



REPUBLIC OF KENYA



Kinyanjui Njuguna Co. Advocates v Invesco Assurance Co. Ltd & another (Insolvency Petition E155 of 2019) [2022] KEHC 16117 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E155 OF 2019
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

KINYANJUI NJUGUNA CO. ADVOCATES PETITIONER

AND

INVESCO ASSURANCE CO. LTD 1ST RESPONDENT

PUBLIC TRANSPORT INVESTMENT COMPANY LTD 2ND RESPONDENT

RULING

1. The petitioner filed this Insolvency Petition against the Debtor/Company, Invesco Assurance Limited, on 17th July 2019. On 18th March 2021, this court delivered its partial judgment in favour of the Petitioner and directed the Commissioner of Insurance to give his input on the matter before the final judgment.
2. Pursuant to the said orders, the Insurance Regulatory Authority (IRA) filed its report dated 12th May 2021 which report precipitated the filing of two applications. In a ruling delivered on 16th December 2021, this court observed that the IRA report was not credible and did not consider in making the final orders. The court further directed the Member, Public Transport Investment Company Limited, to file and serve its proposal on settlement within 60 days of the ruling.
3. Immediately after the delivery of the ruling of 16th December 2021, the Petitioner/Creditor filed the application dated 17th December 2021 which is the subject of this ruling. The Petitioner seeks the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to direct that the Company (Invesco Assurance Company limited) or the Majority Member of the Company be ordered to immediately release



to the Petitioner the sum of Kshs 70 million or a substantial portion of it pending hearing and final determination of this application; or in the alternative pending further directions of this Honourable Court.

3. That in the alternative to prayer 2 above this Honourable Court be pleased to order the Company to comply with the consent orders given on 24/10/2019 on the issue of payments by forthwith paying the Petitioner the outstanding debt of Kshs 70 million or a substantial portion of it pursuant to the said consent order.
 4. That in the further alternative to prayers 2 & 3 herein this Honourable Court be pleased to enforce prayer 4 of the Consent Order given on 24/10/2019 by allowing the petition as prayed due to the Company's breach of the Consent Order terms.
 5. That this Honourable Court be pleased to order that the entire debt currently due to the Petitioner and against the Company (Invesco Assurance Company Limited) now standing at Kshs. 175,952,008.50 inclusive of interest be incorporated in the petition as the total debt outstanding.
 6. That this Honourable Court be pleased to order that the agreed historical debt of Kshs. 10 million be included as part of the outstanding debt owed to the Petitioner by the Company.
 7. That this Honourable Court be pleased to allow the judgment to be reviewed and/or amend pleadings to the extent that the current outstanding debt is Kshs. 175,952,008.50 inclusive of interest to date.
 8. That this Honourable Court be pleased to further order that the outstanding debt will continue to attract interest at 14% P.A until payment in full as per the regulations.
 9. That this Honourable Court be pleased to review its ruling dated 16/12/2021 and reinstate the report by the Commissioner of Insurance (IRA) dated 12/5/2021.
 10. That the Commissioner of insurance (IRA) be ordered to table all the communications made between the Company and itself and state reasons for its report dated 12/5/2021.
 11. That this Honourable court be pleased to order the IRA to submit with evidence a comprehensive report of the status of Invesco Assurance Company Limited from when it was reinstated.
 12. That this Honourable court be pleased to make a pronouncement on the status of all the enjoined Interested Parties who have a claim against the Company.
 13. That this court be pleased to order that the firm of Kinyanjui Njuguna & Company ■ Advocates be paid the proceeds of insolvency in priority to other creditors/debtors.
 14. That the costs be of this application and the petition be borne by the Company.
4. The application is supported by the affidavit sworn by Creditor's advocate, Mr. Seth Khisa, and is based on the following grounds:-
1. That on 18th March, 2021 this Honourable Court delivered judgment in the present matter where it definitively found out that the Debtor Company/1st Respondent (hereinafter referred to as "the Company") is unable to pay its debts; and that it would only be just, equitable and fair to grant the orders sought in the liquidation petition.



2. That upon delivering the judgment this Honourable Court gave an order that the petition and all the other pleadings filed be served upon the Commissioner of Insurance within 15 days to enable the said Commissioner give his input to the petition before this Honourable Court makes final orders on the petition.
3. That the Commissioner of Insurance upon being served with the Court Order given on 18th March, 2021 complied by filing a report dated 12th May, 2021,
4. That the Company did not raise any objection to the Court's order given on 18th March, 2021 requiring the Commissioner's input until when the Commissioner's report was presented and revealed the Company's non-compliance with provisions of the *Insurance Act*, and failure to settle outstanding debts over the years.
5. That the Company had also rushed to the Court of Appeal where it filed an appeal against the judgement of this Honourable Court delivered on 18th March, 2021 through Nairobi Court of Appeal Civil Appeal E158 of 2021; also filed applications dated 29th March, 2021 and 12th May, 2021 seeking to stay proceedings and disqualification of the entire proceedings in this matter for being irregular ab initio.
6. That on 16th June 2021 the Court of Appeal issued its orders dismissing the Company's application.
7. That the Company having failed to persuade the Court of Appeal to issue stay and disqualifications of proceedings orders it again approached this Honourable through application dated 22nd June, 2021 seeking to, inter alia, have the Commissioner's report expunged from the Court record.
8. That the Member equally filed an application dated 22nd June, 2021 seeking to, inter alia, stay issuance of final orders.
9. That the Company's and the Member's applications were only filed after the Company failed to obtain stay orders at the Court of Appeal and they are similar in substance to the application dismissed by the Court of Appeal thus amounting to the Company in cohorts with the Member brazenly abusing court processer disdaining judiciary hierarchy and compromising the integrity of Judicial pronouncements.
10. That on 17th May, 2021 when the Commissioner's report was before this Honourable Court the Company sought to respond to the same and this Honourable Court said that parties may respond if they so wish for whatever worth the response shall serve but that final orders shall be delivered on 24th June, 2021.
11. That on 16th December, 2021 this Honourable Court on the Company's motion expunged the Commissioner's report notwithstanding that it had been provided pursuant to this Honourable Court's order given on 18th March, 2021.
12. That on 16th December, 2021 this Honourable Court at the Member's motion further suspended issuance of final orders for a period of 60 days to allow the Member file and serve a settlement proposal to the Petitioner.
13. That the period requested by the Member to change the management of the Company and settle debts expired without the Member complying with own proposals.



