



Mwangi & 7 others v Invesco Assurance Company Limited (Insolvency Notice E032 of 2021) [2022] KEHC 293 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 293 (KLR)

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

INSOLVENCY NOTICE E032 OF 2021

DAS MAJANJA, J

APRIL 28, 2022

**IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND IN THE MATTER OF INVESCO ASSURANCE COMPANY LIMITED**

BETWEEN

STEPHEN NDIRANGU MWANGI & 7 OTHERS PETITIONER

AND

INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. On 15th February 2021, the Petitioners, as creditors, filed this petition against Invesco Assurance Company Limited (“the Company”) seeking, inter alia, to have the Company liquidated on account of KES. 29, 743,428.99 owed them. In response to the petition, the Company has filed a Notice of Preliminary Objection dated 21st September 2021 where it impugns the petition on the ground that there is a pending Insolvency Petition No. E155 of 2019 involving the Company before this court and that the Petitioners have not invoked the provisions of the [Insurance Act](#) in their petition.
2. I directed that the Preliminary Objection be disposed by way of written submissions which are now on record and which I have considered.

Analysis and determination

3. The Company’s Notice of Preliminary Objection and the parties’ submissions call for resolution of two issues; whether this matter is res sub judice Insolvency Petition No. E155 of 2019 and whether the petition violates the provisions of the [Insurance Act](#) (Chapter 487 of the Laws of Kenya).



4. As to what constitutes a preliminary objection, the Supreme Court in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* SCK Petition No. 10 of 2013 [2014] eKLR, endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors* [1969] EA 696 that:

[A] preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. [Emphasis mine]

5. The Debtor's first point of objection is that this matter is res sub judice Insolvency Petition No. E155 of 2019 contrary to section 6 of the *Civil Procedure Act* which provides that, "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

6. In order to determine whether this petition is res sub judice, the court must appraise itself of the facts and pleadings in the previous case. This is not only a factual inquiry but one that calls upon the court to exercise its discretion. These facts would show that the parties in the pending matter are similar to those in the present case or that they are litigating under the same title and that the subject matter is similar. The Company may also have to demonstrate that the court would issue conflicting decisions based on the same facts. I therefore find and hold that the issue of res sub judice cannot, at least in this case, be urged as a preliminary objection.

7. On the second limb of the preliminary objection, the Company impugns the Petition on the ground that on the ground that the Petitioners have not pleaded breach of section 41 as read with section 122 of the *Insurance Act*. As I understand, the Company claims that section 122 provides that section 384 of the *Insolvency Act* is not applicable to insurance companies when determining ability or inability to pay debts of an insurer. It provides as follows:

122. Insolvency of insurer

For the purpose of section 384 of the *Insolvency Act*, 2015, 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. [Emphasis mine]

8. A reading of section 122 aforesaid does not require a specific plea or pleading to the effect that the insurance company has violated section 41 of the *Insurance Act* in the petition. Further, nothing in the aforesaid section denotes that section 384 of the *Insolvency Act* is inapplicable to insurance companies as submitted by the Company. I hold that this provision acts as a guide to the court in determining whether or not an insurance company is solvent during the liquidation proceedings. It is for this reason that section 121 requires that the Commissioner be served with the petition and that it be heard before a decision is made. It is the Commissioner, as the regulator of insurance companies, who will inform the court whether the company is insolvent under the *Insurance Act*. The question of whether or not the Debtor is solvent, at least in the circumstances of this case, is a matter of fact and evidence which cannot be considered at this preliminary stage before hearing the Commissioner on the matter as required by section 121 of the *Insurance Act*.



Disposition

9. It is for the above reasons that I find the Debtor's Notice of Preliminary Objection dated 21st September 2021 lacks merit. It is now dismissed with costs to the Creditors.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Mwangi instructed by B. W. Kamunge and Company Advocates for the Petitioners.

Mr Aluoch instructed by Kibet Rop and Company Advocates for the Respondent.

