



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 294 OF 2008 (UR 195/2008)

INSURANCE REGULATORY

AUTHORITYAPPLICANT

AND

NEPTUNE CREDIT MANAGEMENT LTD.....1ST RESPONDENT

INVESCO ASSURANCE COMPANY LTD (UNDER STATUTORY) MANAGEMENT.....2ND RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from

the ruling of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Khaminwa, J.) dated 17.10.2008

in

WINDING UP CAUSE NO. 19 OF 2007)

RULING OF THE COURT

The Insurance Regulatory Authority (“the applicant”) comes before us under rule 5 (2) (b) of the rules of this Court seeking an order:

“THAT pending the lodging, hearing and determination of the intended appeal herein, there be a stay of execution of the ruling delivered by the superior court (Lady Justice Joyce Khaminwa) on the 17th of October, 2008 in Nairobi Winding Up Cause No. 19 of 2007 (Milimani).”

In these proceedings, the applicant appears through the Commissioner of Insurance, Mr. Sammy Mutua Makove, who is the Chief Executive of the Authority and is represented by learned counsel, Ms. Lucy Muthoni Kambuni. The Winding up cause alluded to was instituted on 22nd November, 2007 by M/S. Neptune Credit Management Ltd. (Neptune) who claimed that M/S. Invesco Assurance Company Ltd (Invesco) owed them in excess of Sh.14 million for services rendered since May, 2007. Neptune asserted that it had made demand for payment of the debt but Invesco was unable to pay and it was therefore just and equitable to wind up Invesco under section 224 of the Companies Act, Cap 486, Laws of Kenya. It is deponed by Bryan Yongo, the Managing Director of Neptune, that the petition for

winding up was advertised on 17th January, 2008 and gazetted on 22nd February, 2008. Invesco was duly served on 25th February, 2008 and on 26th February, 2008 an affidavit of compliance was filed in court pending the hearing of the cause on 28th February, 2008. It was adjourned on that day at the request of the parties who were exploring a settlement. We are informed that the Winding up cause is still pending hearing and determination before the superior court. In these proceedings Neptune is represented by learned counsel Mr. Ahmednasir Abdullahi, while Invesco is represented by Mr. Kenneth Watta.

It is apparent that the applicant was aware of the Winding up cause and it is indeed asserted that their representative was present when the hearing of the Winding up cause was adjourned on 28th February, 2008. The following day, 29th February, 2008 the applicant made a decision, and a succession of other decisions, which ultimately led to the application now before us, amongst other skirmishes subsequent thereto. On that day, the applicant, through the Commissioner of Insurance (“*the Commissioner*”) fired the first salvo by invoking the powers vested in him by the **Insurance Act, Cap 487, Laws of Kenya** (“*the Act*”) in **Part VI A**, and appointed **Geoffrey Njenga** (Njenga) as the Statutory Manager of Invesco for a period of one year. Part VI A of the Act was introduced by **Act No. 12/94** which was in turn amended by **Act 8/96** and **Act 9/03**, to make specific provisions for “*Inspection and control of Insurers*”. By virtue of his appointment, Njenga took over the management, control and conduct of the affairs and business of Invesco under **section 67 (c) (2)** of the Act and proceeded to discharge his responsibilities as required under **sections 67 (c) (4), (5), (6) and (7)**. The day following his appointment, 1st March, 2008, he invoked **section 67 (c) (10)** of the Act and declared a moratorium on any payments by Invesco to policy holders and creditors.

It would appear that on 4th March, 2008, the Directors of Invesco, aggrieved by the decision of the applicant to appoint a statutory manager, went to court and filed a judicial review application seeking orders of *certiorari* and *prohibition*. There is no court case number in the document on record and it seems that the matter has neither been heard nor determined by any court.

On 11th March, 2008 Njenga went before the High Court, *ex parte* under the provisions of Section 348 of the Companies Act (Cap 486) and sought directions and other orders as the court would think just. Lesiit J. obliged and issued the following order:

“THAT it is declared that during the pendency of the MORATORIUM declared by the statutory manager, no execution, attachment, and/or garnishee proceedings may issue and/or be proceeded with against the property of the company or monies held in its bank accounts.”