14. That the Member has not made any substantial payments to the Petitioner since it brought its application and neither has it committed to comply with the consent order of 24th October, 2019 thus resulting to current outstanding debts owed to the Petitioner pursuant to that consent order to be at Kenya Shillings Seventy Million (Kshs. 70,000,000/=
 15. That since the institution of this matter the debt owed to the Petitioner has continued to accrue due to subsequent certificates of taxations and decrees obtained and it now stands at Kenya Shillings One Hundred and Seventy-Five Million, Nine Hundred and Fifty-Two Thousands, Eight Shillings and Fifty Cents (Kshs. 175,952,008.50).
 16. That the outstanding debt owed to the Petitioner continues to accrue whereas the Company and Member are making colossal profits without any commitment to settle the outstanding debts or make substantial periodic payments pursuant to this Honourable Court's consent order given 24th October, 2019.
 17. That it is contrary to the principles of justice and public policy for the Company and Member to continue issuing insurance certificate and collecting premiums whereas they have deliberately refused to settle crystalized debts owed to the Petitioner as confirmed by valid decrees.
 18. That the foregoing grounds raise sufficient reason for allowing this motion application.
 19. That it is in the interest of justice that the present application has been made.
5. The Debtor/Company opposed the application through the Grounds of Opposition dated 25th January 2022 and the replying affidavit sworn by Mr. Paul Kibet Rop who states that the application is incompetent as it was filed immediately after the court issued orders expunging the report by the Commissioner of Insurance and directed the company to file a proposal on settlement within sixty days. He further states that the Petitioner should have waited for the period given to expire before filing the application. He avers that the court had already dealt with the issues raised in the application.
 6. The Member/2nd respondent opposed the application through the replying affidavit of its Director, Mr. Charles Aholi, who avers that the application is premature as the 60 days period granted to the Member to make a proposal to the Creditors had not lapsed. He further states that the Petitioner seeks to enforce the debt against the Member who had not indicated an interest in taking it over. He avers that the application does not meet the threshold set for the granting of orders for review.
 7. Parties filed their respective submissions to the application which I have considered alongside the pleadings. The issue for determination is whether the applicant has made out a case for the granting of the orders sought.
 8. I note that the orders sought in prayers 2 – 8 of the application relate to the payment of the debt due to the Petitioner. In other words, the main prayers sought in the application are for the payment of the debt due and the enforcement of a consent recorded on 24th October 2019. It is however worthy to note that this court had, in its partial judgment rendered on 18th March 2021 found that the Debtor/ Company is unable to pay its debts. It is upon making the partial judgment that this court requested for the input of the Commissioner of Insurance before making its final orders. The Commissioner's report was however successfully contested by the Debtor.
 9. Having regard to the rulings and partial judgment that have been made in this case, I find that it will not be proper to re-litigate the matter and make orders to compel the Debtor to pay the debt when the court has already found that Company is unable to pay its debts. It was upon finding that the Company



was unable to pay its debts that the Member appeared in court on 16th December 2021 and requested the court for time (60 days) to settle the debt which request the court granted, in the interest of justice, with a view to granting the Company an opportunity to redeem itself.

10. As I have already stated in this ruling, hardly had the ink dried on the orders of 16th December 2021 than the Petitioner filed the instant application. Needless to say, the application was filed before the expiry of the 60 days granted to the Member to settle the debt.
11. The applicant further seeks order to review/ament the judgment so as to reflect the alleged current outstanding debt at 175,962,008.50 inclusive of interest and further to reinstate the report by the Commissioner of Insurance dated 12th May 2021.
12. The Member, on the other hand, opposed the application while arguing that it was premature as the 60 days granted by the court had not lapsed as at the time the application was filed. The Member further faulted the petitioner for seeking to enforce the debt on the Member who was not interested in taking it over.
13. From the foregoing facts and arguments, it is clear that the Petitioner initially moved the court for orders to liquidate the Company. The court already delivered its judgement on 18th March 2021 wherein it held that there was prima facie evidence to show that the Debtor/Company was unable to pay its debt. The court however deferred its final orders to await the report from the Commissioner of Insurance.
14. It is my finding that the instant application is not only premature having been filed before the expiry of the 60 days granted to the Member to pay the debt, but is also misconceived as it seeks orders to enforce the payment of the debt when the court had already found that the Company is unable to pay its debts. My humble view is that the Petitioner's recourse, at this point, should be to move this court with respect to issuing final prayers sought in the Petition.
15. Having regard to the fact that the court had already rendered its partial judgment and was merely awaiting the IRA report before delivering the final verdict, and further, considering that the report by IRA was rejected by this court, I find that the prayers for review and reinstatement of the IRA report are misplaced and unmerited.
16. In sum I find that the prayers sought in the application are not merited save for the prayer to allow the Petition as prayed in light of the partial judgment that remains unchallenged. I award the costs of the petition to the Petitioner.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Njuguna for Bett for Company

Mr. Khisa for petitioner/applicant.

Mr. Shah for 2nd respondent

Court Assistant- Sylvia

