



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 4 OF 2008 (UR 3/2008)

COMMISSIONER FOR INSURANCE.....1ST APPLICANT

MINISTER OF FINANCE.....2ND APPLICANT

ATTORNEY GENERAL.....3RD APPLICANT

AND

KENSILVER EXPRESS LIMITED.....1ST RESPONDENT

SIMON KIMUTAI CHEPKWONY.....2ND RESPONDENT

PETER NJUGUNA NJAHI.....3RD RESPONDENT

NANCY WANJIRU KIMANI.....4TH RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi (Lady Justice Anga'wa)dated 18th December 2007

in

H.C.MISC. APPL. NO. 1345 OF 2005(OS))

RULING OF THE COURT

The Commissioner of Insurance (1st applicant) The Ministry of Finance (2nd applicant) and the Attorney General (3rd Applicant) have moved this Court under rule 5(2)(b) of the Court of Appeal Rules, for an order of stay of the execution of the ruling and order of the superior court given on 18th December, 2007 in High Court Misc. Civil Case No. 1345 of 2005 (OS) . The ruling was delivered by the superior Court (Ang'awa J) in a constitutional application in which the respondents herein prayed for several declaratory orders pursuant to the provisions of sections 60(1), 65(2), 81(1), 84(1) and (6) and 123 (8) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual Practice and Procedure) Rules 2001, O.XXXVI rule 12, O.XXXIX rules 1, 2, 3, 5 and 9 of the Civil Procedure Rules, section 10 (2) of The Insurance (Third Party Risks) Act, Cap 405 Laws of Kenya and Sections 67A, B, C and 203 of the Insurance Act Cap 487 of the Laws of Kenya.

Among the declaratory orders the respondents prayed for are the following:-

- (1) That the 1st defendant (1st applicant) owed a fiduciary responsibility to all the Plaintiffs.
- (2) That, the 1st defendant was negligent in his supervisory role over United Insurance Co. Ltd and therefore failed to forestall the necessity of the suit and therefore became responsible for the judgments and decrees in various suits in which the aforesaid company would have been responsible for an insurer.
- (3) That the executions directed to the Plaintiffs for claims arising from claims subject to subsisting and valid policies of insurance are illegal and were a violation of the Plaintiffs' constitutional rights to personal liberty, protection of the law, and unhindered ownership of property.
- (4) All proceedings, judgments, execution processes against the plaintiffs' property in matters United Insurance Co. Ltd had assumed responsibility to settle be forthwith stayed.
- (5) Appointment of Kenya Re as statutory manager over United Insurance Co. Ltd was ***mala fide***, illegal, null and ***void ab initio*** and contrary to **section 67 C (3)** of the Insurance Act.
- (6) Advertisement for sale by Kenya Re of United Insurance Co. Ltd's property before the 1st defendant (1st applicant herein) complied with **section 67 C (2) (iii) and (iv)** was illegal and a violation of **section 67(5) (a)** of the Insurance Act and the sale should therefore be nullified.

There was also a prayer for an interlocutory injunction to restrain Kenya Re, as statutory manager, from selling by private treaty or otherwise any of the assets of United Insurance Co. Ltd without the leave of the court.

Ang'awa J. granted the orders sought and more specifically a declaration that the plaintiffs' constitutional rights to liberty and peaceful ownership of their property had been violated or that they were in jeopardy of being violated by 3rd parties seeking to execute court processes, decrees in which United Insurance Company Ltd had assumed responsibility under **section 10 (2)** of the Insurance (Third Party Risks) Act. Secondly, that Kenya Re, had since its appointment as statutory manager failed to diligently exercise its mandate in the best interests of the plaintiffs as policy holders and 3rd parties as members of insuring public as envisaged under **section 67 (c) (4)** of the Insurance Act, Cap 487. The applicants herein were aggrieved and have filed a notice of appeal declaring their intention of appealing against that decision. Pending the lodging and determination of that appeal they have brought the motion before us for interlocutory relief.

The jurisdiction of the Court under **rule 5(2)(b)** is original and discretionary. Judicial discretion as always has to be exercised on the basis of evidence and sound legal principles. It is now trite law that for an applicant to succeed he should show that his appeal or intended appeal is not only arguable, but also that unless he is granted the orders he seeks his intended appeal or appeal if successful, the success will be rendered nugatory (See ***DAVID KAMAU V SAVINGS & LOAN KENYA LTD***. Civil Application No. NAI. 255 of 2005 (UR. 158 of 2005).

