



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.241 OF 2007

CONCORD INSURANCE CO. LTD.....PLAINTIFF

VERSUS

CHARLES LUTTA KASAMANI.....DEFENDANT

RULING

(1) Before Court is the Notice of Motion dated **4th April 2018** by which the Defendant/Applicant **CHARLES LUTTA KASAMANI T/A KASAMANI & CO. ADVOCATES** seeks the following orders:-

“1) That the firm of R V Mukoya & Co. Advocates be allowed to come on record on behalf of the Defendant.

2) That the Statutory Manager Concord Insurance Company Limited be enjoined in these proceedings as an interested party.

3) That the firm of Mwaniki Gachoka & Co. Advocates having conducted this suit without the instructions of the Statutory Manager of Concord Insurance Company Limited (under Statutory Management) acted without authority.

4) That all proceedings before the Deputy Registrar of this Court from the 6th of February 2013 to date are a nullity and are hereby struck out.

The Application which was premised upon **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act, 2010**, was supported by the Affidavit sworn on even date by **CHARLES LUTTA KASAMANI**, an Advocate of the High Court of Kenya.

(2) **CONCORD INSURANCE COMPANY LIMITED** (the Plaintiff/Respondent) opposed the application by way of the Replying Affidavit dated **24th May 2018** sworn by **RAPHAEL N. GACHOKA**, an Advocate of the High Court of Kenya, and a partner in the firm of **MWANIKI GACHOKA & CO. ADVOCATES**.

(3) Pursuant to directions given by this Court the application was canvassed by way of written submissions. The Defendant/Applicant filed his written submissions on **12th July 2018**, whilst the Plaintiff/Respondent filed its submissions on **31st July 2018**. Both Counsel appeared in court to highlight those written submissions on **12th November 2018**

BACKGROUND

(4) The genesis of this matter is the Civil Suit filed in **Kisumu HCCC NO.110 of 1990 WELLINGTON ALINYO (deceased) –Vs – CONCORD INSURANCE CO. LTD**. The Defendant/Applicant represented the Plaintiff in this suit. On **27th June 2000** **Hon Justice Wambilianga** (as he then was) entered judgment against the Plaintiff in the sum of **Kshs.1,683,500/=** plus costs and interest. The Plaintiff being dissatisfied filed an appeal against that judgment in the Court of Appeal at Kisumu. On **9th August 2000** (before the said Appeal was heard and determined) the parties reached an agreement to the effect that the Plaintiff pay out the decretal sum to the firm of **M/S KASAMANI & COMPANY ADVOCATES**, which monies were to be deposited into an interest earning account pending the determination of the Appeal. The Plaintiff/Respondent paid out the money to the Defendant/Applicant as agreed. Meanwhile the Appeal being **Kisumu Civil Appeal No.163 of 2000** was heard and was determined in favour of the Plaintiff/Respondent. The award made in favour of the Plaintiff/Respondent for **Kshs.1,642,580/=** was set aside. Accordingly the Defendant/ Applicant ought to have refunded this sum of **Kshs.1,642,580/=** plus interest to the Plaintiff/Applicant. It is averred that despite numerous demands by the Plaintiff/Respondent the Defendant/Applicant refused and/or declined to refund said monies. The Plaintiff/Respondent then instructed the firm of **Mwaniki Gachoka & Co. Advocates**, to recover the decretal sum from the Defendant. The firm of **Mwaniki Gachoka & Co. Advocates** filed in the High

Court in **Nairobi HCCC NO.241 OF 2007** (the present suit) and obtained judgment in favour of the Plaintiff against the Defendant/Applicant for **Kshs.3,806,676.15** with interest. Despite the entry of this judgment the Defendant has never paid the amount in full as required.

(5) The Plaintiff's Advocates then moved to execute and took out a Notice to Show Cause why the Defendant should not be arrested and committed to civil jail for his failure to settle the decretal sum. The Defendant still did not pay.

(6) On **26th March 2013** the NTSC came up for hearing before the Deputy Registrar **Hon. Nyakundi**. The parties agreed by consent and it was ordered by the court that the Defendant/Applicant liquidate the decretal sum by monthly payments of **Kshs.100,000/=**. Once again the Defendant defaulted. On **26th March 2014**, warrants of Arrest were issued against the Defendant/Applicant.

(7) On **16th July 2015**, the Defendant was arrested and presented before the Hon Deputy Registrar where he was given an opportunity to show cause why he should not be committed to Civil jail for 6 months. The Court later released the Defendant on condition that he would deposit **Kshs.500,000/=** in Court.

