



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, GITHINJI & WAKI, J.J.A)

CIVIL APPLICATION NAI 243 OF 2005 (UR. 147/2005)

BETWEEN

REPUBLIC APPLICANT

AND

CHARLES LUTTA KASAMANI T/A

KASAMANI & COMPANY ADVOCATES RESPONDENT

**(An application for stay pending the determination of the
appeal against the Order/Ruling/decision of the High Court of
Kenya at Kisumu (Tanui, J) dated 29th July, 2005**

in

Misc. Civil Application No. 125 of 2005)

RULING OF THE COURT

On the material placed before us, we are satisfied that we must grant to the applicant the orders of stay as sought in the notice of motion dated 9th August, 2005. By his Ruling dated and delivered on 29th July, 2005, Mr. Justice Tanui, by way of an order of mandamus , commanded the Minister for Finance and the Commissioner of Insurance, who are really the effective applicants in the motion,

“..... to commence prosecute and conclude winding-up proceedings against United Insurance Company Ltd, the Affected party.”

The two officers were further prohibited.

“..... from issuing the Affected party with a licence under the Insurance Act.”

One Lutta Kasamani is an advocate of the High Court of Kenya practising law in Kisumu. He alleged in his application by way of judicial review that as such advocate, United Insurance Co. Ltd. owed him Shs.27,825,890.80/- by way of taxed costs and a further sum of Shs.10,838062/- in bills of costs and that the insurance company was unable to pay him.

Under the provisions of section 67 C (2) of the Insurance Act, Chapter 487, Laws of Kenya:-

“The commissioner may, with the approval of the minister –

(i) appoint any person (in this Act referred to as “a manager”) to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its board of directors, including the use of its corporate seal,

(ii)

(iii)

(iv)”

Then section 67 C (6) provides that :-

“The manager shall, within a period of twelve months from the date of his appointment, prepare and submit to the Commissioner a report on the financial position and management of the insurer with recommendations as to whether:-

(i) the insurer is capable of being revived; or

(ii) the insurer should be liquidated.”

On the plain reading of these provisions, it appears to us, *prima facie*, that neither the Minister, nor the Commissioner of Insurance would have the power to straightaway commence the liquidation of an insurance company. The Commissioner has first to appoint a manager under section 67 C (2) and then it is the manager so appointed who recommends to the Commissioner whether the insurance company can be revived or whether it ought to be liquidated. It is to be noted that even under section 67 C (2) the Commissioner is not obliged to appoint a manager; the Commissioner is given a discretion whether or not to appoint a manager. That discretion is bestowed on the Commissioner, not the court. Can a court, by an order of mandamus, compel the Commissioner to exercise that discretion in any particular manner? The case of **KENYA NATIONAL EXAMINATIONS COUNCIL VS. GATHENJI & OTHERS [1996] LLR 483** seems to say the court would have no such power.

Again under section 67 (C) (7) all the Commissioner can do, after receiving the report of the manager, is to make appropriate recommendations to the Minister who shall then take a decision on the matter. There is no requirement that the Minister’s decision must comply with the recommendations of the Commissioner and the manager. **Section 67 C (8) provides: -**

“Where the minister decides that, the insurer should be liquidated, the provisions of section 123 shall apply”

This provision, on its face, appears to give the Minister a discretion to decide on whether or not the insurance company ought to be liquidated. If the Minister so decides, then the provisions of section 123 of the Act apply. Mr. Odunga, learned counsel for the respondent Mr. Kasamani, did concede that these are arguable points in the intended appeal. We are satisfied that the points raise weighty issues of law and the intended appeal cannot by any stretch of imagination, be described as frivolous. The intended appeal is clearly arguable.

Will that appeal be rendered nugatory if it were to succeed in the end and we refused to grant an order of stay at this stage? The Judge’s order commands the applicant to “commence prosecute and conclude winding-up proceedings against.....” the insurance company. Commencing winding-up proceedings would clearly be such a grave step that the insurance company might not recover from it. Again the Commissioner has in fact appointed a manager who may, in the end, recommend the revival of the insurance company. If the order of the superior court were to be effected, even the recommendations of the manager might be rendered nugatory.

We accordingly allow the notice of motion dated 9th and lodged in the superior court at Kisumu on 10th August, 2005 with the result that the orders of the superior court made on 29th August, 2005 are stayed

until the appeal shall have been filed, heard and determined or until further orders of the Court. The costs of the motion shall be in the intended appeal. Those are our orders.

Dated and delivered at Nairobi this 7th day of October, 2005.

R.S.C. OMOLO

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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 original.

DEPUTY REGISTRAR.