



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**WINDING UP CAUSE NO. 6 OF 2016**

**IN THE MATTER OF**

**CONCORD INSURANCE COMPANY LIMITED**

**AND IN THE MATTER OF THE**

**COMPANIES ACT (CHAPTER 486 OF THE LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE**

**INSURANCE ACT (CHAPTER 487 OF THE LAWS OF KENYA)**

**RULING**

1. Concord Insurance Company Limited (“the Company”) is an insurance company regulated under the provisions of the **Insurance Act (Chapter 487 of the Laws of Kenya)**. On 6<sup>th</sup> February 2013, it was placed under statutory management by the Commissioner of Insurance (“the Commissioner”) under the provisions of **section 67C** of the **Insurance Act**. Since the Commissioner, as statutory manager, was unable to revive the Company, the Board of the Insurance Regulatory Authority approved the filing of this winding up cause which is now scheduled for hearing on **23<sup>rd</sup> January 2020**.

2. The issue for consideration in the Company’s Chamber Summons dated 4<sup>th</sup> July 2018 is the scope of the moratorium issued by the Commissioner in his capacity as statutory manager declared under **section 67C(10)** of the **Insurance Act**. In the Summons before the court, the Commissioner seeks the following orders:

*(i) THAT the Honourable Court be pleased to order that the Moratorium declared by the Statutory Manager of Concord Insurance Company Limited (under statutory management) on 6 February 2013, extended severally the latest being on 27<sup>th</sup> May 2016 be expanded in scope to include all current policy holders of Concord Insurance Company Limited (under statutory management) as against third party claimants and until such period that the Winding Up Cause No. 6 of 2016 is finally heard and determined.*

*(ii) THAT there be stay of all legal proceedings of whatever nature or form subsisting against the current policyholders of Concord Insurance Company Limited (Under Statutory Management) be suspended in any court of law pending final hearing and determination of Winding Up Cause No. 6 of 2016 In the Matter of Concord Insurance Company Limited (under statutory management).*

*(iii) THAT the running time for purposes of any law of limitation in respect of any notice, demand or claim against any policy holder of Concord Insurance Company Limited (under statutory management) and shall remain suspended pending final determination of Winding Up Cause No. 6 of 2016 In the Matter of Concord Insurance Company Limited (under statutory management).*

*(iv) THAT leave be granted to publicize the Court orders issued herein by way of publication in the Kenya Gazette and two local newspapers of national circulation.*

*(v) THAT the Honourable Court do make such orders as may be just and expedient.*

(vi) THAT the costs of this Application be provided for.

3. As it is not disputed that the moratorium remains in force, the issue for determination concerns the scope and extent of the moratorium. The issue is one of construction of **section 67C(10)** of the **Insurance Act** which states 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 classes 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 purposes of any law of limitation in respect of any claim by any policy holder or creditor or 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 obligations of the insurer, its policy holders and creditors shall, save to extent provided in paragraph (b), be the same as if there had been no declaration under the provisions if this subsection.*

4. Fortunately, the issue is neither new nor novel and was determined in the case of ***In the Matter of Concord Insurance Company HCCC No. 88 of 2013 [2014] eKLR***. In that case, Gikonyo J., asked and answered the question, “*Whether the effect of moratorium declared under section 67C (10) of the Insurance Act, goes beyond policy holders and creditors to third party claimants.*”

5. In that case, the Statutory Manager filed suit after declaring the moratorium and in due course the court issued an order whose effect was to bar all proceedings against the Company and its policy holders. The interested parties who were plaintiffs in cases where they were claiming compensation for injuries suffered while working with the Company's insurer. As a result of the orders, the suits could not proceed for hearing and they sought to join the suit in order to discharge the orders extending the moratorium to third parties. The interested parties argued that they were neither policy holders nor creditors of the Company. They submitted that they were merely employees, whose fate was tied to the moratorium by the fact that their employer took out insurance policies against claims of injuries with the Company under statutory management.

6. After considering the extent of **section 67C(10)** aforesaid, Gikonyo J., concluded that

*As a good beginning point, I can pronounce with ease that the interested parties herein are not policy-holders of or creditors to Concord Insurance Company. They do not even come closer to being judgment-holder because their cases are yet to be concluded. Even those cases are not against Concord Insurance Company. The only possibility of Concord being drawn into those cases is if judgment is entered against the insured and a declaratory suit is accordingly obtained against Concord. Section 67C (10) of the Insurance Act was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the company from payments by the insurer (company) of its policy-holders and other creditors, and not necessarily to the policy-holders or other creditors against liability from third parties. Therefore, in so far as the interested parties have cases against the insured, there is nothing to stop them from pursuing the claims to logical conclusion.*

7. The decision I have cited above concerned the Company and the interpretation of **section 67C(10)** of the **Insurance Act**. Although that decision concerned an application by the interested party, as the learned judge noted the fundamental issue concerned the scope of application of the moratorium to third parties and determination was fundamental to the determination whether the interested parties could join the suit and whether the order staying proceedings by third parties against the Company's insured should be discharged.

8. The judgment by Gikonyo J., on the matter is a judgment *in rem*. As opposed to a judgment *in personam* which involves two parties and binds the parties in dispute, a judgment *in rem* settles the status or rights of parties against the whole world. ***Halsbury's Laws of England, Vol. 15 (4<sup>th</sup> Ed), para. 351*** defines a judgment *in rem* as a, “*Judgment of the court of competent jurisdiction determining the status of ... a thing, or the disposition of a thing as distinct from particular interest in it of a party to the litigation*”.

9. The decision by Gikonyo J., in the matter involving the Company, being a judgment on the legal position regarding the Company settled the scope of the moratorium and was binding on the Company hence the application before me is an abuse of the court process in so far as it is an attempt to re-litigate the issue. The Company did not appeal against the decision of Gikonyo J., and it remains binding on it.

10. The Notice of Motion dated 4<sup>th</sup> July 2018 is an abuse of the court process and is dismissed.

**DATED and DELIVERED at NAIROBI this 19<sup>th</sup> day of NOVEMBER 2019.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Ochieng instructed by Rachier and Amollo Advocates for the plaintiff.

Mr Oluoch instructed by O. Asher's and Company Advocates for Stephen Kilonzo Matiliku (Creditor)