



Kinyanjui Njuguna & Co Advocates v Invesco Assurance Limited & another (Insolvency Petition E155 of 2019) [2021] KEHC 403 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E155 OF 2019
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

KINYANJUI NJUGUNA & CO ADVOCATES PETITIONER

AND

INVESCO ASSURANCE LIMITED APPLICANT

AND

PUBLIC TRANSPORT INVESTMENT COMPANY LIMITED RESPONDENT

RULING

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 Debtor opposed the petition by way of Preliminary Objection and in a judgment delivered on 8th March 2021, this court rendered itself, in part as follows: -

“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 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.

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.”

3. In compliance with the orders issued on 18th March 2021 the Insurance Regulatory Authority (IRA) filed its report dated 12th May 2021 in court. In the said report, the Regulator found as follows at paragraph 2 thereof.

2. Non- compliance with provisions of the [Insurance Act](#).

Since 2010, the insurer had not been able to fully meet the required capital requirements as per the [Insurance Act](#). This resulted in the insurer being issued with licenses on condition that they meet the solvency requirements.

The insurer over the years continued to give compliance action plans to the authority none of which has been implemented.

Unfortunately, the situation at the insurer has continued to deteriorate and the insurer has struggled to meet regulatory requirements ever since it was revived.



The insurer does not therefore meet the capital adequacy requirements and several other regulatory requirements.

4. The IRA's report precipitated the filing of the 2 applications that are the subject of this ruling, namely; The application dated 22nd 28th June 2021.

Applications

5. Through the application dated 22nd June 2021, the applicant, Public Transport Investment Company Ltd, (PTIC) seeks orders to arrest and/or stay the final orders set to be issued by this court and further, that the liquidation proceedings be stayed for a period of 5 months to enable the applicant take over the management of the respondent company with a view to resolve the sums claimed by the Petitioner/ Creditor or in the alternative, formulate a voluntary arrangements for consideration by Creditors of the respondent company.
6. The petitioner opposed the application through the replying affidavit of Kinyanjui Theuri who avers that: -
 1. That the application is incomplete, a nonstarter, a waste of precious judicial time, lacks merit and ought to be dismissed.
 2. That the application is tantamount to an appeal against the court's own judgment delivered on 18th March 2021.
 3. That the Company has already appealed the judgment of 18th March 2021 and has an application for stay pending Appeal dismissed by the Court of Appeal.
 4. That the present application is only meant to delay the early conclusion of this matter and this court should not entertain it.
 5. That the route that the Company ought to have taken is to demonstrate full compliance with all legal requirements under the relevant Laws.
 6. That the Company only wants to prolong the conclusion of this matter while still conducting business and collecting premiums without settling its debts.
 7. That the Company is seeking to reopen these proceedings which have already been concluded.
 8. That the only avenue available to the applicant is an appeal which has already been filed.
 9. That the Company should not be allowed to approbate and reprobate by litigation in the Court of Appeal and in this court at the same time over the same issue.
 10. That this court is therefore is technically functus officio except for issuance of final orders.
 11. That the Company has severally told this court that they are negotiating settlement with the creditor but they are never interested in resolving the matter at all.
 12. That I urge this court not to allow the side shows by the company but proceed to determine the matter fully and expeditiously.



