



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
HCC 88 OF 2013

**IN THE MATTER OF: CONCORD INSURANCE COMPANY
(UNDER STATUTORY MANAGEMENT)**

AND

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

AND

IN THE MATTER OF: THE INSURANCE ACT (CAP 487 LAWS OF KENYA)

RULING

Raising of moratorium on legal proceedings

[1] I have been called upon to determine the application dated 25th March 2013, which is seeking the following orders:

- 1. Stephen Muriuki Maina and Majaliwa Mengo Fredrick (the interested parties) be granted leave to be joined as interested parties in this suit;***
- 2. The firm of Muriuki Ngunjiri Advocates be granted leave to come on record for the first and second interested parties;***
- 3. The order by the Honourable Court on the 18th of March, 2013 barring all proceedings of whatever nature against the policy holders of Concord Insurance Company Limited (under statutory management) during the currency of the moratorium declared by the statutory manager be set aside in respect of the two interested parties.***

4. Costs of the application

[2] The application relate to raising of the moratorium imposed by the court against all proceedings against CONCORD INSURANCE COMPANY (UNDER RECEIVERSHIP), leave to join parties and allow a firm of advocates to represent the parties so joined. The Applicants as well as the Respondent filed written submission which I shall consider in a comprehensive manner

as below.

Interested Parties' Submissions

[3] The interested parties submitted that the court should allow the application dated 25th March 2013, and order:

- a) That Stephen Muriuki Maina and Majaliwa Mengo Fredrick (the interested parties) be joined as interested parties in this suit;
- b) The firm of Muriuki Ngunjiri Advocates be on record for the first and second interested parties;
- c) That the order by the Honourable Court on the 18th of March, 2013 barring all proceedings of whatever nature against the policy holders of Concord Insurance Company Limited (under statutory management) during the currency of the moratorium declared by the statutory manager be set aside in respect of the two interested parties; and
- d) Costs of the application

[4] Concord Insurance (hereinafter referred to as the Insurance Company) was placed under statutory management on vide a gazette notice no. 2194 dated 6th February 2013. Subsequently, the statutory manager declared a moratorium on the payments by the said insurer to its policy holders and all other creditors for a period of 12 months. Pursuant to this gazette notice and declaration, of the moratorium, the Statutory Manager filed this current suit. On the 18th March, 2013, the Honourable Court granted an order whose effect is to bar all proceedings against the Insurance Company and its policy holders.

[5] The interested parties on the other hand are Plaintiffs in Milimani CMCC No. 4876 and 4875 both of 2012 respectively. The claims are work men's compensation. Both the interested parties were injured in the premises of their employer, Pembe Floor Mills, which in turn had been insured by Concord Insurance Company. During the pendency of the suits, the insurance company was placed under statutory management. Inevitably, the counsel on record for the Defendant in the lower court suits informed the interested parties' advocates that the suits could no longer continue, on the account of the moratorium and the order issued on the 18th March, 2013. Since February, 2013, the interested parties' suits have not been prosecuted at the lower court.

[6] The Applicants see the following as the issue for determination:

Whether the effect of moratorium declared under Section 67 c (10) of the Insurance Act, goes beyond policy holders and creditors to third party claimants.

Section 67 c (10) provides as follow:

(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.

[7] The interested parties in this case were neither policy holders nor creditors of the Insurance Company. They were merely employees, whose fate is tied to the moratorium by the fact that their employer took an insurance policy against claims of injuries with an Insurance Company whose fortunes have now dwindled, leading to statutory management. Clearly therefore, as the interested parties are not policy holders or creditors of the Concord Insurance, Section 67 c (10) does not envisage a situation where their suits should be barred from proceeding to their logical conclusion. The courts have had an opportunity to consider the issue of third parties' suits being barred by a court order upon declaration of a moratorium by an insurance company. **IN THE MATTER OF: BLUESHIELD LIMITED (UNDER STATUTORY MANAGEMENT) CIVIL SUIT 465 OF 2011 (O.S). Justice H.P.G Waweru** was confronted with a case with facts of almost similar cadre as the current one. The applicant had been injured in a road traffic accident. She sued the owners of the motor vehicle who were insured by Blue Shield Insurance Company. She obtained judgment against them but she was unable to execute it against the original defendants in the initial suit on an account of a moratorium placed on creditors and policy holders of Blue Shield Insurance. The court had to determine whether the moratorium declared by the Statutory Manager could extend to such persons. Justice Waweru held thus:

".....Her suit is against a tortfeasor in negligence. She has no direct connection, as policy holder or creditor, to Blue Shield.

10. The moratorium declared by the Statutory Manager, in so far as it extended to the interested party's suit, was clearly ultra vires subsection (10) of section 67C of Cap 487.

