



Invesco Assurance Company v Nzai & 58 others (Insolvency Cause 1 of 2018) [2022] KEHC 12728 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 12728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
INSOLVENCY CAUSE 1 OF 2018
SM GITHINJI, J
MAY 25, 2022
IN THE MATTER OF INVESCO ASSURANCE COMPANY LIMITED
AND
IN THE MATTER OF INSOLVENCY ACT, NO. 18 OF 2015
AND
IN THE MATTER OF COMPANIES ACT, CAP. 486 (NOW REPEALED)**

BETWEEN

INVESCO ASSURANCE COMPANY DEBTOR

AND

DAMA CHARO NZAI & 58 OTHERS CREDITOR

JUDGMENT

1. This matter has a checkered history of litigation. One marked by applications after applications. It's one entanglement with no love lost between the parties. The life of this suit was first breathed through a statutory demand filed on November 15, 2018 issued pursuant to section 384 of the *Insolvency Act, 2015* and regulation 776 of the *Insolvency Regulations, 2016*. This was followed by an application by the debtor (herein referred to as the insurance) dated November 27, 2018 brought under section 17 (2) (d) and 17 (3) (b) of the *Insolvency Act, 2015* and regulations 16 and 17 (6) (b) of the *Insolvency Regulations, 2016* Which Was determined *Vide* The ruling dated February 21, 2019.
2. This was followed by the notice of motion dated June 20, 2019 filed by the insurance seeking declaratory order pending the final determination of the appeal to be instituted in the Court of Appeal. This was a motion brought under section 468 of the *Insolvency Act* and regulation 10 of the court to stay or and withdraw the advertisement of Malindi Insolvency Petition published in the Kenya Gazette on June 1, 2019. This was put to rest by the ruling dated December 3, 2019.



3. Not one to give up without a fight, the Insurance filed another notice of motion dated July 1, 2020 which among other prayers sought interim orders staying proceedings in this insolvency cause. This was determined by the ruling dated March 24, 2021. Presently, for determination is the creditor's liquidation petition dated May 17, 2019 lodged pursuant to section 425 of the *Insolvency Act* and regulation 778 (1) (a) of the *Insolvency Amendment Regulations* seeking the following orders; -
 - a. The company be liquidated by the court under the provisions of the *Insolvency Act, 2015*.
 - b. The court appoints on official receiver who is an insolvency practitioner as the provisional liquidator.
 - c. The costs of this petition be granted to the petitioners and be paid out of the company's assets; and
 - d. Such other order be made in the circumstances as the court shall deem fit.
4. As per the petition, as at November 14, 2018, the insurance was justly and truly indebted to the petitioners in aggregate sum of Kshs 27,699,941 (Kenya Shillings Twenty-Seven Million, Six hundred and ninety nine thousand, nine hundred and forty one) being amount due to the petitioner's pursuant to final judgments and orders obtained by the petitioner's in variegated sums to each petitioner which judgments were delivered on different dates as set out in the petition.
5. It was stated in the petition that despite repeated requests to the Insurance for payment or part payment of the debt amount, the insurance has refused to make good the petitioners claim hence the instant petition which is in accordance with the *insolvency Act, 2015*. The petition for liquidation was then advertised vide a notice dated May 28, 2019 filed on even date.
6. In response the insurance filed a notice of motion dated June 20, 2019 which was determined by a ruling as afore stated, followed by several applications and attendant rulings as mentioned above.
7. The petition proceeded viva voce on November 11, 2021 with the petitioner's calling three witnesses while the respondent did not call any witness.
8. PW 1 Stephen Kahindi Karisa stated that he was involved in the accident and he was not compensated for thus the petition that the insurance is unable to pay and should be dissolved. On cross-examination he stated that he was not aware his advocate had been paid Kshs 5 million on June 20, 2020.
9. PW 2 and PW 3 evidence is similar to that of PW1 save for the amounts of money owed to each one of them.

Submissions by the Parties

Petitioner's Submissions

10. It was submitted that the debtor is unable to pay its debts as evidenced by its failure to fulfill the conditions of the ruling dated February 21, 2019 where they were required to make a payment of Kshs 10,000,000/= to allow for the suspension of the statutory notice. That to date no amount has been paid by the debtor. It was further submitted that the debtor has evidenced a thread of being unable to pay its debts, for example the insolvency petition *Stephen Eyauma v Invesco Assurance Company Ltd* [2019] eKLR.
11. The Petitioner's submitted that the *insolvency Act* is the operative law dealing with liquidation of companies and therefore the assertion that the liquidation process of insurance company is only governed by the *Insurance Act* is misleading. They relied on the authorities of *Trade Bank Ltd v Amin*



Company Ltd & Another [2000] eKLR and *Salesio Kinyua Njagi & 9 Others v Invesco Assurance Company Limited* [2021]eKLR.

12. It was also submitted that the petitioner's demand is allowed under section 7 (2) (a) of the *Insolvency Act* which demand is for an aggregate amount of Kshs 30,777,739/= thus exceeds the bankruptcy level of Kshs 250,000/=. Further, that the debtor has failed to prove overstatement on part of the petitioners.
13. The petitioners also submitted that they had complied with section 122 of the *Insurance Act* and that the commissioner had been duly informed of the proceedings and that his failure of attendance/ participation is not solid to invalidate the petitioner's claim.