13. That the unsuspecting insuring public continue to be at risk and company will not be in a position to cover them.
 14. That the company may hide and dispose of its assets and misuses premiums as the matter continues pending thus resulting to a shell company with no assets by the time the Official Receiver is appointed.
 15. That the Company is unable to meet the terms of the Consent/Court order to payment by instalments this court had already determined that the company is unable to pay its debts and the Insurance Regulatory Authority submitted its report confirming that the Company is by breaching mandatory provisions thus making it extremely necessary that final orders be issued.
7. Through the application dated 28th June 2021, the Petitioner seeks final orders after the judgment entered on 18th March 2021 and that the Company be stopped from issuing Insurance covers. The respondents did not file any response to the application.
 8. Parties canvassed both applications by way of written submissions which I have considered.
 9. Mr. Shah, learned counsel for the Member/Applicant, submitted that since the application dated 22nd June 2021 is brought under Section 781 and 782 of the *Companies Act* as a derivative action for orders against the Company, no leave is required to make the application. He noted that the Company's affairs are being conducted in a prejudicial manner and that owing to the fact that the member had invested close to 1.8 billion shillings in the company, its liquidation is not the proper path as it would elevate the petitioner to a preferential creditor contrary to the provisions of Section 4(1) (5) of the *Insolvency Act* that requires all creditors to be treated equally.
 10. Counsel urged this court to accord the applicant the opportunity to revive the Company. Reference was made to the decision in *Synergy Industrial Credit Limited vs Multiple Hauliers (EA) Limited* [2020] eKLR where the court found that mechanisms could be put in place to keep the Company as a going concern considering that the Petitioner is not the only party with interests in the company. It was further submitted that the court is not functus officio as it can still perfect its orders.
 11. Counsel further argued that even though the court found that the Company cannot service its debts, steps could still be taken to revive the company so as to enable it continue as a going concern.
 12. Mr. Kibet advocate for the Company, submitted that the report by Insurance Regulatory Authority should be expunged from the court record and that the Commissioner of Insurance should furnish the applicant with evidence on how he arrived at the said report. He added that the report contravenes Article 47 on Fair Administrative Act as the commissioner filed the report without seeking or obtaining the applicant's input and despite the fact that the same Insurance Regulatory Authority had licensed the company to operate for the last 10 years.
 13. Counsel submitted that Insurance Regulatory Authority cannot issue the Company with licences and at the same time issue a report that the company was not in a good financial position. He noted that following the company's turnaround strategy, the sum of Kshs 3 million had been paid to the Petitioner towards settling the outstanding debt and that a liquidation would therefore negate Section 3 of the *Insolvency Act* by shutting down a company that still has a fighting chance.
 14. Mr. Awele, also acting for the Company, submitted that under Sections 42 and 44 of the *Insurance Act*, the Commissioner of Insurance cannot unilaterally determine that an Insurance Company does not meet the solvency margins without giving notice to the insurer to give a valuation or seeking



an independent valuation of the assets. Reference was made to the decision in *Commission of Administration of Justice vs Insurance Regulatory Authority & Another* where the court underscored the principle that public interest transcends other interests.

15. Mr. Khisa, learned counsel for the petitioner, submitted that the court should not expunge the report by Insurance Regulatory Authority as the company was duly represented by 2 advocates at the time the court made orders directing Insurance Regulatory Authority to file its report.
16. Counsel noted that a similar application for stay filed before the Court of Appeal was dismissed. He added that the instant application is an abuse of the court process and that allowing it will be tantamount to the court sitting in appeal in its own decision. It was submitted that the Insurance Regulatory Authority report was made in response to a court order and that the report was meant for the court and not the parties. Reference was made to the decision in *Law Society of Kenya vs Attorney General and 2 Others* [2019] eKLR.
17. Counsel argued that since the member's application that was filed after the entry of judgment, without leave, it is irregular and should not be allowed because the company is a separate legal entity from its members. He additionally submitted that the petitioner has sufficiently established that the Company is unable to pay its debts and that the orders sought in the petition should be allowed. He further submitted that the court became functus officio upon delivering its judgment on 18th March 2021.
18. Counsel cited the decision in *Clesoi Holdings Ltd vs Prime Bank Ltd* for the argument that the court becomes functus officio after delivering a judgment in which case, no subsequent applications can be allowed. Counsel observed that the new applications is a side show. Reference was also made to the decision in *Invesco vs Daima Charo Njai* [2019] eKLR for the argument that public interest requires that the Company be liquidated and that it should not collect premiums when it cannot pay debts.
19. In a rejoinder, the Company's counsel argued that under Section 121 of the *Insurance Act*, the Commissioner of Insurance is required to participate in Insolvency proceedings but that in the present case Insurance Regulatory Authority was roped into the proceedings at the tail end during the judgment which implies that the court sought to be guided by the commissioner in determining the solvency margins. Counsel maintained that the company is entitled to comment on the commissioner's report as it adversely affects its interests.

Analysis and determination.

20. I have considered the pleadings filed herein, the parties' submissions together with the authorities that they cited. The main issue for determination is whether the applicant/member has made out a case for the expunging/striking out of the Insurance Regulatory Authority's report dated 12th May 2021. When considering the main issue, the court will also determine the following issues: -
 - a. Whether the court is functus officio.
 - b. Whether the report by IRA should be expunged from the record.
 - c. Whether the applications dated 22nd and 28th June 2021 are merited.

Functus Officio

21. The Supreme Court of Kenya expounded on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR and cited, with approval, the



following excerpt from an article by Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832: -

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

22. The court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542at 550 to the effect that: -

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

23. In the instant case, this court held as follows in the impugned judgment:

“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.”