In respect of an order similar to the one issued 18th March, 2013, barring proceedings of all suits affecting policy holders of Blue Shield, Justice Waweru held thus:

11. Similarly, the order of this court of 28th October, 2011, in so far as it affected the 1st interested party's casewas made without jurisdiction. The order was made ex parte without the 1st interested party being given an opportunity to be heard on the matter. Now that she has been heard, the order is clearly unlawful and was made in error. It must be set aside in so far as it affects her suit to enable her to pursue the tortfeasor. The obligations of Blue Shield to the 2nd and 3rd interested parties (policy holders) under their contract of insurance cannot concern the 1st interested party.

[8] According to the Applicants, similarly in this case, the obligations of the Concord Insurance Company Limited should not extend to the interested parties herein. The Applicants, therefore, urge the court to allow the application dated 25th March 2013 and set aside orders issued on 18th March 2013, in so far as the same affect their suits pending at the lower court.

Submissions by the Respondent-Concord Insurance Company (Under Statutory Management)

[9] The Respondent filed submissions and proclaimed that it had no objection to the interested parties being granted leave to join the proceedings as interested parties to this suit as long as the interested parties do not also seek the involvement of Concord Insurance Company in the proceedings under the doctrine of subrogation as is the tenet under Insurance Law between a policy holder and its insurer. On the 5th of February, 2013, the Honourable Justice Havelock granted orders in favour of Concord. These orders bar all proceedings of whatever nature or form against Concord during the currency of the moratorium declared by the statutory manager. The order also stays all proceedings subsisting against Concord 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 one year from the 6th of February 2014.

[10] The Respondent posits that the justification of barring and staying proceedings against Concord during the period of statutory management are to ensure that there shall be no unrestrained litigation against Concord which might lead to its possible collapse and the rendering of the spirit and intent of Section 67C of the Insurance Act a futile exercise. The application dated the 25th of March 2013 seeks to set aside the order made by the Honourable Justice Mabeya barring all proceedings of whatever nature against the policy holders of Concord. The application seeks that the interested parties be able to proceed against the policy holder of Concord. The policy holders were protected under the order issued by the Honourable Justice Mabeya, which orders lapsed on the 6th of February, 2014. There have been new orders issued by the Honourable Justice Havelock by which orders there is no stay of proceedings against the policy holders, except a stay on taxation proceedings. The stay of proceedings are only made in favour of Concord in order to enable the statutory manager to without the threat of litigation and being distracted in defending suits against Concord to;

- i To trace preserve and secure all the assets and property of the company and those assets that have been found to be hidden;
- ii To recover all debts and other sums of money due to and owing to the company and deposit the monies with Central Bank of Kenya as necessary; and
- iii To evaluate and establish the financial position of the company, in particular its solvency as at 31st December, 2010.

[11] The aim of the above is to inject the necessary capital required to revive Concord and carry on business as an insurer, pay its creditors what is due and ensure that claims against its policy holders are settled. The orders made by Justice Havelock stay all proceedings subsisting against the Insurance Company until 6th of February, 2015 and as such this application in so far as it concerns the company ought to be held in abeyance pending the expiry of the orders made by the High Court.

[12] The third prayer seeks to set aside the said orders with respect to the interested parties. This prayer if granted shall have the effect of opening up the Pandora's Box setting a bad precedent where all other claimants will hurl the company into litigation by suing the policy holders who in turn will rely on the doctrine of subrogation to force the company into litigation. The setting aside of the order as prayed for in prayer number three in the instant application will expose the company to endless litigation defeating the purpose for which the statutory manager has been appointed and causing the company to expend monies in defending litigation and execution proceedings and further causing the liabilities of the company to increase thereby prejudicing its revival. The said order of the court acts as a protective shield for the company to enable the stator manager to trace and preserve all assets of the company and determine the extent of its liabilities thereby determining whether the assets of the company are such as to pay off its liabilities and still be in operation. It is in the best interest of the public and the country that attempts are made at reviving the company rather than have the companies go into liquidation.

[13] The question that therefore arises is whether the court order ought to be set aside setting aside or the court order ought to be considered in line with public policy, and in the instant case it is in the interest of the public and the economy that the company be given a chance to revive itself by determining:

- (a) Where the problems arose which led to non -performance and increase in liabilities of the company necessitating the intervention of the Commissioner for Insurance to place the company under statutory management;

(b) Whether the assets are such as to jumpstart the operation of the company; and

(c) The amount the company has to settle in liabilities through an extensive financial audit.