Debtor's Submissions

14. It was submitted that there was a pending insolvency petition, Milimani Insolvency Petition No 155 of 2019 with similar facts and the debtor is apprehensive that there is a probability of courts of concurrent jurisdiction giving conflicting directions/decisions.
15. It was submitted that an insurance company cannot be liquidated without referring to section 122 of the *Insurance Act*.
16. It was also submitted that the debtor has not breached section 41 of the *Insurance Act*. Further that all debts due to the petitioner have been paid and if there are any unsettled debts the same are disputed and subject to reconciliation of accounts.
17. The debtor submitted that the petition discloses no reasonable cause of action as provided for under order 2 rule 15 (10) of the *Civil Procedure Rules 2010*.

Issues for Determination

1. Whether the debtor is unable to pay its debts?
2. Whether the petition is competent?

Whether the Debtor is unable to pay its debts?

18. Section 384 and 424 (1) e of the *Insolvency Act* provide;

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

- a. For the purpose 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 day 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; or
 - (c) 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 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 The 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.

Further, section 122 and 41 of the *Insurance Act* provide that; -

122 Insolvency

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.

41. Assets. Liabilities, Solvency margins and Investments.

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.

19. I have perused the ruling dated February 21, 2019 by my brother Hon Justice W Korir who ordered for a conditional suspension of the statutory contingent upon the debtor making a payment of Kshs 10,000,000/= within 60 days from the date of the ruling. It is clear that todate the said has not been paid. The debtor alleges to have paid Kshs 5,000,000/= to the petitioner's advocate on June 20, 2020. I find no evidence in support of the allegation.
20. The sum in question is as a result of judgments in favour of the petitioners in varied amounts for each one of them. The petitioners have desperately attempted to execute for payment but in vain.
21. In light of the above and the cited provisions, it is my finding that the debtor is unable to pay its debt and has contravened the provisions of section 41 of the *Insurance Act*.



22. This finding is in line with the holding in case of *Rosenback & Co Property Ltd v Singh's Bazaans Ply Ltd* 1962 SA 593 where the court held that;

“That the court will have regard to the fact that a creditor who cannot obtain payment of his debt is entitled as is between himself and the company ex-debts justified to an order if he brings his case within the Act. He is not barred to give time. The fact that there is due to the petitioner a liquidated sum, then the debt is not disputed, and where the petitioner has demanded payment without success, affords cogent prima facie evidence of the company, inability to pay its debts, and is the ordinance must commonly vetted on.”

Whether the Petition is competent?

23. The debtors argument is that the petitioners do not expressly or impliedly refer to sections 41 and 122 of the *Insurance Act* which ought to be read together with sections 424 (1) (e) and section 384.

24. I refer to the ruling by Nyakundi J in this matter where he held 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 related to the role of the commissioner of Insurance is not bar to set aside the entire liquidation process commenced by the creditors.”

25. In my view, the mere fact that the petitioners did not refer to certain sections of the *Insurance Act* is not sufficient to render their rightful claim, unsustainable.

26. That said, I make the following findings; -

1. That the debtors failure to pay the debt is prima facie evidence that the company is unable to pay its debt thus the petitioners are deserving of the orders sought for liquidation.
2. That the petition is competent.

27. However, I am cognizant of the fact the presence of the commissioner of insurance cannot be wished away in winding up proceedings involving insurance companies. I have seen the attempts made by the petitioners to serve the commissioner with pleadings and rulings in this matter but the commissioner has not risen to the occasion. In my view, the commissioner having been made aware but did not participate means that he is not against winding up the debtor.

28. I have considered the facts set out in the petition and the supporting affidavit, I am satisfied that the creditors have established all the grounds necessary for liquidation of the company under section 123 of the *Insurance Act*. The company is no longer a going concern; it cannot carry on insurance business in compliance with the provisions of the *Insurance Act* and its existence is not in the interests of the company's creditors or policy holders. In the circumstances and pursuant to section 427 of *Insolvency Act, 2015*, I now make an interim liquidation order and appoint the official receiver as the provisional liquidator.

29. The official receiver may in consultation with the commissioner of Insurance, as the case may be, appoint the policy holders compensation Fund established with functions, inter alia, to, “liquidate an insurer as may be ordered by the court,” under section 179 of the *Insurance Act* as the provisional liquidator pursuant to section 439 of the *Insolvency Act, 2015* if necessary.

30. In sum, I make the following orders:



- i. An interim liquidation order be and is hereby issued in respect of the company, invesco insurance company limited;
- ii. That the official receiver be and is hereby appointed as the provisional liquidator of invesco insurance company limited;
- iii. Cost of the petition be borne out of the company assets.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF MAY, 2022.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Anoch & Kibet Rop Advocates for the Applicant
2. Wambua Kilonzo Advocates for the respondent

Mr Anoch; -We pray for 30 days stay.

Mr Kilonzo; -Mr Anoch is not on record.

Mr Anoch;-I work in the firm of Mr Kibet.

Mr Kilonzo; -30 days stay is objected and is not indicated is pending what. They can apply formerly for stay to enable us respond. We have waited since 2018. They can pay the amounts demanded or go to another court.

Mr Shah; -We wish to appeal. We seek leave to appeal.

Mr Anoch; -Stay can be granted pending an appeal.

Court;-It is clear the stay sought for 30 days is pending filing of an appeal. It is granted. If appeal will not be filed within 30 days from the date hereof the stay lapses.

.....

S.M. GITHINJI

JUDGE