That was Milimani HCCC No. 129 of 2008.

Three months later on 30th June, 2008, Njenga obtained a raft of further *ex parte* orders from Lesiit J in Milimani HCCC No. 318 of 2008, again under **section 348** of the Companies Act and **section 67(c)** of the Insurance Act, thus:

“2. THAT no civil proceedings of whatever nature or form shall be entertained and or filed in any court or tribunal against Invesco Assurance Company Limited (Under Statutory Management) or its policy holders during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008.

3. THAT all civil proceedings whatever their nature or form and whatever their stage currently subsisting in various courts and tribunals against Invesco Assurance Company Limited (Under Statutory Management) or its policy holders be and are hereby suspended and shall remain suspended during the during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008.

4. THAT all taxations proceedings whatever their nature or form currently subsisting in various courts and tribunals against policy holders of Invesco Assurance Company Limited (Under Statutory Management) and for which the Company may become liable be and are hereby suspended and shall remains suspected during the during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008.

5. *THAT no statutory notices, demands or claims of whatever nature or form shall be issued or be effective against Invesco Assurance company Limited (Under Statutory Management) or its property or its policy holders during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008.*

6. *THAT the running of time for the purpose of any law of limitation in respect of any notice, demand or claim by any policy holder or creditor of Invesco Assurance Company Limited (Under Statutory Management) is suspended and shall remain suspended during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008.*

7. *THAT the applicant is hereby granted leave to publicize the foregoing orders by publishing them in Kenya Gazette, the Daily Nation Newspaper and Standard newspaper.”*

The *ex parte* orders issued in both civil suits 129/08 and 318/08 do not appear to have been challenged or set aside. Njenga swears that he continued with the statutory management of Invesco and was making reports and proposals to the Commissioner under **section 67 C (5) and (6)** with a view to advising the Minister under **section 67 (C) (7)** of the Act for his decision on whether Invesco should be revived or liquidated. His recommendation was for revival of Invesco. In October 2008, however, he was served with the notice of motion filed by Neptune in the Winding up cause on 25th September, 2008. The notice of motion sought one substantive order:

“2. THAT the Honourable Court be pleased to issue an order of temporary injunction (sic) from disposition and/or transfer of the property of the debtor/company herein, and any transfer of shares or membership of the company until determination of this cause.”

The basis for seeking those orders under certificate of urgency was: -

“(c) THAT the company’s statutory manager declared a moratorium on all payments and has further obtained ex-parte declaratory orders against all execution, attachment and or garnishee proceedings against its assets or monies held in its bank accounts.

(d) THAT the company is now seriously floating its shareholding, membership and/or its assets to prospective buyers, partners and/or equity investors in complete disregard of this winding-up cause or the creditor’s interest herein.”

Njenga and the applicant herein opposed the application and filed affidavits in reply on 6th October, 2008 refuting the assertion by Neptune that Invesco was on the verge of being sold off, the pendency of the Winding up cause notwithstanding. Njenga swore in part:

“24. That I have completed evaluating the financial status of the Company and established that its assets are far out stripped by its liabilities and it would therefore be of little practical benefit to push the Company into liquidation through the instant petition or otherwise (Annexed hereto is a copy of the financial report and marked “GN-4”).

25. That I have therefore concluded and recommended to the Regulatory Authority that the best way forward in the interest of all the parties is to attempt to revive the Company.

26. That the prospect of reviving the Company is one which is clearly contemplated by the applicable statutes and was the basis of my information memorandum annexed to the applicants notice of motion.

27. That floating the shares aforesaid means that the Company is going to operate as a going concern and will meet its valid pecuniary obligations and no prejudice will be suffered by the applicant herein or any other creditor. Consequently the apprehension by the applicant is misplaced.

28. That such floating of shares will be a public process as it will have to meet the necessary regulatory approvals including that of the present shareholders, the Commissioner of Insurance and the Honourable

Minister for Finance. That there is therefore no secrecy as insinuated by the applicant herein.

29. That apart from not being prejudiced by such a process, the applicant has no Locus Standi, sway or hand in the said process as matters arising therein are extraneous to it.