In the matter before us the respondents as plaintiffs in the High Court suit were policy holders with United Insurance Co. Ltd presently under statutory management with Kenya Re as the statutory manager. Those policies are mandatory and no owner of a motor vehicle may use that vehicle on a public road without such as insurance policy. By **section 10 (2)** of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, liability covered by such insurance policy is recoverable from the insurer by the person entitled to the benefit of the judgment against the insured. The respondents contended that United Insurance Co. Ltd was unable to meet its obligations under the aforesaid section with the result that decree holders proceeded against them personally by way of execution of decree. It was their case that by such execution they lost the protection accorded to them by both the Insurance Act Cap 487 and the Insurance (Motor Vehicles Third Party Risks) Act. They accused the 1st applicant of failure to effectively supervise United Insurance Co Ltd, and also for failing to notify them of "... the financial and

professional performance” of the company. It was also their case that the appointment of the statutory manager was unilateral, irregular, oppressive and a breach of the 1st applicant’s fiduciary duty to them.

It is in evidence that the statutory manager declared a moratorium on all payments to claimants and creditors of the company. The respondents contended that the statutory manager’s decision threatened their liberty. It was argued in the superior court on their behalf that the 1st applicant failed to take remedial measures to obviate the United Insurance Co. Ltd going into liquidation. The trial Judge agreed with them and as stated earlier, granted them declaratory orders in terms of the originating summons.

In this application, Mr. Ombwayo, Principal State Counsel, for the three applicants, submitted that, other than a bare statement that the 1st applicant failed to take remedial action, there was no evidence adduced to show such failure. In his view any remedial measures by the 1st applicant must be as provided in **section 4 (1)** as read with **s. 41 (2)** of the Insurance Act. **Sub-section (2)** provides that an insurer in Kenya carrying on short term general insurance shall keep at all times admitted assets of not less than the admitted liabilities and ten million shillings or fifteen per cent of his net premium income during his last preceding financial year, whichever is the greater.

But in our view the main issue in the application before us is whether or not the respondents’ matter was constitutional in nature. The suit before the superior court was commenced as a constitutional matter. **Sections 60(1), 65(2) 81(1) and 84 (1) and (6) and 123 (8)** of the Constitution were the main provisions cited as entitling the respondents to sue. **Sections 60 and 65**, above deal with the establishment of the High Court and other courts, and the jurisdiction exercisable by those courts. Section 81 deals with freedom of movement. **Section 84 (6)** deals with enforcement of the protective provisions and empowers the Chief Justice to make rules for approaching the court in applications for the enforcement of those rights.

There is no allegation in either the respondent’s suit or this application that any of the cited constitutional provisions had been breached. What the respondents have alleged is that third parties have taken steps to execute judgments of courts of competent jurisdiction against them and they are unable to enjoy the benefit under the provisions of **section 10 (2)** of the Insurance (Motor Vehicles Third Party Risks) Act. They accuse the 1st and 2nd respondents of negligently letting United Insurance Company Ltd. collapse. Whether this is a constitutional issue is an issue which certainly will feature in the applicants ‘intended appeal. They have an undoubted right of appeal and in our view they have satisfied the first test of appeal being arguable. It is trite law that applicants need not show more than one issue in order to satisfy the first test.

On the nugatory aspect, it was common ground that Kenya Re was appointed the Statutory Manager of United Insurance Company Ltd. The respondents case is that Kenya Re was not only a wrong party to be appointed, but also that its appointment was irregular. In this application we are not called upon to determine whether the appointment was regular or not. That is a matter for the bench which will eventually hear the appeal. What we are called upon to determine is whether unless we grant the interlocutory orders sought the success of the intended appeal by the applicants will be rendered nugatory.

Mr. Ombwayo for the applicants submitted before us that unless we grant the orders sought a new Statutory Manager will be appointed and confusion will ensue. It was his submission and Mr. Munge for the Statutory Manager agreed with him, that the winding up process of the company is in progress and should be left to proceed to its logical conclusion.

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.

We have tried to avoid dealing with certain submissions by counsel to obviate the danger of encroaching on the jurisdiction of the bench that will eventually hear the intended appeal.

In the result we allow the application dated 17th January 2008 and order that there be a stay of execution in terms of *prayer (1)* of that application. The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 18th day of April, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR