REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 88 OF 2013

IN THE MATTER OF CONCORD INSURANCE COMPANY LIMITED

(UNDER STATUTORY MANAGEMENT)

AND

IN THE MATTER OF COMPANIES ACT (CAP 486 OF THE LAWS OF KENYA)

BETWEEN

MARGOT P. ROY……………………..........…….INTENDED INTERESTED PARTY

RULING

1. For the determination of the Court was the application by the interested party dated 17th June 2014. The application was brought pursuant to the provisions of Order 1 Rule 10(2) and 22 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Article 159(2)(d) of the Constitution as well as any other enabling provisions of the law. The Applicant seeks the following orders *inter alia*;

    1. ***THAT this honourable Court be pleased to enjoin Margot P. Roy as an interested party to these proceedings;***
    2. ***THAT this honourable Court be pleased to grant leave to the intended interested party herein; Margot P. Roy to file a declaratory suit against Concord Insurance Company (Under Statutory Management).***
    3. ***THAT the costs of this application be provided for.***

2. The application was premised on the grounds that the Applicant, as the administrator of the estate of the deceased Jessica Lindsay Roy, was a judgment creditor, having had judgment entered against the insurer's policyholder in **HCCC No 427 of 2007 Stephen T. Roy & Margot P. Roy v Caleb OketchiOtwili** on 3rd May 2013. It was further averred that the insurance Company was lawfully bound to make good the estate's loss as crystallized in the judgment, and that therefore, it would be fair for the Applicant to be enjoined in the suit and granted further leave to file a declaratory suit against the insurance Company.
3. In the affidavit filed in support of the application sworn on 19th June 2014, the deponent in reiterating the grounds of the application, further deponed to that her legitimate interest in executing the judgment decree would be frustrated and legally hamstrung if her application was not allowed.

4. The application was opposed vide the replying affidavit of Charles Osoro Makone, the Statutory Manager of Concord Insurance Company (Under Statutory Management). It was deposed to that there was no prejudice occasioned on the Applicant during the pendency of the moratorium , and that in any event, allowing the prayers would afford the Applicant a preference and priority over other policyholders, which was unjustifiable in law. Further, it was deposed to that the enjoining of the Applicant would be futile during the pendency and existence of the moratorium, and that judgment obtained by the Applicant, being based on a tort against the insured, the Applicant had a choice to either execute against the insured or await the end of the statutory management so as to execute against the insurance Company.
5. The Court has considered the application by the Applicant and the response filed in opposition thereto. The Court has further taken time to consider the submissions made by the parties with regards to the issue of enjoining and seeking leave to file a declaratory suit against the insurance company.The matter was last in Court on 5th February 2015 before my brother Gikonyo, J who extended the moratorium for a further six (6) months from 6th February 2015. The learned Judge further made orders in the nature;

    1. **…………………………………**
    2. **…………………………………**
    3. **…………………………………**
    4. ***<u>THAT there be 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 and as further extended by the Statutory Manager, for a further period of six months from 6th February 2015 be and is hereby granted</u>.***
    5. ***THAT there be a stay of all taxation proceedings currently pending and ongoing against Concord Insurance Company Limited (Under Statutory Management) and its policyholders and for which the Company or its policyholders may become liable during the currency of the moratorium declared by the Statutory Manager on 6th February 2013 and further extended for a further period of six months from 6th February 2015 be and is hereby granted.***
    6. ***<u>THAT all proceedings of whatever nature or form against Concord Insurance Company Limited (Under Statutory Management) be and is hereby barred during the currency of the moratorium declared by the Statutory Manager</u>.***
    7. ***THAT no statutory notices, demands or claims of whatever nature of form shall be effective against Concord Insurance Company Limited (Under Statutory Management) or its property during the pendency of the moratorium.***
    8. **……………………………………………………………**
    9. ***<u>THAT all current, existing and/or pending suits in the High Court, subordinate Courts an any other judicial or quasi-judicial tribunal against Concord Insurance Company Limited (Under Statutory Management) be and is hereby suspended and shall remain suspended during the currency of the moratorium declared by the Statutory Manager</u>.***
    10. **…………………………………………………………………**

6. The highlighted sections above are similar in nature to orders 2, 4 and 7 issued by Mabeya, J on 14th March 2013. These orders were extended by Havelock, J (as he then was) on 4th February 2014 for a period of one (1) year from 6th February 2014, and further extended by Gikonyo, J for a period of six (6) months from 6th February 2015. The application was made on 17th June 2014, during the pendency and currency of the moratorium. In his previous ruling to an application dated 25th March 2014 which is not dissimilar from the instant application, and which the Applicant sought to distinguish, it was the determination of Gikonyo, J that the purpose of the moratorium was not to deny legitimate institution of proceedings against the insured and the insurance Company, but rather it was intended to allow the Statutory Manager to embark on his obligations to revive the insurance Company without any encumbrances, by suspending any litigation against the Company, and which litigation could be pursued by the interested parties upon the lifting of the moratorium.

7. The instant application seeks to pierce the moratorium that had been declared by the Statutory Manager as provided under Section 67C(10) of the insurance Act. The Applicant seeks to be enjoined in the proceedings under the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules which provides that;

   'The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, *and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added*.' (Emphasis added).