30. That floating the Company shares will mean injection of capital into the Company to the benefit of all persons with vested interests including the applicant herein and I am extremely baffled at the applicants attempt to frustrate the same process in order to satisfy its narrow interests to the detriment of all the other creditors and the insuring public at large through unprocedural methods.

The Commissioner also, swore in part: -

“6. That the Manager has duly complied with the law, has advised me of the necessity to restructure the Company through the sourcing of a private investor who shall inject capital of Kenya shillings four hundred and twenty six million (Ksh. 426,000,000/-) and upon my recommendations, the Board did on 16th September, 2008, accept my recommendations that the option of a private investor be explored. A copy of the extract of the board minutes is attached hereto and marked “SMM1”

7. That as is evident from page 4 of the information Memorandum (exhibit BY2), and paragraph 8 of the affidavit of Joseph Gitau Mburu (annexed to exhibit “NY5”), the shareholders were unable to inject some initial capital of Kenya shillings one hundred million (Kshs.100,000,000/-), as recommended by the Caretaker Board, and hence the appointment of the Manager.

8. That it is evident from exhibit BY2 that the sourcing of a private investor is in accordance with the provisions of the Act and is meant to secure the interests of the insurer, the policy holders and the insuring public in general as well as all creditors current and potential.....”

9. That I am aware that the Manager has not executed any transfer of shares with any private investor and the action and the application herein is therefore an abuse of the court process. That I am also aware, and I am thus advised by our advocates on record, which information I verily believe to be true that in any event the Insurance Act envisages such a transfer of shares and were the transfer of shares to be effected that would not be in breach of the law.

.....

12. That I further verily believe that any action taken by the Manager under the authority of the Board and particularly with regard to sourcing for private sector is in the best interest of all the parties concerned, including all creditors, who stand a better chance of recovering their debts if the company is up and running. That indeed, there is even the greater public policy of securing the interests of policy holders and the insuring public at large. That in the premises, I verily believe that no prejudice will be occasioned to the Applicant and further the Applicant will not suffer any irreparable damages or at all.”

Upon hearing the parties on the matter, Khaminwa, J. granted the temporary injunction as sought. In the process, however, the learned Judge made the following findings: -

“i. That the appointment of the Statutory Manager, one Geoffrey Njenga, by the Commissioner of Insurance, on the 29th of February, 2008 was unlawful and should be terminated.

ii. That the Statutory Manager’s management of the company business was not in accordance with the law,

iii. That the Statutory Manager had no authority to take any action either to revive Invesco Assurance Company Limited (“the company”) or liquidate the same,

iv. That it was an abuse of the court process for the commissioner of Insurance to appoint a Statutory Manager whilst the Winding up Cause against the Company was pending before the Court,

v. That where there is a winding up of the company by a person other than the Commissioner of Insurance, the latter's role is limited to appearing and participating in the hearing of the petition which is already before the court,

vi. That the appointment of a Statutory Manager was interference of the court process and should be terminated.”

The extracted orders which ensued from the ruling and which the applicant will be challenging on appeal are thus:

“1. THAT the appointment of the manager is void, null and invalid.

2. THAT a temporary injunction be and is hereby issued (sic) from disposition and/or transfer of the property of the debtor/company herein, and any transfer of shares or membership of the company until determination of this cause.

3. THAT a temporary injunction be and is hereby granted restraining the manager GEOFFREY NJENGA from disposing and/or transferring any of the property of the debtor/company or transfer of shares or membership of the company until the determination of this Winding Up Cause”.

We have gone into some length in examining the background to the application before us because the matter has been bitterly fought on all sides, both before us and in the superior court. We must feel reassured, therefore, that the orders we ultimately make in the application before us accord with the justice of the matter.

The principles we have to apply in considering the application are not in dispute. The court has original jurisdiction and unfettered discretion to exercise. The discretion must however, as always, be exercised judicially or, put another way, on the basis of evidential material and sound legal principles. It is now trite law that the onus is on the applicant, in order to succeed in an application under **rule 5 (2) (b)** of this Court's rules, to show that the appeal or intended appeal is not only arguable or as sometimes put, not frivolous, but also that unless the orders sought are granted, the appeal or intended appeal, if successful, will be rendered nugatory (see **Githunguri v Jimba Credit Corporation Ltd (No 2) [1988] KLR 838, Reliance Bank Ltd v Norlake Investments Ltd [2002]1 EA 218**).

