



**Nduta t/a Mwangi Kengara & Company Advocates v Invesco  
Assurance Company Limited (Insolvency Petition E012 of 2019)  
[2022] KEHC 11217 (KLR) (Commercial and Tax) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E012 OF 2019**

**WA OKWANY, J**

**MAY 26, 2022**

**IN THE MATTER OF THE COMPANIES ACT NO 17 OF 2015**

**AND**

**IN THE MATTER OF INVESCO ASSURANCE COMPANY LTD**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT NO 18 OF 2015**

**BETWEEN**

**MERCY MWANGI NDUTA T/A MWANGI KENGARA & COMPANY  
ADVOCATES ..... PETITIONER**

**AND**

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

**JUDGMENT**

1. The petitioner herein, Mercy Mwangi Nduta t/a Mwangi Kengara & Company Advocates, filed this amended petition on 25<sup>th</sup> May 2021 seeking the following orders:-
  - a That Invesco Assurance Company Limited be liquidated by an order of this Honourable Court in accordance with the *Insolvency Act* No 18 of 2015
  - b That the official receiver be appointed as the liquidator
  - c That the costs of this petition and the sum of Kshs 4,265,244.00 being the initial debt, together with the additional debt of Kshs. 5,102,294.24 making an aggregate sum of Kshs. 9,367,538.24



plus the outstanding interest as awarded in each decree until payment in full be provided for the petitioner from the assets of the company.

2. The petitioner's case is that the Company is insolvent, unable to pay its debts when they fall due and therefore ought to be wound up. The petitioner states that the Company instructed her law firm to represent its policyholders in several court cases but has over the years refused to settle her fee notes despite service with court orders and execution proceedings.
3. The Company opposed the Petition through its amended defence and counterclaim wherein it states that the petition is defective because it does not comply with mandatory statutory provisions governing the insolvency of an insurance company. It is the Company's case that it has a share capital of more than a billion Kenya shillings and that its alleged inability to pay the sum of Kshs 4,308,276 cannot be a basis for liquidation.
4. The Company further states that it does not owe the alleged debt and maintains that it fully settled the petitioner's professional fees. The Company further states that the petitioner thwarted all its efforts to reconcile their accounts.
5. The Company seeks judgment against the defendant for orders that: -
  - a. The petition dated 13<sup>th</sup> March 2020 be struck out or dismissed
  - b. That a declaration be and is hereby issued that the company /respondent has fully settled the claims subject of the petition.
  - c. That in the alternative, parties be directed to settle accounts under supervision of the court and any sums found due to any party after the taking of accounts be paid to the successful party as the case may be.
  - d. That costs shall follow the event
  - e. Any other relief the court deems fit to grant.
6. I have considered the Petition and the respondent's response and the parties' respective submissions. I find that the main issue for determination is whether the Court should declare the Company insolvent and place it under an interim Liquidator.
7. The petitioner's case was that the Company is unable to pay the debts arising from various court decrees and should therefore be declared insolvent. The petitioner argued that the debts are not contested and remain due and owing.
8. The petitioner moved the court under Section 384 as read with Section 424(1) of the [Insolvency Act](#) which stipulate as follows: -

“ 384. The circumstances in which a company is unable to pay its debts

(1) 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 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;

- a. 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; or
- b. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.

- (2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).
- (3) The insolvency regulations may increase or reduce the amount specified in subsection (1) (a)."

424. Circumstances in which company may be liquidated by the Court

- (1) A company may be liquidated by the Court if—
  - (e) the company is unable to pay its debts.

9. The Company, on the other hand, argued that the petition is defective and does not meet the threshold set for the liquidation of insurance companies under Section 122 of the *Insurance Act*. The Company argued that liquidation of insurance companies is governed by the *Insurance Act* and not the *Insolvency Act*. It was the Company's case that there are more issues to consider when liquidating an insurance company apart from mere inability to settle debts.

10. Sections 122 and 41 of the *Insurance Act* stipulate as follows: -

For the purpose of section 219 of the *Companies Act*, an insurer shall be deemed to be unable to pay his debts if at any time the requirements of section 41 (which relate to margins of solvency) are not observed by the insurer."

