries be protected by the Court in exercise of its judicial authority (See Art 159 of *the Constitution*).
 16. It is because of the foregoing, that the Court issued the drastic orders of 4/10/2024 to safeguard public interest. The insuring public would be extremely prejudiced by the actions of the defendants. That is why, with the orders of injunction of 4/10/2024, those restrained have no business going back to the Management of the plaintiff whether through the Court created interim board or otherwise. Until they clear themselves at the trial.
 17. In this regard, by purporting to appoint the same individual(s) restrained by this Court to the interim board, Royal Credit Ltd was but attempting to circumvent the said orders of 4/10/2024. That won't do. None of those restrained is eligible for nomination to the interim board.
 18. Senior Counsel Kamau submitted that the orders of 4/10/2024 placed the plaintiff under receivership. Nothing could be further from the truth. The measures undertaken vide the said orders were of an interim nature. The company was not put under receivership. The measures were geared towards enabling the plaintiff run pending the feuding parties in the arbitral proceedings expediting the process. Once the feuding parties conclude their dispute there, they will be welcome back to take over from where they left it. In the meantime, the plaintiff will be run by the interim board under the governance principles of company law and the Regulator of insurance business in this country.



19. As to whether the 4 nominees already approved by the 11th defendant can run the affairs of the plaintiff without waiting for the nominees of Royal Credit Ltd, the answer is in the affirmative. The orders of 4/10/2024 and 22/10/2024 meant that: -
- a. there should have been 6 nominated directors to the interim board;
 - b. the said board was to be constituted under the direction, supervision and regulation of the 11th defendant (see para 4 of the ruling of 22/10/2024);
 - c. after 31/10/2024, the interim board was to conduct its business in accordance with the law, that is, the meetings are to be regulated by law;
 - d. the quorum therefor would be 3 and its decisions will be by majority of those attending the meeting;
 - e. any decision made by the majority of those attending would be binding and enforceable as such.
20. The reason why the 11th defendant is featuring is because, it is the regulator. It is the one who first flagged out the irregularities that were committed by the former board. It is enjoined by law to ensure that insurers, of which the plaintiff is one, acts in accordance with the law. In the past there has been very sad and disheartening moments in this country when insurers collapsed because of mismanagement. Hundreds of thousands of the insuring public were left. They had no recourse but to come down crushing in ruins. That must be avoided.
21. In this regard, the 11th defendant being a public authority, it is expected to be neutral, acting without favour, bias or discrimination. It is to act in utmost good faith and for public interest.
22. Having stated so, where are the bankers to be left? They are to follow and execute the instructions lawfully given by the company through the interim board. The interim board is expected to make its resolutions and forward the same to the bankers who should act prudently as expected of them in the normal banking practice.
23. Accordingly, I find the application to be meritorious and I allow the same as prayed. The parties may now proceed for pre-trials as earlier on directed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH NOVEMBER 2024.

A. MABEYA, FCI Arb

JUDGE

