



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 281 OF 2005

BETWEEN

**THE MINISTER FOR FINANCE & THE COMMISSIONER OF INSURANCE
AS**

**LICENSING AND REGULATING OFFICERS.....
APPELLANT**

AND

CHARLES LUTTA KASAMANI T/A

KASAMANI & CO. ADVOCATESRESPONDENT

AND

**UNITED INSURANCE COMPANY LIMITEDAFFECTED
PARTY**

JUDGMENT OF THE COURT

1. This is an appeal from a Ruling and Order of the High Court (B. K. Tanui, J) given on 29th July 2005 prohibiting the Minister of Finance (the Minister) and the Commissioner of Insurance (the Commissioner) from licensing United Insurance Company Limited (United Insurance) to carry on insurance business and compelling them, by an order of Mandamus, to commence, prosecute and conclude winding up proceedings against United Insurance.

Background

2. The respondent, an advocate of the High Court of Kenya, practicing law under the firm name of Kasamani & Co. Advocates (the advocates) and United Insurance had an advocate/client relationship for some time. Between the years 2000 and 2005 the advocates, on instructions given by United Insurance, defended third party insurance claims in suits filed against persons insured by United Insurance in Kisii, Kakamega, Mumias, Bungoma, Busia, Kericho and Migori. United Insurance experienced difficulties in meeting its obligations towards the advocates by failing to pay the advocates’ fees for work done. Ultimately the relationship between the advocates and United Insurance became strained on account of the failure by United Insurance to pay the

- advocates' fees. The advocates' fees payable by United Insurance to the advocates were assessed by the court, taxed and allowed in the sum of Kshs. 27,828,890.80. The advocates presented evidence before the lower court of extensive deliberations and proposals and counterproposals between them and United Insurance regarding how the latter would liquidate its debt to the advocates including arrangements for swapping debt with land.
3. On 23rd July 2003, the advocates wrote to the Commissioner complaining that he had failed in his supervisory and regulatory role under the Insurance Act, 1984, Chapter 487 of the Laws of Kenya (the Act), to ensure that United Insurance met its obligations to the public and to its service providers, of which the advocates were one, and demanded action by the Commissioner under section 122 of the Act. That section provides that an insurer is deemed to be unable to pay his debts if he fails to observe requirements as to margin of solvency prescribed under section 41 of the Act.
 4. In his brief response a year later dated 30th July 2004, the Commissioner acknowledged "*that United Insurance Company Limited has experienced liquidity problems lately*" and that necessary steps had been taken to address those problems. The Commissioner maintained that United Insurance was "*not insolvent within the meaning of the Insurance Act to warrant*" the action suggested by the advocates. Upon receipt of that letter the advocates served notice dated 30th July 2004 upon the Attorney General under the Government Proceedings Act of their intention to commence legal proceedings unless the Commissioner proceeded to commence winding up proceedings against United Insurance.
 5. On 2nd June 2005 the advocates executed their threat and presented an application to the High Court seeking leave to apply for an order of mandamus and prohibition directed at the Minister and the Commissioner to institute, prosecute and conclude winding up proceedings against United Insurance. The court granted leave. Thereafter the advocates filed a substantive motion on 22nd June 2005 that was supported by an elaborate statement of facts and a supporting affidavit of Charles Lutta Kasamani. Despite the same having been served on all the parties, no replying affidavit was filed in answer by either United Insurance or by the Minister or by the Commissioner.
 6. The Attorney General did however file grounds of opposition contending that the advocates had the capacity themselves to petition for the winding up of United Insurance without demanding that it be done by the Minister or by the Commissioner; that the many persons insured by United Insurance would be adversely affected; that the duty placed on the Minister and the Commissioner to wind up an insurance company is discretionary and they could not be compelled to act in a specific manner; that the advocates had an alternative remedy of recovering taxed costs by taking out execution proceedings to attach and sell the assets of United Insurance; and that the order of prohibition could not be granted as a licence had already been issued to United Insurance.
 7. The hearing of the motion filed by the advocates on 22nd June 2005 was adjourned on three occasions at the request of the appellant. On one of those occasions the grounds on which an adjournment was sought by counsel for the appellant was that United Insurance had been placed under statutory management. An attempt to adjourn the hearing on a fourth occasion was rejected by the court on 25th July 2005. On that day, counsel for the advocates prosecuted the motion on the basis that the matters set out in the statement of facts and in the supporting affidavit were uncontested. At the close of the advocates submissions, counsel for the appellant again attempted to have the matter adjourned for purposes of the appellant's reply. That request was rejected. Counsel for the appellant did not make any reply to the submissions by counsel for the advocates and a ruling in respect of the motion was reserved for 29th July 2005 when the impugned ruling was delivered allowing the advocates motion in its entirety.