However, under the provisions of Section 67C(10)(a) of the Insurance Act, it is provided that a moratorium shall be ordered by the Statutory Manager for purposes of discharging his responsibilities. The mentioned provision reads;

'For the purposes of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policyholders 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 exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify*;'**

8. The Applicant relied on the cases of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** and **Kenya Shelll v Karuga (1982-1988) 1 KAR 1018** for the proposition that the Court in dispensing justice, should not impose upon itself conditions that fetter its wide discretion and further, that a successful litigant should not be deprived of the fruits of a judgment. The Court has not imposed any conditions upon itself with regards to the exercise of its discretion, and neither has the Applicant, as a successful litigant in **HCCC No 427 of 2007**, been denied the fruits of its judgment. All that the Court is saying is that pending the execution of the decree, there is a pending moratorium in which the Applicant is barred, albeit for the period of the pendency of the moratorium, from instituting any proceedings against the insured and/or the insurance Company. To the mind of the Court, there is no prejudice that has been occasioned upon the Applicant with regards to the pendency of the moratorium.
9. In **Misc Civil Application No 436 of 2013 George NgureKariuki v Charles OsoroMakone; (2014) eKLR**, Gikonyo, J said that in the exercise of its discretion in allowing a suit where there were stay of proceedings in force, the Court had to consider the peculiar circumstances of the matter, and that sufficient cause would include, but not limited to, the instances that he stated therein. In his rendering, the learned Judge held *inter alia*;

   "Leave to institute proceedings in the face of a moratorium is, therefore, the enabler of the right of access to justice. But, the Court must be satisfied that sufficient cause has been shown to open up the moratorium and grant leave to institute proceedings. The discretion is exercised on a case to case basis. Sufficient cause will depend on a number of factors; and although the list is not to be and is not exhaustive, the following matters are important consideration in an application for leave to institute proceedings:

   a) The strength of the applicant's case: - Here, the nature and merits of the case should be considered. This ground also encompasses the seriousness of the issue or issues at hand.

   b) Possibility of the resolution of the dispute during the course of the Statutory Management;

   c) Whether the resolution of the dispute is necessary for the carrying out of the

Statutory Management;

c) The nature of the proceedings and its impact on the Statutory Management; and

d) Delay in commencing the proceedings."

Further in his rendering in **Civil Suit No 88 of 2012** in an application seeking leave to institute proceedings against Concord Insurance Company Limited, the learned Judge had held;

> ***"After all, the concept of interested party is not open ended; it is circumscribed in law, depends on the nature and circumstances of each case; in the circumstances this case a hope or possibility that a party may obtain a judgment in a pending case may not suffice. In any case, their judgments, if at all, will be directed to the insured at first instance, and any attempt to enjoin Concord Insurance on the judgments will have to pass through the moratorium and the orders of the Court, if at all in force at the time. For now, nothing is really instructive to join them as interested parties. Equally, nothing will prevent them from applying and being enjoined in the future as interested parties save on the correct basis of law."***

10. In his ruling in the case of **George NgureKariuki v Charles OsoroMakone** (supra), Gikonyo, J relied on grounds that he construed may render sufficient cause for the Court to consider allowing an applicant leave to institute proceedings. These were in line with the provisions of Order 1 Rule 10(2) in which the Court would consider the enjoining a party whose presence was necessary to enable the Court to effectively and effectually determine all issues arising. The question arising, therefore,is constitutes a necessary party to be enjoined in a suit?***"The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. As stated in SARKAR'S LAW OF CIVIL PROCEDURE, Vol. I at pages 531 and 532 there are two tests in the application of this principle:-***

1. ***There must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings in question.***
2. ***It should not be possible to pass an effective decree in the absence of such a party."***

As per Ringera, J (as he then was) in **Nairobi (Milimani) H.C.C.C No. 2363 of 1998 (UR)**

Werrot& Co. Ltd & Others v Andrew Douglas Gregory & Others.

In **Amon v Raphael Tuck & Sons Ltd (1956) 1 All E. R. 273** relied upon by Havelock, J(as he was then) in **HCCC No 436 of 2010 Elisheba MuthoniMbae v Nicholas KaraniGichohi& 2 Others; (2013) eKLR**, it was reiterate at pg. 286-287 thus;

> "***What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately…the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."***

11. Is the enjoining of the Applicant in the instant suit therefore, and in accordance with the aforementioned cases, necessary for the effectual and effective determination of the suit? The suit pertains the statutory management of Concord Insurance Company Limited. The Applicant was

neither a policyholder nor directly involved with the issues of statutory management or Concord Insurance Company Limited. Any decision that may be issued by the Court in that regards, does not have a direct bearing on the Applicant. Further, they are not bound by the decision of the action, and that the instant matter would still be effectually and effectively determined without the presence of the Applicant. In Halsbury's Laws of England Fourth Edition, Vol. 37 at para 216, it reads;

> **'A person cannot be a Plaintiff unless he has a vested interest in the subject matter of the action. In an action founded on contract, the proper Plaintiff is the person in with whom or on whose behalf the contract was made or in whom the rights under the contract are vested.'**

12. The Applicant has not shown what vested interests she has in the statutory management proceedings. Further, it has not been shown that her enjoinment in the suit would be pertinent to the effective and effectual determination of the suit. All that she has stated is that she has a legitimate interest in the suit, even though she has insufficiently provided evidence in support of her proposition. She has failed to satisfy the criteria as set out by Ringera, J in **Werrot& Co. Ltd & Others v Andrew Douglas Gregory & Others** (supra) and further enunciated by Gikonyo, J in **George NgureKariuki v Charles OsoroMakone** (supra). As such she cannot be enjoined as a party to the suit in light of the foregoing, and further as provided under the provisions of Section 67C(10)(a) of the Insurance Act. Enjoining her to the suit, and further allowing her to file her declaratory suit as against Concord Insurance Company Limited would unnecessarily delay the effective and expedient determination of the instant suit, which would be in discordance with the provisions of Section 1A(1) and 1B(1)(a) & (d) of the Civil Procedure Act. In consideration therefore, the upshot is that the application is unmeritorious and the same is dismissed with costs to the Respondent.

Dated, Signed and Delivered in Court at Nairobi this 3rd day of December, 2015.

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C. KARIUKI

JUDGE