(8) Instead the Defendant/Applicant proceeded to file **Constitutional Petition No.303 of 2015**, in which he challenged his committal to civil jail on the grounds that said committal was unprocedural and did not comply with the law. On **16th February 2018 Justice Chacha Mwita** dismissed the Petition. The Defendant/Applicant then filed the present application.

(9) Firstly the Defendant/Applicant submits that he has appointed the firm of **R.V MUKOYA & CO. ADVOCATES** to act for him and seeks that they be granted leave to come on record after judgment.

(10) The Defendant/Applicant also submits that since the Plaintiff had been placed under statutory Management on **6th February 2013**, the mandate of the firm of **Mwaniki & Gachoka Advocate** who had been appointed by the Plaintiff to act for them prior to **6th February 2013**, ceased, there being no fresh instructions issued to said firm by the Statutory Manager.

(11) The Defendant/Applicant contends that the firm of **Mwaniki Gachoka** continues to prosecute this suit without instructions and in so doing have obtained adverse orders against the Defendant. That further the said firm collected the sum of **Kshs.500,000/=** which had been deposited by the Defendant in Court and have not to date rendered an account or surrendered that amount to the Plaintiff/Respondent (the decree-holder).

(12) The Defendant/Applicant submits that by virtue of **Section 67(c)** of the **Insurance Act, Cap 487, Laws of Kenya**, once the Plaintiff was placed under statutory management, then all contracts held with the previous management became null and void unless ratified and extended by the Statutory Manager. Therefore all judgment, decrees or orders (including the decree dated **20th July 2007**) obtained by the impugned firm of Advocates are similarly null and void.

(13) The Defendant avers that he has been dealing with the Plaintiffs Statutory Manager directly. That said Statutory Manager wrote to the Deputy Registrar seeking release of the **500,000/=** to him directly but this was not done. Finally the Defendant/Applicant submits that the Statutory Manager ought to be enjoined as a party in the present proceedings.

(14) On their part the firm of **Mwaniki Gachoka & Co. Advocates**, submit that the present application is defective "**ab initio**" as it was filed by the firm of **R.V Mukoya & Company Advocates** who were not properly on record for the Defendant. They further submit that in view of the fact that the question of the validity of the proceedings before the Hon Deputy Registrar was raised in **Petition No.303 of 2015** and was determined by **Hon Justice Chacha Mwita**, that issue is now "**Res Judicata**".

(15) The Plaintiff /Respondent submits that the appointment of a Statutory Manager did not amount to a withdrawal of instructions from all advocates who were previously handling matters on behalf of the Plaintiff in Court. That the Plaintiff, though under statutory management was still entitled to recover debts due to it. They further submit that instructions were never withdrawn from the firm of **Mwaniki Gachoka Advocates** and state that the statutory manager even acknowledged the efforts made by the law firm and instructed them to proceed with the process of recovery of the debt in question. They contend that being properly on record, the proceedings before the Hon Deputy Registrar of **6th February 2013** were valid.

(16) On the question of enjoinder of the Statutory Manager in these proceedings it submitted, that this is not necessary where the Plaintiff has an advocate on record, and finally the Plaintiff/Respondent submits that having not to date paid the decretal amounts as required, the Defendant's only motive in filing this application is to delay execution of the decree and to frustrate the Plaintiff's efforts to recover its debts and to enjoy the fruits of the judgment delivered in its favour way back in **July 2005**.

Analysis and Determination

(17) I have carefully considered the submissions filed by both parties as well as the relevant statute and case law. The following issues arise for determination.

- (i) Is the firm of **R V MUKOYA & CO. ADVOCATES**, properly on record for the Defendant/Applicant?
- (ii) Should the Statutory manager be enjoined in these proceedings?
- (iii) Does the firm of **MWANIKI GACHOKA & CO. ADVOCATES** have authority to act for the Plaintiff/Respondents?

(iv) Were the proceedings before the Hon Deputy Registrar on **6th February 2013** valid?

I shall proceed to deal with each issue individually.

Does the firm of R V MUKOYA & CO. ADVOCATES have authority to act for the Plaintiff/ Respondent?

(18) By prayer (1) of the Application, the Defendant/ Applicant has sought that the above firm be allowed to come on record for him. **Order 9 Rule 9** of the **Civil Procedure Rules, 2010**, provides as follows:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.”

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

Order 9 Rule 10 provides:-

“An application under Rule 9 may be contained with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

(19) The reasoning behind the provisions of **Order 9 Rule 9** were made clear in the case of **S.K. TARWADI –VS- VERONICA MUEHLE MANN [2019]eKLR**, where it was held thus:-

“..... the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be side stepped hence the enactment of Rule 10 as follows:-

“An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

(20) The procedure to be applied in actualizing **Order 9 Rule 9** was expounded upon by **Hon Justice Gacheru** in **LIVINGSTONE SIMEI SANG –VS – SHADRACK F OGATA & Another [2014]eKLR** as follows:-

“From the above provisions of law, there are two options of coming on record. Firstly one may seek leave of Court by way of an application or file a consent letter.....”