24. From the above extract of the judgment, it is clear that the court deferred the issuance of its final orders in the Petition in order to await the report from the Commissioner of Insurance. My finding is that in the circumstances of this case and considering the fact that the Commissioner’s report was yet to be availed and acted upon, the court cannot be said to be *functus officio*.

Expunge Report

25. The Company’s case was that the report by the IRA should be expunged from the record as it was obtained without the Company’s input contrary to the provisions of Article 47 of the Constitution on Fair Administrative Action. The report was also challenged on the basis that IRA did not reveal how it was arrived at.

26. On his part, the Petitioner argued that the report should not be expunged as the Company was duly represented by 2 advocates at the time the court directed IRA to file its report.

27. My finding is that the issue under challenge is not whether IRA should have filed its report or not but rather, whether the report reflects the true position of the financial affairs and status of the Company. The Company poked holes on the credibility of the report while arguing that it does not explain why



the Commissioner, despite holding the view that the Company did not meet the solvency levels, still went ahead to issue the Company with licences for a period of over 10 years.

28. As I have already noted in this ruling, this court, on its own motion and at the tail end of the judgment, directed the Commissioner to file its report in court so as to guide the court in making its final orders in the judgment. The IRA made a negative report against the Company to the effect that it does not meet the regulatory and capital adequacy requirements. The Company objected to the report on the basis that it was not accorded a hearing before it was made thus violating its rights to fair administrative action under Article 47 of the Constitution.
29. The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized. The Court of Appeal stated as follows in the case of *Judicial Service Commission vs Mbalu Mutava & another* [2014] eKLR: -
- “ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”
30. In the case of *Dry Associates Ltd vs Capital Markets Authority and Another*, [2012] eKLR the Court observed; -
- “ Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”
31. Bearing in mind the above jurisprudence, there is no doubt in my mind, that acting as it did, the Commissioner violated the Company’s right to a fair Administrative Action contrary to Article 47 of the Constitution. Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. Granting a party a hearing before taking action against him is no longer discretionary but is firmly entrenched in our Constitution as an inviolable right. This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test.
32. Having regard to the above analysis I find that the IRA report leaves a lot to be desired more so in view of the undisputed fact that Commissioner has over the years issued the Company licences to operate when he was well aware of its alleged dire financial status. This court is of the considered view that the IRA report fails the credibility test and cannot be adopted to guide the court in making its final orders in the judgment.
33. Through the application dated 28th June 2021, the Petitioner seeks orders that the court proceeds to issue final orders after the judgment was entered on 18th March 2021 and that the Company be stopped from issuing Insurance covers. The respondents did not file any response to the application. I find that



even though the application was unopposed, it was not really necessary as this court is still under an obligation to make its final verdict having already found that the Petition was merited.

34. This is however not to say that the court is in such a matter expected to act blindly or to move with haste and liquidate the Company in the face of a move by a party seeking to revive it as has been proposed by Public Transport Investment Company Ltd (PTIC) who seeks orders to arrest and/or stay the final orders for a period of 5 months to enable it take over the management of the Company with a view to resolve the sums claimed by the Petitioner/Creditor or in the alternative, formulate a voluntary arrangements for consideration by Creditors of the respondent company. I associate myself with the decisions in *Re Ukwala Supermarket Ltd* [2019] eKLR which cited *Matic General Contractors vs The Kenya Power & Lighting Co Ltd* (2001) LLR 4837 (CAK) wherein it was held: -

“ That liquidating a Company is a draconian step which amounts to Corporate execution.”

35. I note that the member’s application to be allowed time to revive the Company was filed in June 2021 and one can therefore say that PTIC has had ample time to make good its proposal to settle the Petitioner’s debt among the concerns of other creditors. I do not find that such a proposal will prejudice any party to these proceedings considering that the ultimate aim of the Petitioner and indeed all other creditors is to be paid the debt owed by the Company.
36. For the above reasons, this court will once again defer its final orders in the judgment and direct PTIC to file and serve its proposal on settlement within 60 days from today’s date.
37. Mention on 23rd February 2022.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER 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. Khisa for the Petitioner.

Ms Matata for Kibet for the Company.

Mr. Mwangi for Mwandume for IP Joseph Kinyanjui.

Ms Maore for Muthuma for Interested Party.

Mr. Shah for the Member Applicant.

Mrs Ndungu for IP Ibrahim Aferwoki.

Court Assistant: Margaret

