



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E155 OF 2019

KINYANJUI NJUGUNA & CO ADVOCATES.....PLAINTIFF

VERSUS

INVESCO ASSURANCE LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. On 17th July 2019 the Petitioner/Creditor herein, **M/S Kinyanjui & Company Advocates**, (hereinafter “**the Creditor**”) filed this Insolvency Petition against the Debtor/Company **Invesco Assurance Company Ltd** (hereinafter “**the Company**”) seeking the following orders: -

A. That Invesco Assurance Company limited be liquidated by an order of this court and in accordance with the Insolvency Act 2015.

B. That this court appoints an official receiver/statutory manager who is an authorized insolvency practitioner to act as the provisional liquidator.

C. That the costs of this petition and the Petitioner’s debts of a total amount of more than 29,000,000 be provided for from the assets of any Invesco Assurance Company Limited.

D. That the court do issue an order stopping the insurer from issuing insurance policies under Cap 405 Laws of Kenya pending its liquidation.

E. That all the premiums owed by the insurers of Invesco Assurance Company Limited be paid to the liquidator.

F. That the assets of all shareholders and directors Invesco Company Limited acquired using money appropriated by them by the insurer be traced and reserved for sale by the liquidator to pay debts and this debt and any dealing in them by sale, transfer, lease, mortgage, or whatsoever stopped pending liquidation.

G. That the directors of Invesco Assurance Company Limited (past and present) be barred by a court order from being directors of any other insurance company in Kenya permanently by themselves or by proxy.

H. That such orders that this honourable court may deem fit and just in the circumstances.

2. The Petitioner’s case is that it represented the Company in several court cases and that as at 11th June 2019, the Company is truly indebted to it in the aggregate sum of over Kshs 29 million on account of the decretal amounts arising out of the taxation of their Advocate/Client Bill of Costs. The Petitioner contends that the company/Debtor has refused and/or neglected to settle the said debt and has no reasonable prospect of doing so. It maintains that it is therefore only just, equitable and fair that the court grants the liquidation petition.

3. The Petitioner states that it has tried all the available means of execution including garnishee proceedings but that all the attempts were fruitless. It is the Petitioner’s position that the Company poses a great danger to the public as it continues to collect premiums yet it was unable to meet the claims filed against it.

4. The Debtor opposed the Petition through its replying affidavit dated 15th October 2019 wherein it states, *inter alia*, that it is a *sui generis* company governed by the Insurance Act Cap 487(hereinafter “**the Act**”) which sets out the threshold and manner in which it may be wound up. According to the Debtor, the Petition does not meet the threshold set in the Act and is therefore incompetent, premature, irregular and unlawful.

5. The Debtor also filed a Notice of Preliminary Objection dated 20th November 2019 wherein it listed the following grounds; -

a. That the Respondent/Creditor’s Petition does not plead the necessary and the most vital conditions precedent that must be satisfied before filing insolvency/winding up petition against insures a set out under the Insurance Act Cap 487. The said petition does not have legs at all.

b. That the Creditor’s Petition is anchored on fatally inapplicable provisions of the law.

c. That the Respondent/Creditor is maliciously using insolvency/winding up proceedings as a disguised mode of execution to recover unverified claims.

d. That the remedies sought cannot be legally granted through the said petition and

e. That the petition does not disclose cause of action therefore, it is vexatious, frivolous, and scandalous and amounts to abuse of the court process and a wastage of the applicant’s precious time and limited resources.

6. The petitioner opposed the Preliminary Objection through the Replying Affidavit its advocate **Mr. Kinyanjui** who avers that the petition is well grounded in law and in fact. He states that the debtor has no proper answer to the Petition as it did not honor its proposal to settle the outstanding debts and that the decrees remain unsatisfied.

7. He further states that the petitioner has provided all the requisite documents to the debtor and auditor for purposes of reconciling the accounts but that the debtor did not settle the decrees as had been agreed.

8. Parties canvassed the Petition and Preliminary Objection by way of written submissions which they subsequently highlighted at the hearing thereof.

9. I will proceed to determine the Preliminary Objection first as its determination will have a bearing on whether or not this court should proceed and determine the petition.

Debtors Submissions on the Preliminary objection

10. The Debtor submitted that while an ordinary company may be liquidated once a creditor establishes that the provisions of Section 384 of the Insolvency Act are satisfied, the said sections are not applicable for the winding up of an insurance company on account of inability to pay debts. It was submitted that the court cannot liquidate an insurance company under the said sections unless breach of Section 41 of the Insurance Act is established. It was further submitted that the petitioner did not plead breach of sections 122 and 41 of the Insurance Act thus rendering the petition fatally defective.

11. It was submitted that Section 122 of the Insurance Act provides that Section 384 of the Insolvency Act is not applicable to Insurance Companies when determining the ability or inability to pay debts of an insurer.

12. It was submitted that the Insurance Act is a primary and substantive Act with its own specific winding up laws and procedures while the Insolvency Act provides for the general procedure applicable for the winding up of other companies.

Petitioners submissions to the Preliminary Objection.

13. In a rejoinder the petitioner submitted that the Preliminary Objection is argumentative and does not raise pure points of law as the matters raised require the court’s discretion and the consideration of facts.

14. It was also submitted that the issues raised in the Preliminary Objection can be canvassed and dealt with in the main Petition. For this argument, reference was made to the decision in *Samuel Waweru v Geoffrey Muhoro Mwangi* [2014] eKLR wherein the court reiterated the position that a Preliminary Objection should be raised on pure points of law and not matters that must be ascertained or if what is sought is the exercise of judicial discretion.

Analysis and determination of the Preliminary Objection.