(21) In this present suit judgment was entered on **13th July 2007** and decree was issued. The Defendants Advocate has complied fully with the provisions of **Order 9 Rule 9** of the Civil Procedure Rules. They have sought the leave of the court to come on record after judgment. By virtue of **Order 9 Rule 10** it was not necessary for the law firm to seek leave to come on record **prior** to filing the present application. It was quite in order for them to combine this prayer for leave together with the other prayers being sought on behalf of the Defendant/Applicant. I find that prayer (1) of this application has merit and leave is granted to the firm of **R V MUKOYA & CO. ADVOCATES** to come on record for the Defendant/Applicant.

Enjoinment of the Statutory Manager in the present proceedings

(22) Despite having raised this issue of joinder by virtue of prayer (2) of their Motion, the Defendant/Applicant did not submit on the same. The Plaintiff/Respondent submitted that it was not necessary that the Statutory Manager be enjoined in the proceedings as he was adequately represented by Counsel.

(23) The legislative framework on the issue of joinder of parties to a suit is spelt out in **Order 1** of the Civil Procedure Rules. **Order 1 Rule 10** provides a framework for substitution and addition of parties to a suit. In addition to the above guiding principles, the Court of Appeal in **Meme Vs. Republic [2004] KLR 367** set out circumstances which would warrant grant of leave to enjoin a party to wit:-

(i) Whether the presence of the party will result in the complete settlement of all questions involved in the proceedings.

(ii) Whether the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law; and

(iii) Whether the joinder will prevent a likely case of proliferated litigation.

(24) In the case of **LOCHAB BROTHERS –VS- KENYA FUR FURAL CO. LIMITED [1983] KLR** the Court of Appeal held:

“A receiver cannot sue in his own name as receiver since he has no property vested in him and so acquires no right of action by his appointment. Nor can the court give a receiver leave to sue as a receiver. The receiver’s duty is to take care of and receive the property which is put under his charge and he is not at liberty and is not entitled to bring an action in his own name.....”

(25) In **FRANCIS KARIUKI MURUATETU LTD & Another –Vs- REPUBLIC & 5 others, Petition No.15 of 2016 [2016]eKLR**, the Supreme Court of Kenya identified the elements to be considered in granting an application for joinder of an interested party as follows:-

“(1) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.

(2) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote” [own emphasis]

(26) The Defendant/Applicant has failed to demonstrate what prejudice if any he stands to suffer on account of non-joinder of the Statutory Manager. Likewise there is no demonstration of any personal stake that the Statutory Manager may have in the present suit. His only duty is as an administrator. The suit is now at the execution stage and I find that it would serve little purpose to enjoin a party at the tail end of a suit. All in all I find that prayer (2) of the application is not merited and the same is dismissed.

Does the firm of MWANIKI GACHOKA & CO. ADVOCATES have authority to act in this matter?

(27) The Defendant/Applicant has submitted that once the Plaintiff/Respondent went into receivership the firm of **Mwaniki Gachoka Advocates** had no authority to continue acting without the express authority of the Statutory Manager. The Defendant/ Applicant relied on two letters to buttress these submissions. First is the letter dated **6th July 2016** from the Statutory Manager to the Defendant wherein it was stated that upon being placed under statutory management on **6th February 2013**, all advocates acting for the Plaintiff ceased acting, and that all service providers, creditors and policy holders were thenceforth to deal with the Statutory Manager. That letter being Annexure **CLK II** to the Notice of Motion dated **4th April 2018** reads in part as follows:-

“This is to clarify that upon Concord Insurance Company Limited being placed under Statutory Management on the 6th February 2013 advocates acting for the company ceased acting....

It therefore became necessary for all service providers, creditors and policy holders to deal directly with the statutory manager on all matters pertaining to the Company.”

(28) Secondly the Defendant/Applicant relied on the letter dated **14th March 2018** written to the firm of **Mwaniki Gachoka Advocates** from the Statutory Manager in which the latter stated that any action by the law firm against the Judgment Debtor (the Defendant) in the present suit during the statutory period would be null and void. This letter reads in part.

.....Further, any judgment or decrees obtained in court from any cases or proceedings by any advocate during the statutory management period are deemed null and void without any prior written instructions from the Statutory manager.”