In satisfaction of the first of the twin principles, Ms. Kambuni referred us to the draft memorandum of appeal on record raising seven grounds. Those grounds are substantially reproduced as the grounds upon which the motion is made and in the affidavit in support thereof. It is not in our province to analyse each of those grounds and make findings thereon at this stage as we expect the appellate court to grapple with them fully. A solitary ground, however, if arguable, will still avail the applicant. One of the main issues raised by Ms. Kambuni is that the order given by the superior court declaring that Njenga's appointment as the statutory manager was “null and void”, was not part of the prayers sought by Neptune. All that Neptune wanted was to stop the alleged intention by the statutory manager to sell the property and shares of Invesco until the Winding up cause is finalized. An unpleaded issue was therefore determined, and determined without hearing the parties, contrary to well established principles of law. The ensuing order was therefore made in excess of jurisdiction. **Chalicha F.C. Ltd v. Odhiambo & 9 Others [1987] KLR 182** was cited in aid of that argument. Another major issue raised was the finding that the **Companies Act, Cap 486** under which the Winding up proceedings were taken, took precedence over the **Insurance Act, Cap 487**, under which the statutory manager was appointed and was operating. The view taken by the applicant is that Parliament, by enacting the amendments to **Part VI A** of the Insurance Act, intended to provide for the control of all insurers for the benefit of the insuring public and the process of winding up insurance companies is fully provided for under the Act.

In these arguments and others raised by Ms. Kambuni, the applicant was supported by Njenga, who was represented before us by Mr. Anthony Oteng'o Ombwayo, senior state counsel, instructed by the Attorney General. Mr. Ombwayo added that the only way the appointment of the statutory manager could be challenged was through Judicial Review proceedings and not by side wind in the Winding up

proceedings.

For its part, Neptune, through learned counsel Mr. Ahmednasir Abdullahi, submitted that only one order was granted as prayed in Neptune's application, that is to say, an injunction to restrain the statutory manager from disposing of the shares and property of Invesco. In so asserting, Mr. Ahmednasir was obviously oblivious of the first order made by the superior court "*that the appointment of the manager was void, null and invalid*". He nevertheless submitted that the discussion on the propriety of the appointment of the statutory manager was *obiter*. He was emphatic that the applicant through the Commissioner was in abuse of court process by commencing a political process parallel to a court process and insisting that the court process was subservient. Mr. Ahmednasir fervently called upon us to make a strong statement disabusing the executive arm of Government of such kind of interference by making a finding that there was no arguable appeal. In his view, there was no conflict whatsoever between the Companies Act and the Insurance Act since **section 120** of the Insurance Act ousts the jurisdiction of the Companies Act, but where there is no express ouster, the Companies Act applies. Both Acts, he concluded, were in harmony.

Finally, Mr. Watta for Invesco saw no conflict between the Companies Act and the Insurance Act, citing **s. 67(c) (5) (e)** as an example of a provision which exempts "*any other written law*", in this case, the Companies Act. He submitted that the views expressed by the learned Judge cannot therefore be faulted and the intended appeal is not arguable. It is also not arguable for the reason that the notice of appeal was not served on all creditors of Invesco who will be affected by any orders issued on appeal. The notice of appeal is thus incompetent and no appeal can be based on it. Finally, Mr. Watta submitted that there was nothing wrong with the expressions made by the superior court on the validity of the statutory manager's appointment. The court had inherent jurisdiction under **section 60** of the Constitution and **section 3A** of the civil Procedure Act to quash nullities in law without even inviting the parties to submit on the issue.

We have carefully considered that aspect of the matter and we think, with respect, that the two issues posed by the applicant are not frivolous. The amendments to the Insurance Act are relatively recent and Parliament appears to have pronounced itself emphatically in the various provisions introduced under **Part VI A** of the Act. The interplay between those provisions and the relevant provisions of the Companies Act is not as obvious as submitted by M/S. Ahmednasir and Watta and it will require full ventilation and authoritative decision of the appellate court. Nor is it understandable why the superior court issued an order for nullification of the appointment of the statutory manager when no such order was sought in the pleadings before her. We are inclined to find, on this aspect of the matter that the intended appeal is arguable.