[14] Upon revival the company will set out to discharge and perform its obligations as an insurer and as prescribed under the Insurance Act. The company has not refused to fulfil its obligations arising out of the Insurance Act and the Insurance (Motor Vehicles Third Party Risks) Act, it has simply utilised the power granted to the statutory manager under the Insurance Act to declare a moratorium to protect the company from litigation in the interim period. And that the statutory manager in considering the best interests of the company applied for a stay order barring all proceedings against the company during the period of the moratorium. The company has not refused to fulfil its contractual obligations flowing from the insurance contracts and policies; it shall perform and discharge its obligations arising therefrom after the period of statutory management.

[15] It is inaccurate, the Respondents argues, to state that the moratorium stifles, curtails and scuttles the normal adjudicative process. The moratorium seeks only to give the statutory manager the time required to audit the company and enable its revival rather than see the company go into liquidation. A revival of a company is more advantageous to the economy of Kenya than its liquidation. The statutory manager cannot efficiently discharge his obligations where he is faced with litigation proceedings and creditors seeking to enforce payment of debts owed, hence a moratorium is a protective legal cover for a limited period of time to enable the statutory manager to dissect the company and identify its malady and recommend its cure by analysing its profit and loss accounts, income and expenditure accounts and make independent financial audits in order to either help revive the company or recommend its liquidation so that the provisions of the Company's Act on winding up become operational.

[16] The Respondent urges further, that it is inaccurate to state that the moratorium denies the interested parties their fundamental rights to equal protection under the law. The moratorium simply suspends litigation against the company, which litigation can be pursued by the interested parties upon lifting of the moratorium. The moratorium is only in place for a year.

[17] It is crucial that the company has its day in court to verify the legitimacy of the claim made against it and this cannot be done by the company while it is in a period of audit and attempting to gather all documents belonging to company in order to analyse genuine claims as opposed to claim already paid out. It is in the interest of justice that the instant matter pends lifting of the moratorium and the stay proceedings to enable the parties to properly go to trial and produce supporting evidentiary documentation. There is no law barring the statutory manager from making an application to the Court to seek orders having the effect of protecting the company. There is no law restraining the Court from making Orders having the effect of protecting the company. There is no law restraining the Court from making orders that are equitable and in the interest of the public and of the Kenyan economy.

COURT'S DECISION

[18] I can see two issues, namely:

a) Whether the moratorium declared by the statutory manager of Concord Insurance Company (under Receivership) as well as the orders of the court as extended by Havelock J on 4.2.2014, in so far as they extend to the interested parties, should be set aside; and

b) Whether the interested parties should be joined in these proceedings.

[19] Upon reading the application and meticulous consideration of the submissions of the parties, I see the basis of the application to be that the moratorium and the order of the court as

extended on 4.2.2014 are affecting the interested parties because; 1) the interested parties have filed suits against the insured of Concord Insurance Company and those suits cannot proceed to logical conclusion due to the moratorium and orders of the court herein; 2) the interested parties' right to due hearing and compensation for pain, suffering and loss of amenities has been inhibited by the moratorium and the orders of the court thereto; and 3) the moratorium and the orders of the court attendant thereto are clearly ultra vires section 67C (10) of the Insurance Act for they affects third parties. 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. The Respondent is apprehensive that the pursuit of the cases may result into the policy-holders dragging the Company into those proceedings through the doctrine of subrogation. As long as the moratorium is in place and the orders of the court staying any proceedings against the Company, there is no such danger. In the face of the orders of the court in force in this case, there is no proceeding, even by way of subrogation that can be conducted against the company. The orders of the court staying all proceedings against the company (as extended by Havelock J) are quite in line with the law and are not set aside, except I am persuaded to set aside the part of order No 8 which seems to stay all current, existing and or pending proceedings against the policy holders of concord Insurance Company.

[20] Given the stand I have taken on the matter, is it appropriate to join the interested parties in these proceedings? Without administering a sudden shock on the Applicants, I think not. From the record, the interested parties are not claiming to be holders of any judgment; original or declaratory which would make them at least judgment-creditors. Their cases are yet to be heard. On that basis, therefore, I think they are not in a position yet to join these proceedings as interested parties especially in such case on statutory management of Concord. 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 of 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 really is instructive to join them as interested parties. Equally, nothing will prevent them from applying and being joined in the future as interested parties save on the correct basis of law. There is no prejudice that will be caused by the course I have taken. Indeed, the court has opened the path of the Applicants to pursue their claims to logical conclusion. Let them do so as far as the law permits.

[21] Following the position I have taken, I believe, the other limb of the application which is seeking leave for Muriuki Ngunjiri Advocates to come on record for the interested parties, also fails. It is so ordered.

[22] The upshot is that the application dated 25th March, 2013 succeeds only to the extent which I have specifically granted. I am not, however, inclined to make any order as to costs in view of the nature of the matters I have had to determine. Orders accordingly.

Dated, signed and delivered in court at Nairobi this 12th day of May, 2014

F. GIKONYO

JUDGE