Section 41 states:-

Assets, Liabilities, Solvency Margins and Investments

- (1) 1) An insurer carrying on insurance business in Kenya shall at all times keep total admitted assets of not less than its total admitted liabilities and the capital adequacy ratio as may be determined by the Authority.
- (2) For purposes of subsection (1), the Authority may prescribe the method of determining admitted assets and admitted liabilities.
- (3) An insurer carrying on both long term and general insurance business shall at all times maintain separate margins of solvency.
- (4) An insurer failing to comply with the requirements of this section shall be deemed to be unable to pay its debts within the meaning of section 123."



11. The issue in contention herein is the applicable statute in the liquidation of an insurance company. While the Company argued that the applicable law is the [Insurance Act](#), a perusal of the petition, reveals that the petitioner invoked the provisions of Section 384 of the [Insolvency Act](#).
12. The court is dealing with a scenario where two Acts of Parliament provide for different procedures with regard to insolvency proceedings of an insurance Company. While I appreciate the fact that the procedure for liquidation contained in the [Insurance Act](#) is more detailed and applicable to these proceedings, the court cannot close its doors to a litigant who elects to proceed with its case through the [Insolvency Act](#).
13. My finding is that it cannot be said that there are hard and fast rules binding a creditor who wishes to initiate its insolvency petition against an insurance company to a specific Act. I therefore find that the mere fact that the petition herein was brought under the [Insolvency Act](#) and not the [Insurance Act](#) does not make the petition defective as the ultimate aim of the petitioner is to recover the debt in question. I am guided by the decision in [Invesco Assurance Company Limited vs Dama Charo Nzai & 58 others](#) [2019] eKLR where the court observed that: -

“There is no reason in this regard to differentiate the rights and obligations that exist under the [Insurance Act](#) and the ones vested in the [Insolvency Act](#) 2015. The above mentioned provisions by the applicant as they relate to the role of the commissioner of Insurance is not bar to set aside the entire liquidation process commenced by the creditors. Therefore, save as the orders must be viewed in terms of Section 122 and 67 of the [Insurance Act](#), nothing is far from the truth that the commissioner is not aware that the creditors intended to prove that the company has failed to honor its financial obligations. This means that the commissioner is not precluded in joining the proceedings as an interested party to show that he has a direct and substantial interest of the company subject to liquidation.

Broadly speaking given this background a company can be wound up or liquidated by the shareholders, or the creditors or a petition can be filed to compulsorily or voluntarily wind it up.”

14. Turning to the Counterclaim, I note that the Company did not tender any evidence to show that it settled the debt. I therefore dismiss the counterclaim and find that the petitioner has established the company is unable to pay its debts.
15. In [Kinyanjui Njuguna & Co Advocates v Invesco Assurance Limited](#) [2021] eKLR this court held that:-

“The Debtor’s advocate submitted that the Company is able and, in a position, to pay the debt. It was however not disputed that the Debtor has not made good the Petitioners debt as per the terms of the consent order. I find that the Debtor’s refusal/failure to pay the debt is *prima facie* evidence that the company is unable to pay its debt. Consequently, I find that it would, in the circumstances of this case, only be just, equitable and fair to grant the orders sought liquidation petition.

Be that as it may and having noted that the presence and/or appearance of the Commissioner of Insurance is a critical requirement in the winding up proceedings involving insurance companies, this court directs that the Petition and all the other pleadings filed herein be served on the Commissioner of Insurance within 15 days from the date of this decision to enable the said Commissioner give his input to the Petition before this court can make its final orders on the Petition.”



16. My above findings notwithstanding and owing to the nature of the Company and the fact that it is regulated by the Insurance Regulatory Authority, I find that it will be premature to make final orders to wind up the company at this stage without the Involvement of the commissioner of insurance. While the petitioner has demonstrated that the Company is unable to pay its debts, this court will still welcome the presence and/or input of the Commissioner of Insurance as a critical player in the winding up proceedings involving an insurance company. I say so taking cognizance of the fact that the company herein may have issued policies to other parties/insurance covers to other parties not represented in these proceedings.
17. In this regard, while I note that the Commissioner of Insurance was duly served with the pleadings and the hearing notice, it will still be necessary, for good measure, to receive his input before the court can make its final orders. For the above reasons, I direct that all the pleadings filed herein and this judgment be served on the Commissioner of Insurance within 15 days from the date of this decision to enable the said Commissioner present his input to the Petition before this court can make its final orders.
18. Mention on 25<sup>th</sup> July 2022 for final orders.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2022.**

**W. A. OKWANY**

**JUDGE**

In the presence of:-

Ms Mwangi for Petitioner.

No appearance for Respondent.

Court Assistant - Sylvia