Will the success of the intended appeal, if such be the eventuality, be rendered nugatory if we do not stay the three orders given on 17th October, 2008 and issued on 12th November, 2008 as reproduced above? The first observation to make is that order number (2) appears to be a mis-typed version of order number (3). Be that as it may, Ms. Kambuni referred us to a list of what the applicant believes will be the natural consequences flowing from the failure to issue the order sought and thus make the intended appeal nugatory. These are:

"a. The applicants shall in obedience to the superior court's order be obliged to abandon the statutory management in contravention of their mandate under the Act and this would result in confusion and perpetuation of an absurdity particularly of section 67 C which expressly and literally provides for the power of the Commissioner of Insurance to intervene in the management of Insurance companies where the requisite conditions exist and place the Insurance company under statutory management.

b. The disruption of the statutory management which is within the stipulated period under the Act shall negate all the efforts made by the statutory manager in seeking to reorganize and restructure the company, a situation which will portend enormous loss to all the policy holders who are currently facing execution processes, and damage irreparably the last vestiges of confidence by the insuring public particularly with regard to public service motor vehicles granted the numerous failed insurance companies in that sector. In addition, the directors and shareholder who are now certain of the action that the Commissioner has taken against the company will interfere with the few remaining assets of the

company and probably also cart away key documents and files, the latter which has already begun to happen.

c. The moratorium declared by the statutory manager with regard to all payments to all classes of policy holders and creditors shall lapse and as a result occasion a rapid run on the company's fragile assets, to the total prejudice of bonafide citizenry who insured their 'matatus' or who are yet to recover decretal sums pursuant to personal injury claims filed in court. In addition fraudulent claimants who hold unwarranted judgments shall launch an assault on the company to the prejudice of all bonfide claimants.

d. All the efforts achieved towards reorganizing and restructuring the company with a view to refloating it will be completely lost and no sensible investor will be interested in injecting capital into the company.

e. That the consequences of the court's orders in the first ruling are that the insurance industry shall be in total disarray, completely unmanageable and as a result, the already wanting public confidence in the industry specifically with regard to public service vehicle insurance shall continue. That this is a matter of great public importance and great concern to the Insurance authority which under section 3A of the Insurance Amendment Act, 2006 is mandated to ensure the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya.

f. The long term implications of the ruling of the court will spell complete disorder to the insurance industry as all that fraudulent shareholders of an insurance company that does not comply with the Act need to do is connive with a preferred creditor to file a petition for winding up the company which may remain undetermined for as long as parties spin the legal yarn.

g. The 'locking up' of the commissioner of Insurance in a Petition that has been filed by another individual would negate the provisions of the Insurance Act which requires specific proof of insolvency under the Act in any winding up of an insurance company the proof of which is statutorily the special province of the Commissioner of Insurance and the decision to liquidate an insurance company which can only be made within the context of statutory management."

She submitted, and was supported by Mr. Ombwayo, that there was a statutory duty on the Commissioner to take care of the interests of the public in the insurance industry and in this particular case he did so through the statutory manager. The statutory manager has so far taken legal measures to protect the assets of Invesco which is evidently in serious financial and management problems and in the process, has catered for the interests of the policy holders, creditors and the public at large. All hell will break loose if that *status quo* is disturbed. According to the applicant, the *status quo* is that the applicant still has legal control of Invesco despite unorthodox attempts made by the Directors to wrest control of the insurer. The enforcement process of the orders of the superior court was not complete as at the time the application was argued and Ms. Kambuni referred us to some applications made by the Directors seeking the court's directions on the superior court's orders: firstly, a Chamber summons filed on 5th November, 2008 seeking the following orders:

"2. A declaration do issue that the Board of Directors of Invesco Assurance Company Limited is the bona fide authority with competence to transact on behalf of the company and to operate bank accounts held in its name or on its behalf.

3. Mr. Geoffrey Njenga, previously the statutory manager of Invesco Assurance company Limited, be compelled to hand over all assets, items, documents and information in his custody or knowledge, and account for all activities, transactions, payments, and receipts ring his tenure at the company pursuant to section 324 and 325 of the Companies Act.