The appeal and submissions by counsel

8. Based on the memorandum of appeal, the appellant has challenged the ruling on the same grounds that were set out in the grounds of opposition in the lower court but which were not canvassed at the hearing. Those grounds are that the advocates had an alternative remedy; that persons directly affected, namely the persons insured by United Insurance were not served with notice of hearing; that the orders should not have been granted when a statutory manager had already been appointed; that the judge erred in directing the Minister and Commissioner to exercise their discretion in a particular manner; that the order of prohibition purported wrongly to prohibit that which had already taken place, namely the issuance of a licence; that the judge wrongly declined to grant the appellant an adjournment; that since the advocates interest in the matter was based on contract, he did not have locus standi to seek judicial review; that the finding that United Insurance was insolvent was not supported by facts.
9. Both parties filed written submissions before this Court. Learned counsel Mr. K. O. Onyiso appeared for the appellant while learned counsel Mr. Kasamani appeared for the respondent. Though served, there was no appearance for United Insurance or its counsel.
10. It is the appellant's case that the finding by the learned Judge that United Insurance was unable to pay its debts was not well founded as there existed litigation over those debts between it and the advocates; that the advocates did not demonstrate that United Insurance was insolvent within the meaning of section 41 of the Act; that the advocates, as a creditor of United Insurance, had a more convenient, beneficial and effectual alternative remedy of applying for the winding up of United Insurance itself; that the Judge should have considered that the Minister and the Commissioner had in public interest already intervened and appointed a statutory manager under section 67C of the Act. According to counsel the court should have had regard to the provisions of section 67 of the Act generally, which regulates the winding up of insurance companies.
11. Referring to **Kenya National Examination Council vs. Geoffrey Gathenji Civil Appeal [1997] eKLR**, the appellant urged that the court erred in granting an order of mandamus directing the exercise of discretion in a specific or particular manner; that as a licence had already been issued, it was irregular to grant an order of prohibition.
12. On his part, counsel for the respondent submitted that there was clear evidence before the court regarding the inability of United Insurance to pay its debts. He drew our attention to the fact that United Insurance issued cheques that were dishonored and that it swapped land for debt on account of its inability to pay the debt; and that despite having brought the dire circumstances of United Insurance to the attention of the Commissioner, the latter did nothing.
13. Counsel submitted that United Insurance failed to comply with section 41 of the Act and was protected and permitted to operate by the Commissioner for reasons that were not transparent and that the learned judge was right to hold that United Insurance was unable to pay its debt within the meaning of section 219 of the Companies Act.
14. Counsel also referred to the case of **Kenya National Examination Council vs. Geoffrey Gathenji** [Supra] and submitted that in all the circumstances, the learned judge was right to grant the orders for judicial review.

Determination

15. We have considered the appeal and the submissions by learned counsel. As we have already noted, when the respondent's motion came up for hearing before the lower court, counsel representing the appellant applied for, and was granted adjournment on three occasions. A fourth attempt to adjourn the hearing was declined. After counsel for the respondent concluded submissions before the lower court, counsel for the appellant yet again unsuccessfully sought to have the matter adjourned to another date in order for the appellant to make arguments in opposition to the motion. When that request was declined, the appellant did not submit on the motion at all. The result is that the respondent's motion was for all purposes uncontested as there

was no answer to the statement of facts and to the matters deposed to in the respondent's supporting affidavit.

16. With the possible exception of the complaint that the judge erred in declining to grant the appellant yet a further adjournment, it is too late in the day for the appellant to raise matters on appeal that were not canvassed or deliberated upon by the lower court in reaching its decision. Considering however that there were on record grounds of opposition that had been filed that ought to have been considered, we will address three issues that in our view require consideration. The first is whether the learned Judge erred in declining to adjourn the hearing of the motion. The second is whether the advocates demonstrated that United Insurance was unable to pay its debts. The third issue is whether the learned Judge erred in granting the reliefs.

17. Regarding the complaint that the judge erred in refusing the appellant's further request for adjournment, the grant or refusal to grant an adjournment involves the exercise of judicial discretion. The circumstances under which this Court can interfere with the exercise of discretion are limited. In **Mbogo and Another vs. Shah [1968] E A 93** this Court stated that it:

“...will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. Counsel for the appellant did not demonstrate to us that the learned judge either took into account irrelevant matters or failed to take into account relevant matters in refusing the adjournment. As already stated, the hearing of the motion had been adjourned at the instance of the appellant on three previous occasions. The appellant was given every opportunity to address the motion. It failed to avail itself of that opportunity. This complaint has no merit.

19. The appellant has also argued that it was not demonstrated to the court that United Insurance was unable to pay debts because it was not shown that it had not complied with the provisions of section 41 of the Act. Section 122 of the Act provides that for the purposes of section 219 of the Companies Act, an insurer shall be deemed to be unable to pay his debts if at any time the insurer does not observe the requirements of section 41 of the Act. Section 41 of the Act deals with “margin of solvency” and prescribes level of assets that insurance companies should keep at all times relative to its liabilities.

20. In our view, although section 122 provides that an insurer shall be deemed to be unable to pay his debts if it fails to observe the requirements as to the margin of solvency under section 41, section 122 does not exclude other circumstances when an insurer may be deemed to be unable to pay its debts. It is noteworthy for instance that under section 67C of the Act, inability to pay debts “within the meaning of section 220 of the Companies Act” is acknowledged as a potential trigger for intervention by the Commissioner in the affairs of an insurer. The circumstances of “*inability to pay debts*” under section 220 of the Companies Act include where execution or other process issued on a judgment, decree or order of any court in favour of a creditor of a company is returned unsatisfied in whole or in part or where it is proved to the satisfaction of the court that the company is unable to pay its debts. In determining whether a company is unable to pay its debts the court is required to take into account the contingent and prospective liabilities of the company.

