



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO 322 OF 2012

VAN DEN BERG (K) LIMITED.....PLAINTIFF

VERSUS

CONCORD INSURANCE COMPANY LIMITED.....DEFENDANT

RULING

The plaintiff brought the suit herein seeking a declaration that it is entitled to full indemnity and payment of legal expenses, decrees and risks arising from 64 cases listed in paragraph 10 and 22 of the plaint. It also seeks a mandatory injunction to compel the defendant to settle all the claims and liabilities arising from the insurance contracts signed between itself and the defendant (Concord Insurance Company Ltd) between 2007 and 2010.

Simultaneously filed with the plaint is the notice of motion dated 23/8/2012 seeking, *inter alia*, a stay of proceedings in the 64 suits pending the hearing and determination of the suit. On 29/11/2012, the court made an interim order staying proceedings in those suits.

On 6/2/2013, the Commissioner of Insurance placed the defendant under statutory management and appointed Charles Osoro Makone as the statutory manager.

By a notice published in the daily Nation of February 12th, 2013, the statutory manager declared a moratorium on the payments by the defendant to its policy holders and creditors for a period of twelve (12) months.

During the pendency of the suit, the plaintiff also discovered that there were other suits filed against it and in respect of which it also needed to seek protection from its insurer, the defendant.

Owing to the changed circumstances, the plaintiff brought the notice of motion dated 21/2/2013 seeking leave to amend the plaint to include the statutory manager of the defendant, Charles Osoro Makone, and some other parties who had lodged claims against it as parties to the suit. The motion also seeks a stay of all the proceedings and payments in respect of all the suits listed in paragraph 10 and 22 of the proposed amended plaint pending the lifting of the moratorium imposed by the statutory manager for a period of 12 months. Alternatively, the plaintiff seeks an order directing the statutory manager to meet all legal costs, decrees, judgment and any claims arising out of the suits listed in paragraph 10 and 22 of the amended plaint.

The application is supported by the affidavit of the applicant's Managing Director, John Remeus, and is premised on the grounds that the suits listed in the proposed amended plaint emanate from contractual obligations between the plaintiff and the proposed 1st defendant; that all costs and claims arising from such suits ought to be borne by the 1st defendant under the respective contracts. It is the plaintiff's case

that at the time the suits were filed, the 1st defendant instructed an advocate to defend the claims (Muriu Mwaniki Advocates) and met all the legal expenses and decrees arising therefrom. Further, the decision to put the defendant under statutory management and the moratorium declared by the statutory manager has an effect on it as it exposes it to possible liability and execution.

As concerns the intended amendment, the plaintiff argues that it is necessary to bring the statutory manager in the suit and reflect all the pending suits for which it is covered under the contract of insurance signed between itself and the defendant between 2007 and 2010.

In the affidavit sworn in support of the application, the deponent has reiterated the grounds therein. To prove the issues raised therein, the deponent has annexed a copy of the notice of appointment of the statutory manager (annexture JR1), copies of the complaints filed in the suits sought to be included in this suit (annexture JR2) and a copy of the proposed amended complaint (annexture JR3).

Counsel for the plaintiff, Mr. Biko, reiterated the grounds listed in the application and urged the court to allow the application.

I have read and considered the pleadings herein and the arguments advanced by the plaintiff's advocate in support of the application. The sole issue for determination is whether the plaintiff has made up a case for grant of the orders sought?

Of amendment of pleadings: Under Section 100 of the Civil Procedure Act, the court has power to amend any defect or error in any proceedings in a suit. Besides, the section obligates the court to make all necessary amendments for the purpose of determining the real question or issue raised by or depending on the proceedings. That power of the court is restated under Order 8 rule 5 of the Civil Procedure Rules thus:-

“5. (1) For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

In the instant application, the Plaintiff seeks to amend its pleadings to reflect the changed circumstances of the case. The circumstances that have led to the need to apply for amendment of the complaint are the appointment of a statutory manager to take charge of the affairs of the defendant and the discovery of some more cases for which the plaintiff is entitled to claim indemnity under the contract of insurance it had with the defendant.

Having considered the circumstances that led to the filing of the instant application, I find as a fact that the plaintiff had a contract of insurance with the defendant. That contract of insurance entitled it to claim indemnity from the defendant from all the suits listed in the amended complaint. Appointment of the statutory manager meant that, during the statutory manager's term of office, all issues concerning the defendant must be handled by the statutory manager and not the defendant. For these reasons, I agree with the plaintiff that the statutory manager and the plaintiffs in the suits sought to be added to the complaint filed herein are necessary parties in this suit for purposes of hearing and determination of the issues raised in this suit. That being the case, I direct that the amended complaint annexed to the plaintiff's supporting affidavit be deemed as duly filed upon payment of the requisite court fees.

Of stay of proceedings: As noted above, the plaintiff also seeks a stay of proceedings in all the suits filed against it and for which it is entitled to indemnity under the contract of insurance it had with the defendant.

Concerning this prayer, the plaintiff submitted that the firm of Muriu Mwaniki Advocates which had been appointed by the defendant to defend its interests in the suits has ceased existing; that owing to the moratorium herein, it can no longer benefit from the contract it had with the defendant and that unless the orders sought are granted it will suffer irreparable harm.

Having already found that the plaintiff had a contract with the defendant which entitled it to indemnity from all claims covered under it, and taking note of the fact that the defendant has been put under statutory management and a moratorium declared staying payment of all policy holders of the defendant during the pendency of the moratorium, I agree with the plaintiff that such a scenario has left the plaintiff exposed to the risks for which it had obtained the insurance cover. It also left it without representation in the said cases, as the advocate appointed by the defendant to prosecute those suits can no longer prosecute the suits without instructions. I take judicial notice of the fact that it is the defendant who could have given the advocates on record instructions to defend those suits. Having been put under statutory management, the defendant can no longer issue instructions on the advocates it had instructed to represent the plaintiff.

In view of the foregoing, I agree with the plaintiff that unless an order for stay is granted, the plaintiff might be forced to personally meet the costs of the suit to its great detriment and prejudice.

For the foregoing reasons, I find the prayer for stay of proceedings to be merited and allow it. However, as concerns the alternative prayer, I find and hold that the same cannot issue against the statutory manager since he has not been accorded an opportunity to respond to the issues raised herein. Costs to abide the suit.

DATED and DELIVERED this 2nd day of October, 2014

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Odundo holding brief for Prof. Ojianda for the plaintiff

N/A for the defendant

Kennedy – Court Assistant