4. Mr. Geoffrey Njenga, previously the statutory manager of Invesco Assurance Limited, be compelled to reimburse the company for sums paid to him in remuneration of his services as statutory manager over the period of his tenure in such capacity.

5. That the Commissioner of Insurance be compelled to furnish this Honourable court with terms of

engagement in respect of Mr. Geoffrey's Njenga's appointment as statutory manger."

Secondly, a notice of motion filed on 24th November, 2008 seeking orders that:

"2. This Honourable Court be pleased to give directions and effect its ruling on 17th October, 2008 t wit Honourable Justice Joyce Khaminwa.

3. The bankers of the Invesco Assurance Company Limited be and are hereby directed to give the Board of directors of the Company access to bank accounts held by the bankers on the Company's behalf."

Various authorities were placed at our disposal in support of the submissions made on behalf of the applicant.

Mr. Ahmednasir for Neptune found no substance in the perceived consequences of failure to grant the order sought as put forward by the applicant. He frowned on the applicant's pontification that it has the interest of the public at heart, citing several cases of failed insurance companies, including Invesco, and wondered where the Commissioner was before such situations befell the insurers. In his view the order sought will achieve nothing since it cannot stop the proceedings in the Winding up cause in superior court. He also submitted, on the basis of correspondence on record, that the statutory manager had already left the premises of Invesco and therefore there was nothing to stay. He cited in aid of that submission, the refusal by this Court to grant a stay to a tenant who had already been forcibly dispossessed of premises soon after the decision of the court was made on the basis that "the horse had already bolted". The Court stated:

"An order of stay is supposed to prevent execution from taking place. Execution does not imply only the formal execution of a decree or order through the court process. A successful litigant who is able to take over possession of suit property peaceably in pursuance of a decree or order of a court of competent jurisdiction is deemed to be executing the decree or order. Execution through the court process is normally resorted to where peaceable means fail. The respondent having obtained possession of the suit property we opine that an order of stay if made in this matter is likely to make the applicant seek forcible re-entry, which will be undesirable and possibly lead to violence, and breakdown of law and order."

- See **Jaribu Holdings Ltd v Kenya Commercial Bank Ltd [2008] eKLR Civil Appl. Nai. 314 of 2007.**

Finally Mr. Watta submitted that there was no demonstration by way of affidavit, of any loss that was likely to be suffered by the applicant if the order was not granted and the fears listed above by the applicant were unfounded. He also asserted that the Board of Directors of Invesco had taken control of the affairs of Invesco and therefore there was no purpose in granting the orders sought. He referred us to the replying affidavit of one of the Directors, Mr. George Omolo Macodawa, confirming that the statutory manager vacated the offices of Invesco the day following the ruling of the superior court on 17th October, 2008 and the company reverted to the control of the Directors. It was no longer under statutory management. It was clear to Mr. Watta that the application made herein was merely a gimmick by the statutory manager to avoid intended criminal proceedings which the Directors of Invesco intend to prefer against him for breach of his fiduciary duties towards the insurer for the period he was managing it.

We have anxiously considered this aspect of the matter and have formed the following view of it. Whether or not the success of an appeal or intended appeal will be rendered nugatory is a question of fact not law. Each case must therefore be considered on its own peculiar facts and circumstances and there is no limit to the number of factors that may be considered in the process exercising the court's discretion. As this Court stated in **Judicial Commission of Inquiry into Goldenberg Affair & 3 Others v. Kilach [2003] KLR 249** at page 264.

"In the circumstances of one case the burden of an immediate payment of a large sum of money might be too heavy to bear for an applicant and it may be more prudent to ask the decree-holder to

wait for its money until after the hearing and determination of the appeal –see- Oraro & Rachier Advocates vs. Co-operative Bank of Kenya, Civil Application No. Nai. 358 of 1999 (unreported); Kenya Breweries Ltd v Kiambu General Transport Agency Ltd Civil Application No. 100 of 2000 (unreported). In another case, the Court can take into account the fact that even though the applicant can pay without necessarily running out of all resources, yet the money to be so paid is from the public coffers and it may well be necessary to ask the said the decree-holder to wait for the outcome of the appeal – see for example – Attorney General v Equip Agencies, Civil Application No. Nai.432 of 2001 (unreported). The circumstances must be as varied as the cases themselves.”