(29) The Plaintiff/Respondent submits that instructions have never been withdrawn from the firm of **Mwaniki Gachoka Advocates** either by the Plaintiff or by the Statutory Manager and that the statutory moratorium placed on the Plaintiff related only to:-

- (a) Stay of proceedings subsisting against the Plaintiff during the pendency of the moratorium.
- (b) Stay of pending taxation proceedings against the Plaintiff during the pendency of taxation.
- (c) Stay of claims of whatever nature against the Plaintiff during the pendency of the moratorium.

(30) It is contended that the appointment of a Statutory Manager did not in itself amount to a withdrawal of instructions from all Advocates handling matters on behalf on the Plaintiff/Respondent in court nor did it amount to a stay of proceedings in which the plaintiff was claiming against any party. The question that needs to be answered is whether the effect of the Plaintiff being placed under Statutory Management, meant that all Advocates on record for the Plaintiff automatically ceased to act for them?

(31) The Plaintiff/Respondent was placed under statutory management on **6th February 2013** pursuant to **Section 67 (c)(2)(i)** of the **Insurance Act**. A statutory manager was appointed and a notice to that effect was published in the Kenya Gazette on **15th February 2013**. A Moratorium was declared on the payments of the Plaintiff/Respondent to all its policy holders and to all other creditors for a period of twelve (12) months.

(32) **Section 67C(2)(i)** of the **Insurance Act** provides as follows:-

(2) The Commissioner may, with the approval of the Board

(i) Appoint a competent person familiar with the business of the insurer (in this Act referred to as “a manager”) to assume the management, control and conduct of the affairs and business of an insurer to the exclusion of its Board of Directors,

including the use of its corporate seal;

(ii) remove any officer or employee of an insurer who, in the opinion of the Commissioner, has caused or contributed to any contravention of any provisions of this Act, or any regulations or directions made thereunder or to any deterioration in the financial stability of the insurer or has been guilty of conduct detrimental to the interests of policyholders or other creditors of the insurer;

(iii) appoint three competent persons familiar with the business of insurers to its Board of Directors to hold office as directors who shall not be removed from office without the approval of the Commissioner;

(iv) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by the insurer in favour of any officer, employee or any other person.

The notice in the Kenya Gazette reads as follows:-

“As notified by the Commissioner of Insurance in exercise of his powers under section 67C(2) (i) of the Insurance Act, the Commissioner of Insurance and Chief Executive Officer appointed Charles Osoro Makone of P O Box 57035, Nairobi Kenya to as the Statutory Manager of Concord Insurance Company Limited, with effect from 6th February 2013.

(33) The Statutory Manager filed Originating Summons in Court in HCCC NO.88 OF 2013 under Section 348 of the Companies Act and obtained inter alia the following orders issued on 14th March 2013:-

a. That a stay of all proceedings subsisting against Concord Insurance Company Limited (under Statutory Management) during the currency of the Moratorium declared by the Statutory Manager on 6th February 2013 be and is hereby granted.

b. That a stay of all taxation proceedings currently pending and on-going against **Concord Insurance Company Limited** (under Statutory Management) and its policy holders and for which the company or its policy holders may become liable during the currency of the Moratorium declared by the Statutory Manager on 6th February 2013 be and is hereby granted.

c. That all proceedings whatever nature of form against **Concord Insurance Company Limited** (under Statutory Management) be and are hereby barred during the currency of the moratorium declared by the Statutory Manager.

d.

e. That these orders shall remain in force for a period not exceeding twelve (12) months.

(34) That moratorium was extended for a further twelve (12) months by an Order issued by **Havelock J. (Rtd)** on 14th March 2014. It was further extended for a period of six (6) months by an Order issued by **Gikonyo J.** on 6th February 2015, and was further extended for a period of Forty-Five (45) days by an Order of **Ogola J.** on 6th August 2015.

(35) The Defendant/Applicant contends that by dint of the above moratorium all contracts with the Plaintiff/ Respondent's previous management are null and void and would remain so unless and until ratified and renewed by the Statutory Manager.

(36) Section 67(c) (10) of the Insurance Act, Cap 487 Laws of Kenya provides as follows;

“(10) For the purpose of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policy holders and other creditors and the declaration of a moratorium shall:-

(a) Be applied equally to all cases of policy holders and creditors, subject to such exceptions in respect of any class of insurance as the manager may by notice in the gazette, specify:

(b) Suspend the running of time for the purposes of any law of limitation in respect of any claim by any policy holder or creditor of the insurer;

(c) Cease to apply upon the termination of the manager's appointment whereupon the rights and obligations of the insurer, its policy holders and creditor shall, save to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of his subsection.”

