

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MILIMANI HIGH COURT
MISC. NO 238 OF 2017
IN THE MATTER OF THE INSURANCE ACT, CHAPTER 487 LAWS OF
KENYA
AND
IN THE MATTER OF INSOLVENCY ACT NO.18 OF 2015
AND
IN THE MATTER OF LIQUIDATION OF BLUESHIELD INSURANCE
COMPANY LIMITED
BETWEEN

GODFREY K. KIPTUM ACTING
COMMISSIONER INSURANCE REGULATORY
AUTHORITY.....PETITIONER
AND
BLUESHIED INSURANCE COMPANY LIMITED.....RESPONDENT
BETH N. MUIGIA
JEAN M.NGENGI.....^{1ST} INTERESTED PARTIES
DIRECTOR OF CRIMINAL INVESTIGATION.....^{2ND} INTERESTED PARTY

RULING

1. Blueshield Insurance Company Limited (Blueshield) is under threat of liquidation through these proceedings commenced on 22nd May 2017 by the Acting Commissioner of Insurance and the Insurance Regulatory Authority.

But in a quick reaction Beth N. Muigai and Jean N. Ngengi (the 1st interested parties jointly) have sought to have the proceedings stayed.

2. That plea is in a Notice of Motion dated 6th June 2017 for the following specific prayers:-

1. THAT this application be certified urgent and heard in priority and that service on the Respondent and 2nd Interested Party herein be dispensed with in the first instance.

3. THAT there are no procedural rules and guidelines with regard to the question of winding up, or as provided in the Insolvency Act No. 18 of 2015, for the liquidation of companies that would enable, or invoke the Court's jurisdiction to hear and determine the dispute.

4. THAT the Petitioner be restrained from publishing advertisements and gazette notices of the Petition pending the hearing and determination of the application.

5. THAT the Court lacks jurisdiction to hear and entertain the application.

6. THAT Originating Summons dated 20th May 2017 filed in Court on 22nd May 2017 be struck out with costs to the Petitioner.

3. The 1st Interested parties are the majority shareholders of Blueshield. On 16th September 2011, Blueshield was placed under statutory Management by The Commissioner of Insurance and has had two Statutory Managers being Eluid Muriithi and thereafter John Michael Sifa Kéah.
4. It is the assertion of the 1st interested parties that under the watch of the Statutory Management, acts of fraud were committed by the Statutory Managers. In the affidavit of Jean Ngengi sworn on 6th June, 2017, in support of the Motion before Court, she avers that the 1st Interested Parties made a report to the Directorate of Criminal Investigations (DCI) on 4th February 2016 to investigate the misappropriation of rental Income collected by the Statutory Manager from the Tenants at Blue Shield Towers. A property owned by Blue Shield.
5. The DCI investigated the matter and part of his investigation was to request for an Audit Report from the Auditor General to ascertain the amounts collected as rent, salaries for staff of Blue Shield and expenses incurred for maintenance of the property. The Auditor General produced a special Report dated 2nd August 2016.

6. It is the case of the 1st Interested Parties that the Special Report identified the following breaches by the Commissioner of Insurance:-

- 13.1 He failed to develop and avail the statutory manager and staff of the Blue shield Insurance Company Ltd standard operating procedures to guide finance and procurement operations in Blue Shield Insurance Company company under statutory management.
- 13.2 He appointed a statutory manger without criteria to ensure that statutory manager is the most qualified in terms of technical competency and cost effective.
- 13.3. He determined and approved remuneration of the statutory manager without any basis.
- 13.4. He failed to provide oversight and supervisory role over the statutory managers thereby occasioning inadequate budgetary controls during the statutory period.
- 13.5. He occasioned the statutory management period not guided by transparency.
- 13.6. He occasioned the statutory management which is not time bound for the purposes of cannibalization of the company.

7. The same Report, it is averred, also sets out the following breaches by the Statutory Managers:-

- 14.1 failure to put in place budgetary controls by operating without budgets.
- 14.2 making payments without supporting documents to prove delivery of relevant services/goods.
- 14.3 incurring expenditures of the company that does not relate to the company's goals and objectives including on entertainment.
- 14.4. making payments without job cards to prove that work was actually done.
- 14.5 made irregular overpayments of salary.
- 14.6 failing to undertake an audit to determine fraudulent claims
- 14.7 expending Kshs.491, 401,825.74 exceeding the revenue collected of Kshs.477,071,604 by Kshs.14,330,221.74 through utilizing the call deposits to sustain operational/recurrent expenditure.

8. Prior to the appointment of the Acting Commissioner of Insurance, one Sammy Makove occupied that position in a substantive capacity. It is alleged by the Respondent that through coercion and extortion the

shareholders of Blueshield advanced Ksh.3,000,000/= to him through his spouse Josephine Mwihaki Kitavi and cash of Kshs.2,000,000/-.

9. It is the argument of the 1st Interested Parties that the financial position of Blueshield is redeemable. In furtherance of this position they assert that in the year 2015 they had secured a credit facility of Kshs.400 million from a commercial Bank towards the revival of the Company but they were forced to cancel it after the Petitioner refused to end the Statutory Management of the company. It is also averred that the Company holds Government securities in the value of over Kshs.255 million.
10. In addition, the 1st Interested Parties contend that according to the Petitioner's own auditors some Kshs.255,482,515 has been confirmed as paid into the Company's various accounts but not posted due to absence of supporting documents. An argument is therefore presented that this amount, together with Kshs.512,000,000/= irregularly utilized by the Statutory Managers, demonstrates the good financial health of the Company.
11. The 1st Interested parties take the position that the current proceedings were commenced to cover up the culpabilities of the Petitioner and would be the reason why he abandoned negotiations to revive the Company. That the Petitioner is acting unreasonably in seeking to have the Company liquidated instead of pursuing its revival.

12. The other matters raised in the affidavit of Jean Ngengi are legal arguments which this Court shall consider in its rendition.
13. The Motion found further support from the DCI who made an Affidavit through Police Constable Kenneth Kemei. He confirms that on 5th February 2016, the DCI received a complaint from a Director of Blue Shield complaining about misappropriation of funds of about Khs.400 million during the period of the Statutory management. He also confirms the request for the Special Audit alluded to earlier.
14. PC Kemei avers that after receipt of the Report, the DCI carried out further investigations and analysis of the evidence and a recommendation has been forwarded to the office of the Director of Public Prosecution for perusal and advice. PC. Kemei then avers that:-

"If the Court allows the Petitioner to carry out Winding Up proceedings it will be a challenge to carry out the prosecution as most of the documents relate to the Company shall have been done away with and therefore nugatory".(sic)

15. The Petitioner and the Statutory Manager of Blue Shield resist the Motion.
- Mr. Godfrey Kiptum, the Acting Commissioner of Insurance and Chief Executive Officer of The Insurance Regulatory Authority swore an affidavit

on 23rd June 2017. In a nutshell he justifies the commencement of these proceedings.

16. Mr. Kiptum depones that prior to the presentation of the Petition, the advocates of the Interested Parties and the Petitioner had held several discussions on the possible revival of the Company up to and including on 16th May 2017 when they were unable to agree on the appointment of a Caretaker Board. The appointment of a Caretaker Board being one of the terms of revival of the Company. The other terms would be in the letter of 10th May 2017 from the deponent to The Interested Parties Advocates. These included that shareholders would capitalize the Company to Khs.300 million to meet the minimum core capital requirement. Mr. Kiptum depones that none of the conditions have been met.

17. It is deponed by the Petitioner that the High Court in Miscellaneous Civil Application No.547 of 2012 declined to extend the term of the Statutory Manager upon expiry on 16th May 2017 unless there was either an agreed and signed revival plan or filing of winding up proceedings. As the revival plan had failed it was necessary to commence these proceedings so as to protect the assets of the Company.

18. In respect to the allegations of fraud and investigations by the DCI, the position of the Petitioner is threefold:-

- (a) It has engaged the DCI and Auditor General in the issues raised by the shareholders and those issues cannot be re-opened up before this Court.
- (b) This Court is neither a Criminal Court nor Parliament to consider and determine a Criminal prosecution resulting from the Investigations of the DCI or the Report of the Auditor General respectively.
- (c) It cannot answer allegations made against Mr. Makove who is not a party to the suit.

19. In a sum, the Petitioner makes the point that the Investigations carried out by the DCI or Auditor General cannot be a bar to the liquidation of the Company as those are issues which would be subject of separate proceedings.

20. Mr. John Sifa Keah, The Statutory Manager of Blueshield swore an affidavit on 13th June, 2017 which in many respects mirrors the position of the Petitioner. Perhaps one issue needs to be highlighted. Mr. Keah states that on the issue of capitalization of the Company (as one of the conditions for revival), the net assets of the Company was Khs.5 million as at 31st December 2016 as against a sum of Khs.300 million which is required to meet the minimum core capital requirement.

21. The Court has considered the Motion, Grounds and Affidavits in support and those in opposition. In that context and those of the submissions made by Counsel, the Court sees the following questions as deserving its determination:-

- (i) Does the Court have jurisdiction to determine the matter before it?
- (ii) Is the Petition defective for want of form?
- (iii) Should the Petition be stayed in view of investigations by the DCI?

22. It is not in controversy that Blue Shield was placed under Statutory management on 16th September 2011. This was done in exercise of the Power to intervene in the management of an Insurance Company granted to the Commissioner of Insurance under the provisions of Section 67c of The Insurance Act. Amongst occasion when this power can be exercised is when an Insurer is found to have failed to meet the minimum solvency margin under Section 41 of The Act.

23. Section 67C (2) of The Act is of some importance to this matter and it reads:-

“The Commissioner may, with the approval of the Board—

- (i) appoint a competent person familiar with the business of the insurer (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) remove any officer or employee of an insurer who, in the opinion of the Commissioner, has caused or contributed to any contravention of any provisions of this Act, or any regulations or directions made thereunder or to any deterioration in the financial stability of the insurer or has been guilty of conduct detrimental to the interests of policyholders or other creditors of the insurer;**
- (iii) appoint three competent persons familiar with the business of insurers to its Board of Directors to hold office as directors who shall not be removed from office without the approval of the Commissioner;**
- (iv) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by**

the insurer in favour of any officer, employee or any other person".

Under those provisions, the Commissioner may, with the approval of the Board of the Regulatory Authority appoint a Statutory Manager to assume the management and control and conduct of the affairs and business of an Insurer and to exercise all powers of the Insurer to the exclusion of its Board of Directors. But the appointment of such Manager is not an end to itself.

24. One of the responsibilities of a Statutory Manager is to evaluate the solvency and liquidity of the Insurer (Section 67c (5)). And before the end of his term, the Manager is required to prepare and submit to the Commission 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.

25. Because there would be many actors interested in the revival of an Insurer, not in the least the shareholders and the Insured Public and Policy Holders, the design and architecture of the Statute is as much as possible to save the Insurer from liquidation. On this, the Court is in agreement with Counsel Apollo Mboya for the two Shareholders.

26. To the affidavit of the Statutory Manager is a copy of a Report dated February 2017, on the Statutory management at Blueshield amongst the final recommendations were that,

“(6) Shareholders have neither partially nor fully fulfilled a single revival obligation.

(7) Blue shield Insurance Company Limited under ‘statutory management’ still remains insolvent five (5) years after being placed under Statutory management as a result of the Shareholders failure to fulfill the agreed rival obligations.

(8) Policyholders and Claimant will continue to suffer if this matter remains unresolved”.

27. The decision to wind up was held back until sometime in May 2017 when the Board upheld the recommendation. This decision came about 6 years after the Statutory Manager had been appointed and his term extended on several occasions.

28. There is no doubt therefore that the Petitioner is entitled in law to commence such winding up (now insolvency proceedings) and the procedure leading up to the presentation hereof was in conformity with Statute. On winding up, section 123 of the Insurance Act provides:-

"1) The Commissioner may, with the prior approval of the Board, unless the insurer is already being wound up by the court, present an application to the court for winding up the insurer in accordance with the Companies Act (Cap. 486) under any of the following circumstances:

(a) in terms of section 19(5) or 67(3) of this Act;

(b) in the case of an insurer carrying on long term insurance business as a closed fund within the meaning of that term in section 21, on the grounds that the business has continued as a closed fund for a period of more than five years (excluding any period before the appointed date), that the insurer has failed to implement a scheme approved or framed by the Commissioner under section 10, and that the continuance of the insurer without winding up is detrimental to the interests of the policy-holders;

- (c) on the ground that the insurer is unable to pay his debts within the meaning of section 219 of the Companies Act (Cap. 486);**
- (d) on the ground that the insurer, having failed to comply with any requirement of this Act, has continued that failure, or having contravened any provision of this Act, has continued that contravention for a period of six months after notice of failure or contravention has been given to the insurer by the Commissioner;**
- (e) on the ground that the insurer is unable to fulfil the reasonable expectations of policy-holders or potential policy-holders;**
- (f) on the ground that it is just and equitable in the interests of the policy-holders that the insurer should be wound up;**
- (g) on the ground that the insurer has failed to pay tax that is due and outstanding.**
- (2) The court may, after considering the petition presented by the Commissioner, order the winding up of the insurer if it is of**

the opinion that there are sufficient grounds and it is just and equitable for the insurer to be wound up.

29. It is clear that an application for Winding up (or liquidation) of an Insurer brought by the Commissioner of Insurance is to be brought under the procedure provided by The Companies Act (or the statute replacing it for purposes of winding up now being The Insolvency Act, **Act No. 18 of 2015**). And the jurisdiction to hear and determine such a matter would be the Insolvency Court such as this.