It was also held in Jogoo Kimakia Bus Services Ltd v. Electrocom International Ltd [1985] KLR 260 that:

“3 While exercising the special jurisdiction to order a stay of execution conferred by rule 5(2)(b) of the Court of Appeal Rules, the Court of Appeal will bear in mind not only such matters as the substantial loss that my result, delay, the security given for the performance of the decree or order appealed from but also the general principle that an appeal must not be rendered nugatory. The discretion of the Court in granting the stay is unfettered and the applicant is required to show on affidavit that he has sufficient grounds for a stay.”

In this particular case we cannot close our minds to the obvious public interest evident from the totality of the documentation laid before us. From the numerous policy holders, through numerous creditors and debtors, to members of the public who have a stake in the outcome of the litigation generated so far, the matter eminently qualifies to be so treated. In another decided case, this Court was considering litigation between the statutory manager and for policy holders of another failed insurance company, United Insurance Company Ltd, and it stated:

“From the affidavit evidence before us, it cannot categorically be said that the respondents were the only insured parties with United Insurance Co Ltd. There must be other affected parties who probably have claims against that company who need protection. The Statutory Manager’s duty is to ensure a rateable distribution of the company’s assets to all known creditors of the company. On that account we do not agree with Mr. Kinyanjui that this is not a matter of public interest. Executing the judgments in issue is most likely going to exclude the insured public whose claims are not included in this litigation. It is in the best interests of the company to handle all its creditors together. We are satisfied that the applicants have satisfied the second test as well.”

And so it is that we ought not lose that perspective of the matter before us. It is common ground that Invesco is in dire financial and management straits. Even Neptune, the 1st Respondent, does not dispute that fact and indeed that is why the Winding up suit was necessary in the first place. The Directors of Invesco acknowledge that fact too but say they are capable of doing something about the problems. The law in the Insurance Act nevertheless provides a crucial role for the applicant to play and that process has been under way since February 2008. If the Directors of Invesco took any action to reverse the consequences of that law, they have not demonstrated it before us. It is Neptune who went to court in October, 2008, without challenging the validity of the appointment of the statutory manager, and sought injunctory relief on the basis that the statutory manager was *in situ*. The applicant, as correctly pointed out by Mr. Ahmednasir, has not sought a stay of further proceedings in the superior court. There is no reason therefore why the Winding up cause cannot proceed to finalization. The injunctory orders numbers (2) and (3) issued by the superior court must nevertheless subsist until they are upset by the appellate court or are otherwise lawfully discharged, and we do not intend to disturb those two orders. In our view, they would not render the success of the intended appeal nugatory. We must, however, express ourselves and pronounce on the *status quo* that should remain as the court processes take their course.

We have considered the rival contentions of the applicant and the Directors of Invesco on the *status quo* existing as at the time of filing the application now before us. There are obviously attempts which have been made by the Directors to wrest the control and management of Invesco from the statutory manager. In our view those attempts had not succeeded by the time the application was filed or argued before us. If they had, the Directors would not be seeking from the superior court the various orders reproduced

above. In that respect it cannot be said, as in the **Jaribu Holdings Ltd Case** (supra), that the “horse had bolted” before the application for stay was filed. There are court orders made by Lesiit J. which have neither been challenged nor set aside. There is also an undetermined suit by the Directors seeking Judicial Review orders in relation to the appointment of the statutory manager. In all these circumstances it is our judgment that the intended appeal will be rendered nugatory if the order number (1) issued by the superior court is not interfered with and stayed.

In the result, we grant a partial stay of the orders issued by the superior court with the result that the Insurer, Invesco Assurance Co. Ltd, shall remain under statutory management and the statutory manager, Geoffrey Njenga, shall continue to exercise his duties subject to the order of injunction issued by the superior court until the intended appeal is heard and determined or until further orders of this Court. The temporary orders issued by this Court on 17th day of December, 2008 are hereby vacated. The costs of the application shall be in the intended appeal.

Dated and delivered at Nairobi this 13th day of February, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR