



**Robson Harris Advocates LLP v Invesco Assurance Company Limited (Insolvency Notice E054 of 2021) [2022] KEHC 290 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY NOTICE E054 OF 2021**

**DAS MAJANJA, J**

**APRIL 28, 2022**

**BETWEEN**

**ROBSON HARRIS ADVOCATES LLP ..... PETITIONER**

**AND**

**INVESCO ASSURANCE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. By a petition dated 28<sup>th</sup> July 2021, the Petitioner, as creditor, seeks, *inter alia*, liquidation of the Invesco Assurance Company Limited (“the Company”) by the court under the provisions of the [Insolvency Act](#), 2015. The Petition has been precipitated by a cumulative debt of KES. 41,122,000.00 which the Petitioner claims that the Company has refused to settle despite being served with a Statutory Demand.
2. The Company responded to the Petition by filing a Notice of Preliminary Objection dated 17<sup>th</sup> September 2021 stating that this matter ought to be stayed due to ongoing proceedings in Insolvency Petition No. E155 of 2019 which are at an advanced stage. That the petition is fatally defective as it is anchored on inapplicable provisions of the law which is misleading to the Court and that it should be struck out. It contends that the Petitioner has failed to cite the Commissioner as contemplated under sections 121 and 3E of the *Insurance Act* (Chapter 487 of the Laws of Kenya), which is a fatal omission.
3. The Company further impugns the petitioner for not pleading or providing evidence of its non-compliance with section 41 of the *Insurance Act*. It contends that the petition has been brought in bad faith as the Petitioner is using liquidation proceedings as a disguised mode of execution to recover a disputed debt. Further that the petition does not disclose a cause of action, is vexatious, frivolous, and scandalous and amounts to abuse of court process.



4. In opposing the Preliminary Objection, the Petitioner has filed a replying affidavit sworn on 16<sup>th</sup> November 2021 by its advocate and partner, Kelvin Mbogo. Both sides have filed written submissions in support of their respective positions.

### **Analysis and Determination**

5. In determining whether the Company's preliminary objection is merited, I am guided by the decision of the Supreme Court in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others SCK Petition No. 10 of 2013* [2014]eKLR which endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors [1969] EA 696* where the court 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]

6. In short, for a preliminary objection to be successful, the facts pleaded by the other party are assumed to be correct or at any rate undisputed. It must be a matter of law which is capable of disposing off the suit and it must not be blurred by factual details calling for evidence or it must not call upon the court to exercise discretion.
7. I hold that the question of stay of the suit on the ground that it is sub judice involves the exercise of discretion by the court. In doing so, the court must appraise itself of the facts of previous case in order to determine whether the current case is sub-judice. The issue of stay of proceedings cannot, at any rate in this case, be resolved on the basis of a preliminary objection given that all the facts on which the plea is based have not been laid bare before this court. I therefore do not find any basis to stay these proceedings in order to allow Insolvency Petition No. E155 of 2019 to be concluded first.
8. The Company's objection is also grounded on sections 121 and 122 of the *Insurance Act* which provide as follows:
121. Liquidation by the court
- (1) If an application for the liquidation of an insurer is presented by a person other than the Commissioner, the applicant shall serve a copy of the application on the Commissioner.
- (2) On being served with a copy such an application, the Commissioner becomes a party to the proceedings and is entitled to be heard at the hearing of the application.
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.
9. The Company argues that failure to serve the Commissioner of Insurance when the petition has been presented against an insurance company is fatal. Under section 121 of the *Insurance Act*, the Creditor's only obligation is to serve the Commissioner. It does not require the Commissioner to be a party to the petition when it is filed. The Commissioner only becomes a party once it is served. Further, the



section does not state when the petitioner is to effect service but since the Commissioner must be heard on a petition for liquidation of an insurance company, I hold that service must be effected at any time before hearing of the petition. I would also add that the failure to serve the Commissioner is not fatal as the court may direct that the Commissioner be served prior to the hearing as it is entitled to be heard on any petition concerning liquidation of an insurance company. The preliminary objection fails on this ground.

10. Whether service has been effected or not is a question of fact. It requires the court to consider the affidavits of service. In this case the Creditor has demonstrated service by the advertisement and affidavits of service on record which confirm that the Commissioner has been duly served. In any case, at the time of compliance, the court shall satisfy itself that service has been effected on the Commissioner before certifying the matter for hearing.
11. On whether the petition offends the provisions of the *Insurance Act*, the Company submitted that the petition is fatally defective as the Petitioner has not pleaded breach of section 41 as read with section 122 of the *Insurance Act* and that the said 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.
12. I hold that a reading of section 122 of the *Insurance Act* does not require a specific plea in the petition to the effect that the insurance company has violated section 41 of thereof. Further, nothing in the aforesaid section denotes that section 384 of the *Insolvency Act* is inapplicable to insurance companies as submitted by the Company. If anything, this provision acts as a guide for the court in determining whether or not an insurance company is solvent for purposes of 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.
13. As I have stated, 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**

14. The reasons I have set out above, the Company's Notice of Preliminary Objection dated 17<sup>th</sup> September 2021 lacks merit. It is now dismissed with costs to the petitioner.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Kiprotich by Robson Harris Advocates LLP for the Petitioners.

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