21. There was in our view, more than sufficient and uncontroverted evidence before the court of the inability of United Insurance to pay its debt. There was a plethora of unsatisfied certificates of taxation. There were cheques issued by United Insurance to the respondent that were dishonored on presentation. There were offers of land in lieu of payment of debt by United Insurance. The finding by the learned judge that United Insurance was unable to pay its debts was well supported by the evidence. As noted by the editors of **Palmer's Company Law**, the fact that a creditor has made repeated applications for payment and the company has neglected to pay affords cogent

evidence that it is unable to pay its debts. There is therefore no merit in this complaint either.

22. The last issue for consideration is whether the learned judge erred in granting the reliefs that he did. As already indicated, the Judge proceeded on the basis that the motion was uncontested and concluded, *“there are no grounds advanced to challenged (sic) the contentious canvassed by Mr. Kasamani. In the circumstances, I find that United Insurance Company Limited is not able to pay its debts. I would allow this judicial review.”* The learned Judge then ordered, without much ado, that:

“a) That there will be an order of Mandamus directed at the Minister of Finance and the Commissioner of Insurance that they commence, prosecute and conclude winding up proceedings against United Insurance Company Limited the affected party.

b) That there will be an order of prohibition to prohibit them from licencing [sic] the said United Insurance Company Limited to continue its operation any longer.”

23. Whereas we are fully in agreement with the learned Judge regarding the finding as to United Insurance’s inability to pay its debts, he does not appear to have considered the appropriateness or otherwise of the remedies sought in the circumstances of the matter with which he was dealing. We think he should have done so in light of the grounds of opposition that was on the record.

24. What then are the circumstances in the present case? Where the affairs of an insurance company are conducted in a manner that is detrimental or prejudicial to that company, any policyholder, the economy or the insurance industry, the Act provides a wide range of intervention measures at the disposal of the Commissioner, some of which could only have been taken with the approval of the Minister. Under section 10 of the Act for instance, the Commissioner may apply to court for the winding up of the business of an insurance company where he considers the continuance in business of an insurer is likely to lead to insolvency or order an investigation of that insurer.

25. Under Section 67C of the Act that deals specifically with powers of the Commissioner to intervene in the management of an insurance company, the measures that the Commissioner may, in his discretion, take include appointment of a manager to assume the management and control of the insurance company; appointment of additional members to the board of directors of an insurer as well as recommending the winding up of the insurer under section 123 of the Act. Those powers may be exercised by the Commissioner for a variety of reasons including, where the insurer fails to maintain the required margins of solvency as prescribed under section 41 of the Act or where the insurer is unable to pay his debts within the meaning of section 220 of the Companies Act.

26. The decision as to what is the appropriate measure of intervention, whether for instance to recommend to wind up the company or to appoint a manager is a matter of discretion of the Commissioner. It is not a matter in which the court can direct the Commissioner to exercise that discretion in a particular manner.

27. This Court considered the efficacy and scope of the remedies of mandamus, prohibition and certiorari in the case of **Kenya National Examination Council vs. Geoffrey Gathenji** that was referred to by both counsel. In that case the Court explained in careful and elaborate detail the circumstances under which orders of mandamus, prohibition and certiorari may be given.

28. As regards an order of mandamus, the Court cited with approval passages from **Halsbury’s Laws of England** 4th edition volume 1, and noted that an order of mandamus is directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office that is in the nature of a public duty; that its purpose is to remedy the defects of justice and it will issue the end to which that justice may be done; and that *“in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and that it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”* The Court also sanctioned the

passage that:

“Where a statute, which imposes a duty leaves a discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

29.It was up to the Commissioner to determine the appropriate mode of intervention in the affairs of United Insurance. We are therefore persuaded that the learned Judge erred in granting the order of mandamus directing the Minister and the Commissioner to commence winding up proceedings against United Insurance. It is also not clear to us, and no explanation was offered, what prevented the advocates themselves from directly pursuing the remedy of winding up.

30.Regarding the order given by the court prohibiting the licensing of United Insurance that order could only relate to the future and could not quash a licence that had already been issued. As the Court explained in **Kenya National Examination Council vs. Geoffrey Gathenji** an order of “... prohibition looks to the future...” and is “powerless against a decision which has already been made...[as] such an order can only prevent the making of a decision.”

31.The order of prohibition issued by the court could not therefore relate back to what had already been done.

32.For the foregoing reasons, while we uphold the finding by the learned Judge that United Insurance was unable to pay its debts, we allow the appeal and set aside the orders of mandamus and prohibition issued by the court on 29th July 2005.

33.We award the costs of the proceedings in the High Court to the respondent. Each party shall however bear their own costs of the appeal.

Dated and delivered at Kisumu this 19th day October, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR