



**Kiptum v Blueshield Insurance Company Ltd; Muigai & another  
 (Interested Parties) (Miscellaneous Application 238 of 2017)  
 [2024] KEHC 7603 (KLR) (Commercial and Tax) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7603 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
 COMMERCIAL AND TAX  
 MISCELLANEOUS APPLICATION 238 OF 2017**

**A MABEYA, J**

**JUNE 26, 2024**

**IN THE MATTER OF THE INSURANCE ACT CHAPTER 487 LAWS OF KENYA  
 IN THE MATTER OF THE INSOLVENCY ACT NO 18 OF 2015  
 IN THE MATTER OF LIQUIDATION OF BLUESHIELD INSURANCE COMPANY**

**BETWEEN**

**GODGREY KIPTUM, AG. COMMISSIONER OF INSURANCE REGULATORY  
 AUTHORITY ..... PETITIONER**

**AND**

**BLUESHIELD INSURANCE COMPANY LTD ..... RESPONDENT**

**AND**

**BETH N MUIGAI ..... INTERESTED PARTY**

**JEAN M. NGENGI ..... INTERESTED PARTY**

**JUDGMENT**

1. By an Originating Motion dated 20/5/2017, the Commissioner of Insurance Regulatory Authority (“the petitioner”) petitioned the court for the liquidation of Blue Shield Insurance Company Limited (“the Company”).
2. The company was incorporated on 4/12/1982 whereby it operated insurance business under the regulation of the Insurance Regulatory Authority. The company began having operational and compliance challenges necessitating the petitioner to place it under statutory management on 16/9/2011.



3. The ground for which the liquidation was sought was that; on 16/9/2011, the company was placed under statutory management for its failure to be compliant with the Insurance Act (“the Act”). Consequently, a statutory manager was appointed who advised on measures to revive the company upon fulfilment of several conditions. The petitioner contended that the company was unable to meet the solvent margins required under the Act and thus it could not meet its insurance obligations.
4. That the company could not fulfil the reasonable expectations of the policy holders and its shareholding and board structure were not in compliance with the Act. That despite being given an opportunity by the Insurance Regulatory Authority (“the IRA”) to comply with the Act, the company had not taken any steps to regularize the same.
5. In the verifying affidavit of Godfrey K Kiptum sworn on 20/5/2017, it was deponed that upon investigation of the company, it was discovered that the company had not complied with various sections of the Act, to wit, sections 32, 41 and 50. The company had issues with compliance with respect to non-remittance of contributions to policy holder’s compensation fund, non-payment of premium levies as well as non-remittances to the Insurance Training and Education Trust.
6. For the said reasons, on 16/9/2011, the company was placed on statutory management and the statutory manager recommended conditional revival. It gave several reports concerning the company’s progress.
7. That vide a court order of 22/5/2015, the court extended the management on condition that a caretaker board be appointed. It was comprised of the Statutory Manager, two appointees of the shareholders and two appointees of the IRA.
8. However, in the report of the Statutory Manager of 27/2/2017, it was indicated that there was no agreement with the shareholders on the agreed conditions. It recommended liquidation since the several proposals for its revival had not been implemented. That the company’s shareholders had failed to be compliant.
9. The Statutory Manager filed an affidavit dated 12/10/2021 in support of the petition. It contended that the Policy Holders Compensation Fund Board of Trustees had recommended the winding up of the company in its report of February, 2017. That the company was in dire financial difficulties and was been unable to meet its financial obligations to policy holders and creditors. That the company was insolvent and was not in a position to operate the business of an insurer under the Act.
10. This affidavit was supported by the verifying affidavit sworn by the managing trustee of the Policyholders Compensation Fund WILLIUM MASITA dated 12/10/2021. He stated that the company was placed under statutory management as it had been experiencing continued financial and operational difficulties resulting to its shrinking in business, resources and ability to meet its contractual obligations.
11. That the shareholders/interested parties had failed to honour several undertakings and the company remained insolvent thus unable to operate as an insurer under the Act. That it was in the best interest to have an insolvency order issued and a provisional liquidator appointed to ensure orderly distribution of assets of the company.
12. The petition was opposed by the company’s shareholders. In her response dated 24/11/2021, the Jean Mumbi Ngengi (“the 2<sup>nd</sup> interested party”), stated that the liquidation of the company was draconian and would be an instrument of concealing the fraudulent dealings of the Statutory Manager and the Commissioner of Insurance. She observed that the company’s financial position was redeemable as there was a combined amount of Kshs. 255,482,515/- and Kshs. 512,000,000/-respectively.



13. That in a bid to re-open, the company secured a credit facility of Kshs. 400,000,000/- which was cancelled at the instance of the Statutory Manager and the IRA. That in 2016, the IRA communicated certain deliverables and due to the inequality of footing, the shareholders felt that the IRA had undue influence over them.
14. That there was no certainty with respect to the financial position of the company and any effort to get funds was skewed and aimed at curtailing their ability to meet the conditions. She stated that the statutory managers and IRA engaged in fraud over the assets of the company thus showing bad faith and adverse interests. She urged the court to apply section 3(c) of the *Insolvency Act* 2015 and find the company redeemable.
15. In her further affidavit sworn on 29/2/2024, she stated that the company was solvent to the tune of Kshs 547million and thus capable of being revived. That the company building was estimated to be valued at Kshs 1.5 billion which asset could be sold and money injected back to business. That the shareholders should be allowed to restructure the company and inject capital for its operationalization.
16. The petition was canvassed by way of written submissions which were hi-lighted on 14/3/2024. It was submitted for the petitioner that the decision to institute liquidation proceedings was due to the company's failure to meet the solvency margin. That, despite being placed under statutory management, the company was unable to fulfil the reasonable expectations of the policy holders. That the company had been unable to meet its obligations as an insurer without injection of funds from the shareholders since 2021.
17. That it was necessary to place the company under statutory management due to its continued non-compliance with the Act. This was in compliance with section 67(2) of the Act. That the company failed to make contributions to the policy holders' compensation fund at the time of being placed under statutory management and did not comply with section 197b for remitting training levy.
18. That it ought to be liquidated for being unable to pay its debts within the meaning of section 384 of the *Insolvency Act* 2015. That the respondent did not have the required capital to support its day today trading operations. That the verified liabilities totaled Kshs. 855,000,000/- inclusive of court judgments, executed discharge vouchers and service provider vouchers.
19. For the Statutory Manager, it was submitted that the placing of the company under statutory management was a justifiable cause under the Act since the shareholders and management had neglected the company. That despite several revival attempts, the shareholders had failed to comply with the recommendations.
20. For the interested parties, it was submitted that according to the audited accounts of the company for the year ending 31/12/2015, the company held governmental securities worth Kshs. 230,000,000/- and in the unaudited accounts for 2016, the values rose to Kshs. 355,000,000/-. That on this basis the statutory managers unlawfully filed the insolvency petition despite the company being solvent.
21. That the company had a positive net worth whereby the audited financial statements as at 31/12/2022 demonstrate that the company had become solvent to the tune of Kshs. 547million. That upon re-evaluation of the company's building, the value would rise to Kshs.1.5 billion. That the court should not focus on historical challenges but rather look into the actual current financial position of the company as it stood today.
22. That the statutory manager had failed to conduct its duties of diligently tracing, preserving and securing all the assets of the company. That liquidation would be draconian as it would conceal the fraudulent activities perpetrated by the statutory manager.



23. For the Statutory Manager, it was submitted that the Policy-holders Compensation Fund reviewed the audit reports by the Auditor General and Parker Randall which revealed that a sum of Kshs. 767,482,515/- was not properly accounted for. That the sum of Kshs 512,476,375.24 was derived from the special audit report of the Auditor General dated 2/8/2016 on the rent collected and expenditures incurred by the Statutory Manager from 1/10/2011 to 31/1/2016. It was urged that the petition be granted.
24. I have considered all the pleadings, the documents presented and the submissions on record. The only question for determination is whether a case has been made for the liquidation of the company. It was for the petitioner to prove his case.
25. The petition was lodged by the Commissioner for Insurance for reasons that the company had been unable to meet the solvent margins as provided for under the Act, that the company was unable to meet its obligations as an insurer without the shareholders injecting additional capital and that its shareholding and board structure was not in compliance with the Act.
26. Under the *Insolvency Act*, a company is deemed to be insolvent if it is unable to pay its debt. Section 384 (1) of the *Insolvency Act* outlines the requisite components of a demand in the case of liquidation of companies. It provides: -

“For the purposes of this part, a company is unable to pay its debts;

- a. If a Creditor (by assignment or otherwise to whom the Company is indebted for a hundred thousand shillings or more has served on the company, by leaving it at the company’s registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the Creditor;
- b. if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;
- c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.”

27. On the other hand, section 122 of the *Insurance Act* provides for insolvencies of insurance companies. It provides: -

“ 122. For the purpose of section 384 of the *Insolvency Act*, an insurer is taken to be unable to pay its debts if at any time the requirements of section 41 (which relate to margins of solvency) are not observed by the insurer.

28. Further, section 123 of the Act provides for instances when an insurance company may be liquidated. Some of these are that: -

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- “ a) ...
- b) on the ground that the insurer is unable to pay the insurer’s debts within the meaning of section 384 of the *Insolvency Act*;



...

- c. on the ground that the insurer is unable to fulfil the reasonable expectations of policy-holders or potential policy-holders;
- d. on the ground that it is just and equitable in the interests of the policy holders that the insurer should be wound up;
- e. on the ground that the insurer has failed to pay tax that is due and outstanding;
- f. ...”

