



**Munge v Invesco Company Limited (Insolvency Cause E004 of 2021)
[2022] KEHC 15982 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E004 OF 2021**

A MABEYA, J

NOVEMBER 25, 2022

BETWEEN

JAMES NDUNGU MUNGE PETITIONER

AND

INVESCO COMPANY LIMITED RESPONDENT

RULING

1. The matter for determination is the preliminary objection raised on 4/11/2021 by the debtor on the grounds that the statutory demand dated 12/6/2020 was fatally defective as it was in breach of section 77B (1) of the *Insolvency Regulations* 2018. That the petition be struck out as it was anchored in inapplicable provisions of the law and did not disclose a cause of action.
2. The preliminary objection was canvassed by way of written submissions.
3. The petitioner submitted that the decretal sum was not disputed as the respondent had even come up with a proposal to settle the same. Counsel further submitted that failing to conform to forms 32C, 32D and 32E would not invalidate a petition for insolvency of a company.
4. The respondent on the other hand submitted that the statutory demands issued by the petitioner were not in form 32E. That section 122 of the *Insurance Act* provided that the insurer's inability to pay debts could not be anchored on section 384 of the *Insolvency Act*. It was the respondent's submission that the petition did not disclose any reasonable cause of action.
5. I have considered the preliminary objection and the submissions by the parties. The issue for determination is whether the preliminary objection dated 4/11/2021 is merited.
6. The threshold for preliminary objections is that they should be purely based on a point of law.



7. In *Mukisa Biscuits Manufacturing Co Ltd -v- West End Distributors Limited* (1969) EA 696, a preliminary objection per Law JA was stated to be: -

“So far as I am aware, 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.”

8. Sir Charles Newbold, P stated: -

“... 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

9. In the present case, the preliminary objection was raised on the ground that the statutory demand dated 12/6/2020 was fatally defective and in breach of section 77b(1) of the *Insolvency Act* and for ailing to invoke sections 41 and 122 of the *Insurance Act*.

10. It is trite that a preliminary objection should be raised on a pure point of law with no contest as to the facts. In this case, the applicant challenges the law the petitioner invoked in the petition. In my opinion, incorrect provision goes to the jurisdiction of the court and thus raises a point of law.

11. The question therefore is whether invoking section 384 of the *Insolvency Act* as opposed to sections 41 and 122 of the *Insurance Act* was fatal to the petition.

12. Section 384 of the *Insolvency Act* provides: -

“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;

(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 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)."

13. On the other hand, sections 41 and 122 of the *Insurance Act* provides: -

- " 41 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.
- (1)
- (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."
- "122. 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."

14. The foregoing provisions give the procedures for insolvency proceedings. While I appreciate that section 41 and 122 are more specific with regard to the insurance companies, my view is that the same cannot act as a bar to litigants invoking section 384 of the *Insolvency Act* in insolvency proceedings.

15. In *Salesio Kinyua Njagi & 9 others v Invesco Assurance Company Limited* [2021] eKLR, it was held: -

"According to the respondent, the applicable Act ought to have been the Insurance Act in view of the fact that the respondent is an insurance company.

Section 3(2) of the Insolvency Act stipulates as follows: -

- "(2) This Act applies to natural persons, partnerships, limited liability partnership, companies and other corporate bodies established by any written law."

Section 423(1) of the Insolvency Act on the other hand stipulates that: -

"Jurisdiction of High Court to supervise liquidation of companies

- (1) Only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya."

In the present case, it is not disputed that the respondent is a limited liability company incorporated under the Companies Act. No material has been placed before this court to indicate that the Insolvency Act is not applicable in the liquidation process of an insurance



company. Indeed, section 3(2) of the Insolvency Act cited herein above is clear that the Act applies in the insolvency of companies.”

16. With regard to the defective statutory forms, I find that the same do not prejudice the respondent in the petition and the same can be cured as a procedural technicality under article 159 of the *Constitution*.
17. In the upshot, I find that the preliminary objection lacks merit and the same is dismissed with costs.
18. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

A. MABEYA, FCIArb

JUDGE

