



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 418 OF 2008

KENYA COMMERCIAL BANK.....PLAINTIFF

-VERSUS-

JOHN K MBUU & 3 OTHERS.....DEFENDANTS

RULING

[1] By its Notice of Motion dated **9 October 2015**, the 4th Defendant, the Statutory Manager, United Insurance Company Limited seeks a stay of all the proceedings herein on account of the Moratorium that was declared by the 4th Defendant on **15 July 2005** and as last extended for a further period of six months commencing on **26 June 2015**. The 4th Defendant further relied on the Supporting Affidavit of **John Sifa Keah** sworn on **9 October 2015** and the Order issued on **27 June 2016**, contending that the indebtedness that is the subject matter of this suit is principally that of the insurer.

[2] In her written submissions filed in support of the application, **Ms. Kambuni**, Senior Counsel, referred to the Order issued by **Kimaru**, on **22 October 2009**, which directed, inter alia, that no demands or claims of whatever nature or form shall be effective against the Insurer, its property or its policy-holders during the currency of the Moratorium, and contended that that order has not been lifted or set aside. She added that under **Section 67C(10) of the Insurance Act, Chapter 487 of the Laws of Kenya**, the Moratorium applies equally to all classes of policy-holders and creditors, and therefore the enforcement of the Guarantee that is the subject matter of this suit against the 1st, 2nd and 3rd Defendants cannot be done whilst the statutory management and the Moratorium are in place. She thus urged the Court to grant the application and issue an order of stay as prayed.

[3] The Plaintiff/Respondent opposed the application contending, in the Grounds of Opposition filed herein on **6 November 2015**, that the this suit is principally against the 1st, 2nd and 3rd Defendants as guarantors, and that the 4th Defendant enjoined itself to the suit and has now sought to delay its prosecution, yet the Plaintiff has no claim against it; that the 4th Defendant has mischievously filed the instant application to cushion the 1st, 2nd and 3rd Defendants from their liabilities under a **Deed of Guarantee and Indemnity** in favour of the Plaintiff; and that the application has been filed in bad faith merely for the purpose of delaying the hearing and determination of this suit. In addition thereto, Counsel for the Plaintiff, urged the Court, vide the written submissions filed herein on **8 July 2016**, to find that the case as filed is not affected by the Moratorium aforementioned since the Plaintiff has not made any claim against the Insurance company. Counsel relied on **Halsbury's Laws of England, 4th Edition, Vol. 37** at paragraphs 442 and 443 for the proposition that stay proceedings, being a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial, ought not to be granted

unless absolutely necessary.

[4] I have perused the Pleadings and it is manifest that the suit directly involves the 4th Defendant. In paragraph 5 of the Plaint, for instance, it was pleaded that:

"On or about the month of November 2003, United Insurance company Limited (hereinafter referred to as the Borrower) approached the Plaintiff and requested to be advanced a loan and/or financial accommodation to contribute towards its working capital. The Plaintiff acceded to this request and reduced the terms of the facility in a Facility Letter dated 24th November 2003."

[5] It was further pleaded that by the aforesaid Facility Letter, the Plaintiff agreed to advance to United Insurance Company Ltd a loan subject to a maximum of **Kshs. 50,000,000** and that as security for the said loan, United Insurance Company Ltd agreed to procure and/or execute, inter alia, directors' personal Guarantees for **Kshs. 50,000,000**, which was done by each of the directors who are the Defendants herein. It was on the basis of the foregoing that the Defendants contended that the suit is premature as the cause of action against them was yet to accrue.

[6] The Court's attention was also drawn to the Order issued on **27 October 2009** in **HCCC No. 748 of 2009** by **Kimaru, J** halting all proceedings in respect of debts owed by United Insurance Co. Ltd, the Order dated **27 June 2016** by **Ochieng J**, by which the term of the Statutory Manager for United Insurance Co. Ltd, the 4th Defendant herein, was extended for a further 3 months, in **HCCC No. 67 of 2012**, as well as the last extension of the Moratorium dated **27 June 2016**.

[7] Having carefully perused and considered the application, the submissions filed, which were highlighted before me on **13 July 2016**, as well as the proceedings to date, I am satisfied that, as at the time this application for stay was made, there was a Moratorium in place, that had been declared by the 4th Defendant in respect of all debts owed by United Insurance Co. Ltd. That Moratorium was issued pursuant to **Section 67C(10)** of the **Insurance Act**, which provides that:

"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 be applied equally to all classes of policy-holders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify..."

[8] In the premises, there being no proof that this particular debt that the Plaintiff seeks to enforce by way of a Deed of Guarantee, has been exempted from the Moratorium, I am satisfied that it is affected by the Moratorium. Secondly, there is no indication that the Order dated **27 October 2009** issued in **HCCC No. 748 of 2009** by **Kimaru, J** staying all proceedings in respect of debts owed by United Insurance Co. Ltd, has been lifted or set aside.

[9] In the foregoing premises, I would grant stay of proceedings as prayed with an order that costs be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2016

OLGA SEWE

JUDGE