30. In the Originating Summons that commenced these proceedings, the Petitioner avers that the Originating Summons are anchored under, inter alia, the provisions of Section 38(1)(c) and (2) of The Insolvency Act:-

- (1) As soon as practicable after the appointment of an interim trustee, the trustee shall publish a notice of the appointment—**
 - (a) in one or more newspapers circulating in Kenya; and**
 - (b) in such other publication as may be prescribed by the insolvency regulations for the purposes of this section.**
- (2) The appointment of the interim trustee does not take effect until subsection (1) has been complied with.**

31. It is true that up to now the Rules providing for the procedure of Court in Insolvency matters have not been made as required by Section 697(1) of The Insolvency Act. The Interested Parties argues that for that reason this Court has no jurisdiction to hear and determine this matter. Further that in this quandary Article 159 of The Constitution would not provide a panacea.
32. In determining a similar argument this Court in Paul James Savage vs. Lesbelles Savage Limited (in liquidation) & another 2017 eKLR held:-

“However I prefer to read what the Supreme Court was saying somewhat differently. It may be true where there is a clear lacunae in the Law caused by lack of Legislation, a Court may not be in a position to always provide a panacea to the problem created by the lacunae. But in my view that would in respect of Primary legislation. Distinguished, in the Cause before me, there is primary legislation (Section 228 of the Repealed Companies Act) that empowers a Court to grant leave. What is lacking is the procedural framework in which the court is to exercise such power because as at the date of the Motion, the Rules Committee had not made the

Rules as required by Section 697 (1) of the Act. Is the Court to concede that such a lacunae should hamstring it from acting on a power expressly granted by an Act of Parliament? I think not! Because, as it has been said before, Procedural Rules are a handmaiden of Substantive law and to surrender to the argument that this Court cannot act on a power granted to it by Primary Legislation simply because the Rules Committee has not carried out its duty is to accept that the intention of Primary legislation can be defeated because of lack of Procedural Rules. This could lead to an injustice to those who would want to seek to enforce the substantive legislation. In so far as the Respondents have not demonstrated that the procedure adopted by the Applicant prejudices them in any way, this Court will not fault that procedure. That does it for the first objection”.

33. The absence of Procedure Rules cannot handicap this Court from exercising Power and Jurisdiction expressly granted to it by substantive law. The choice of procedure adopted by the Petitioner is an Originating Summons. This Court has not been told by the Interested parties that the procedure

prevents them or impinges on their ability to answer to the Petitioner or that it prejudices them in any other manner.

34. Turning on to the Investigations and a related issue, it was argued by Counsel for the 1st Interested parties that the shareholders have met all the conditions of the revival plan save for the issue of the Constitution of a Caretaker Board. On its part, the Petitioner says that there is an additional issue. That there is undercapitalization of the Company to the tune of about Kshs. 250 million and that the shareholders were required to capitalize the Company to Kshs.300 million to meet the minimum core capital.

35. Although the 1st Interested Parties attempted to minimize the issue of capitalization, the evidence presented by them tells a different story. In paragraph 35 of her Affidavit Jean Ngengi depones as follows:-

"THAT the parties have agreed that the Shareholders to undertake the following:-

- (i) Recruit the Principle Officer**
- (ii) Nominate and propose for approval of Directors to run Blueshield Insurance Company who shall be independent with on previous or current association with Blueshield Insurance Company (Under Statutory Management).**

- (iii) Capitalize the company requirements of the company.**
- (iv) The shareholders to inject a working capital over and above the projected net rental income to finance the operations of the company upon reopening.**
- (v) The shareholders to come up with and negotiate scheme of arrangement with all creditors.**
- (vi) Recruitment of other departmental staff of the company". (my emphasis)**

36.A question to be posed is why would the shareholders undertake to capitalize the Company and inject working capital when it is their case that the Company is in good financial standing because of Kshs.255,482,515 being amounts alleged not put to its accounts and Kshs.512,,060,000/= allegedly misused or misappropriated by the Statutory Manager? Why would they be acceding to the demand to inject more funds if they had a strong argument that the Company was sufficiently solvent? If the shareholders believed that the findings of the Criminal Investigations would have a bearing as to the financial stability of the Company, why then would they agree to capitalize the Company before the Investigations were complete?

37. These are questions that will be answered at the hearing of these Insolvency proceedings but for now, and on the evidence available, the action of the Petitioners in commencing these proceedings cannot be said to be unwarranted, frivolous, or in bad faith. There would be no reason to stay the proceedings to await the conclusion of the Investigation by DCI when the complaining shareholders acceded to certain conditions (which may not have been met) in the full knowledge that the investigations were ongoing and incomplete.
38. The entire Notice of Motion dated 6th June 2017 is without merit and is hereby dismissed with costs.

Dated, signed and Delivered in Court at Nairobi this 5th day of October, 2017.


E. TUIYOTT
JUDGE

PRESENT:

Oduor h/b for Ochieng for Petitioner
Mboya for Shareholders
Olao h/b for Kambuni for Statutory Manager
Alex - Court clerk