29. Unlike other companies, insurance companies are regulated by the IRA which is tasked at ensuring that there is an effective regulation, supervision and development of insurance in Kenya. The petitioner deposed that, the company started experiencing challenges in 2009 when it was discovered that it had been non-compliant. That it had some operational challenges in terms of settlement of claims, failing to remit statutory deductions and insolvency.
30. In the circumstances, it was placed under Statutory Management for failing to comply with the regulatory requirements. The Statutory Managers were two; the first one Mr. Eliud Mucholi Muriithi appointed on 16/9/2011 whereas the second one was Policy Holder’s Compensation Fund appointed on 5/7/2014 pursuant to section 67C (2)(1) of the Act.
31. The first issue is whether the company is solvent. It was the interested party’s contention that, based on the audited accounts for the years 2021 and 2022, the company was solvent to the tune of Kshs. 547,000,000/-. That a re-evaluation of the company’s building demonstrated that its value would go up to Kshs 1.5 billion.
32. The Court has considered the 1<sup>st</sup> statutory managers’ report dated 31/12/2013. On adequacy of capital and reserves, he stated that the requirement for an insurer transacting general business was Kshs. 300 million. However, due to losses, the company’s net equity had reduced to Kshs. 277 million as at 31/12/2013.
33. In the circumstances, he recommended that the shareholders ought to raise adequate capital to meet the shortfall. That they ought to raise liquid funds of Kshs 597 million to meet the solvency shortfall. He recommended that the shareholding and composition of board of directors do comply with the requirements of the Act.
34. Upon the appointment of the 2<sup>nd</sup> Statutory Manager, the narrative was the same. The shareholders had an obligation to first raise the liquid funds by Kshs. 400 million and a further sum of Kshs. 200 million in order to meet the solvency shortfall and liquidity of the company.
35. The evidence before the Court demonstrate that, the shareholders were unable to meet these requirements and the company therefore remained insolvent. This was against the provisions of section 23 of the Act which prescribed the minimum Capital requirement as Kshs. 300,000,000/-. As at 2013 the minimum capital requirement for the respondent had a shortfall of Kshs. 23 million.
36. As already stated, section 122 of the Act provides that an insurance company must at all times adhere to the requirements of section 41 of the Act as relates to margins of solvency. Under that section, 11 assets are excluded from consideration when determining an insurer’s capital adequacy. This includes all fixed assets. In this regard, the interested parties contention that the company’s building valued at Kshs.1.5b should be taken into consideration does not hold water.



37. The petitioner's contention that the company had been facing liquidity challenges from 2009 was neither disputed nor challenged. It was also not disputed that the capital ratios required under section 41 of the Act had not been complied with by the company, either before or during Statutory Management.
38. From the record, it is evident that the respondent had been insolvent for some time and was unable to meet the regulatory requirements in the *Insurance Act*. The record shows that, on several occasions the company was given opportunities to regularize the position and comply with the requirements of the law but failed to do so.
39. To the extent that the petitioner's evidence on the non-solvency of the company in accordance with the *Insurance Act* was not displaced, the Court holds that the company is insolvent. The contention that the company holds Kshs. 547 million did not displace the petitioner's contention that, the verified liabilities of the company exceeds Kshs.800 million.
40. The business of insurance is so crucial and it involves very many players. Insurance companies are tasked to comply with the requirements laid out in the Act for good reason. The policy-holders pay premiums to insurance companies so that when a risk attaches, the policy-holders are cautioned from the consequent damage.
41. In this case, there was evidence of unsettled judgments. There were unsettled discharge vouchers. That exposed the policy-holders to executions for which they had paid premiums to avoid. It was not disputed that, by 2009, the company had started showing evidence of collapsing and drastic measures had to be put in place to ensure it continued in its operation. The many proposals put forward by the Statutory Managers were not heeded. The company could not be turned around which necessitated the filing of the liquidation petition.
42. In view of the foregoing, the Court finds that; the company is insolvent under the Act, that the company failed to pay the levies required under the Act and therefore taxes under the law, that the company has been unable to fulfil the reasonable expectation of policy-holders and that it is just and equitable in the interests of the policy-holders that the insurer should be wound-up. The Court's view is that, the requirements of section 123 of the Act have been met.
43. The invitation that the Court should not consider the historical problems but the current 'solvent' situation of the company does not hold any water. This is so because, firstly, it is the historical events that led to the filing of the liquidation petition, secondly, there was no evidence that the shareholder were willing to inject any capital to the company to make its capital ratios compliant and finally, that the verified liabilities in excess of Kshs. 800 million still stare at the company.
44. Accordingly, I find merit in the petition and therefore allow the same and make the following orders: -
  - a. A liquidation order is hereby made against Blue Shield Insurance Company.
  - b. Mr. Longet Kiprono Terer, MBS is hereby appointed as the liquidator of the company.
  - c. Costs of the petition shall be borne on the assets of the company.It is so decreed.

**DATED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF JUNE, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