15. In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, the court expressed itself as follows on what constitutes a Preliminary Objection: -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

16. In the present case the Preliminary Objection is anchored on the Debtor’s claim that the Petitioner did not invoke the provisions of the Insurance Act which, according to the Debtor, is the Act applicable to the winding up of insurance companies as opposed to the Insolvency Act which, it maintains, applies to other companies in general.

17. The question which then arises is whether the Debtor’s Preliminary Objection is merited. The Debtor faulted the petitioner for relying on Section 424(1) (e) of the Insolvency Act in seeking its liquidation instead of Section 122 as read with Section 41 of the Insurance Act.

18. Section 384 and 424(1) (e) 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).”

“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;

19. Sections 122 and 41 of the Insurance Act on the other hand stipulates as follows:

“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.”

20. Having regard to the above cited provisions, I find that the issue of whether the Insurer Company is unable to pay debt and has therefore breached Section 41 of the Insurance Act by failing to maintain the capital adequacy ratio of 100% is a question of fact that can only be

debunked at the hearing of the main petition.

21. I further find that the mere fact that the petitioner did not specifically refer to certain sections of the Insurance Act does not necessarily render the petition fatally defective as the court will still be able to consider if the Petitioner complied with the said sections of the Insurance Act, an exercise that can only be achieved at the hearing of the petition.

22. For the above reasons, I find that the Preliminary Objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the petition.

23. I will now turn to consider the arguments made in respect to the Petition.

24. At the hearing of the Petition, **Mr. Khisa**, learned counsel for the Petitioner submitted that the Petitioner issued the Debtor with numerous statutory notices which were not answered within the prescribed time. He further added that the Petitioner advertised the petition and there are parties who have joined the suit thereby confirming that the company is unable to pay its debts.

25. It was submitted that the Company and the Petitioner entered into a consent wherein the company agreed to settle the debt but that the Company did not honour the terms of their consent. He clarified that the Petitioner's aim was not to enforce payment by the Company but to seek orders of insolvency on the basis that the Company is unable to pay its debts.

26. **Mr. Kibet**, learned counsel for the Debtor, opposed the petition and submitted that Section 384 of the Insolvency Act should be read together with Section 122 of the Insurance Act CAP 487. He further submitted that the Creditor had not fulfilled the condition set out by law on winding up of an insurance Company.

27. **Mr. Awele**, also appearing for the Debtor opposed the petition and submitted that the nominal share Capital of the company was more than Kshs. 2 billion thus placing the Company in a redeemable financial position. He urged the court to allow the Company to continue operating so as to strive for a better outcome for the Creditors. Counsel further stated that the Company is regulated by the Insurance Act whose provisions should be invoked and exhausted before the issuance of any liquidation order.

28. Counsel submitted that Sections 41, 67(c), 122 and 121 of the Insurance Act are categorical that the Petition cannot be determined before deferring the matter to the regulatory authority of the Commissioner of Insurance. He further termed the petition as fatally defective for non-joinder of the Commissioner of Insurance and reiterated that the Insolvency Act ought to be read together with the Insurance Act.

Analysis and Determination.

29. I have carefully considered the Petition, the responses made by opposing parties and the authorities that they cited. I find that the main issues for determination are as follows: -

a. Whether this Insolvency Petition based on the process and procedure that is prescribed by the Law.

b. Whether the Court should declare the Company insolvent and place it under an interim Liquidator.

30. Regarding the first issue, counsel for the Debtor/Company submitted that since the Debtor is a regulated insurance company, sections 41 and 122 of the Insurance Act ought to be complied with. I have already highlighted the provisions of the Act in this judgment.

31. As I have already stated in this judgment, Debtor's case is premised on the claim that the liquidation framework applicable for liquidating insurance companies in the Insurance Act mandates the Commissioner of Insurance to be present in the Liquidation proceedings commenced in court. It was argued that the liquidation process is draconian and a serious matter which requires the court to be satisfied that all procedural steps are adhered to especially Section 41 of the Insurance Act.

32. In determining a similar matter, Nyakundi J. observed as follows in *Invesco Assurance Company Limited v Dama Charo Nzai & 58 others* [2019] eKLR: -

“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.”

33. While appreciating the arguments made by the parties herein, I am alive to the fact that the law is generous in providing the procedure to be adopted in liquidating Companies. The Insurance Act, which the Debtor relied upon, provides for a detailed procedure that mandates the Commissioner of Insurance to be present in liquidation proceedings that are commenced in court. The Insolvency Act also provides for the procedure to be adopted when liquidating a company. The Creditor herein opted to use the Insolvency Act and complied with all the prerequisite steps expected in such a process. I therefore find that the petition is properly before the court.

34. On the second issue regarding whether or not the Court should declare the Company insolvent and place it under an interim Liquidator. The Petitioner urged the court to liquidate the Company on the basis that it is unable to pay its debts. It was not disputed that the Company/Debtor is indebted to the petitioner. This is evident from the Consent order dated 24th October 2019. The petitioner pleaded that it exhausted all the possible avenues to realize its money to no avail.

35. **Section 384 (1) (2) of the Insolvency Act** deals with circumstances under which a Company can be declared as being unable to pay its debts. The section stipulates that: -

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).

36. In the case of *Rosenback & Co Pty Ltd v Singh's Bazaans Ply Ltd* 1962 SA 593 it was held that: -

“That the court will have regard to the fact that a creditor who cannot obtain payment of his debt is entitled as between himself and the company ex-debits justifier 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's 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 (sic) on.”

37. 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 Petitioner's 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.

38. 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.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nderitu for Awele for the Company Invesco Assurance.

Mr. Lesaigor for Khisa for Petitioner.

Mr. Kimutai also for the company

Court Assistant: Sylvia.