(37) A clear reading of this provision is to the effect that a statutory manager can only by law declare a Moratorium on payments to policy-holders and creditors. Such a moratorium would not in my view extend to instructions previously issued to Advocates.

(38) Section 67(c)(5) of the Insurance Act sets out the responsibilities of a statutory manager as follows:-

“(5) The responsibilities of a manager shall include:-

- (a) Tracing, preserving and securing all the assets and property of the insurer;
- (b) Recovering all debts and other sums of money due to and owing to the insurer;
- (c) Evaluating the solvency and liquidity of the insurer;
- (d) Assessing the insurer's compliance with the provisions of this Act and regulations made or directions issued thereunder;
- (e) Determining the adequacy of the capital and reserved and the management of the insurer and recommending to the Commissioner any restructuring or reorganization which he considers necessary and which, subject to the provisions of any other written law, may be implemented by him on behalf of the insurer; and
- (f) Obtaining from any former principal officer, director, secretary, officer or employee of the insurer any documents, records, accounts, statements, correspondence or information relating to its business."

(39) Section 67(1)(5) of the Insurance Act provides for the responsibilities of a Statutory Manager whilst Section 67(c)(10) provides for the powers of the statutory manager. Nowhere do those provisions automatically suspend the instructions issued by an entity to legal counsel. The order issued by the court suspended proceedings, taxations and claims of any kind against the Plaintiff/Respondent. The current proceedings are not proceedings against the Plaintiff/Respondent rather they are proceedings by the Plaintiff/Respondent seeking to recover debts due to it. Recovery of debts is one of the duties of a statutory manager vide Section 67 c(5) of the Insurance Act. Accordingly I find that the current proceeding do not fall within the parameters of the Order/Moratorium issued by the Court. I find further that said Order/Moratorium did not automatically suspend the instructions issued to the firm of **Mwaniki Gachoka Advocates**.

(40) The Defendant/Applicant cited the two letters dated 6th July 2016 and 14th March 2018 as proof that the Statutory Manager had in fact withdrawn instructions from the firm of **Mwaniki Gachoka Advocates**.

(41) The duty of a Statutory Manager is administrative in nature by taking over the running of a company.

In **ODERA OBAR & CO. ADVOCATES –VS- CHARTER HOUSE BANK LIMITED [2018] eKLR** the Court of Appeal held:-

“There is no difference in principle between the appointment of a receiver or manager of a company and the placement of a company under statutory management insofar as the general powers of the directors of a company are concerned. Although in case of receivership the receiver or manager protects the interest of the debenture holders, while statutory manager protects the interests of the company, its deposits and other creditors, in both cases, the powers of the directors of the company are paralyzed and vested in the receiver or statutory manager.”

However, in both cases, the structure of the company remains intact until the winding up or liquidation as the case maybe.

(42) In **KERR On The Law and Practice as to Receivers and Administrators – 17th Ed.**, the authors state at P.369, 2nd para:-

“Although as regards the outside world the receiver is the sole person in charge of the company's operations, nevertheless, the corporate structure of the company still subsists. The directors are not thereby relieved of their normal statutory duties, although the discharge of those duties may well be rendered extremely difficult or even impossible without the co-operation of the receiver, which they are in no position to require, save in relation to accounts.”

(43) For the Statutory Manager (in his capacity as the administrative head of the Plaintiff) to seek to withdraw instructions to counsel after judgment, he would be bound to comply with the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules 2010** just like any other litigant. These provisions have been couched in mandatory terms and the letter of 6th July 2016 could not have circumvented these mandatory provisions. Therefore on account of failure to comply with **Order 9 Rule 9** I find that there was no effective withdrawal of instructions from the law firm of **Mwaniki Gachoka Advocates**.

(44) I find therefore based on the foregoing that the firm of **Mwaniki Gachoka** had proper instructions to act for the Plaintiff/Respondent and had full authority to act to recover the decretal sum due to the Plaintiff/ Respondent.

Validity of the Proceedings before the Hon Deputy Registrar

(45) The Defendant/Applicant had challenged the validity of the proceedings before the Hon Deputy Registrar of 6th February 2013 and asked that the same be declared a nullity and be struck out. On the basis of the foregoing I find no merit in the above prayer and decline to grant the orders sought.

Conclusion

1. The Notice of Motion dated 4th April 2018 is allowed in terms of Prayer (1) only.
2. Prayers (2) (3) and (4) of the Notice of Motion dated 4th April 2018 are dismissed.

3. Costs of this application to be met by the Defendant/Applicant.

Dated in **Nairobi** this **22nd** day of **July 2019**.

Justice

Maureen A. Odera