



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

INSOLVENCY/BANKRUPTCY CAUSE NO. 1 OF 2018

IN RE INVESCO ASSURANCE COMPANY LIMITED.....DEBTOR/APPLICANT

VERSUS

DAMA CHARO NZAI.....1ST CREDITOR

LNC (minor suing through mother and next

Friend ZJK).....2nd CREDITOR

DODI MOHAMED OMAR alias DODI MOHAMMED.....3rd CREDITOR

HHM (minor suing through mother

and Next friend DMO).....4th CREDITOR

LJC (minor suing through mother and

Next friend ZJK).....5TH CREDITOR

ZAWADI JOSEPHINE KATANA.....6TH CREDITOR

MANGISI MWAVADU MAGUNDA alias MAGISI

MAVACHO MAGUNDA.....7TH CREDITOR

RAMLA BONA MAKORANI alias RAMLA BOMA

MAKORANI.....8TH CREDITOR

FLORENCE WAMBUI CHIMBA.....9TH CREDITOR

MADINA OMAR BWAMADI.....10TH CREDITOR

SAFARI MITSANZE IHA.....11TH CREDITOR

BGC (minor suing through mother and

Next friend DCN).....12TH CREDITOR

EGC (minor suing through mother

and next friend DCN).....	13 TH CREDITOR
MONICA WAMUYU MUGANGA alias MONICA JACOB.....	14 TH CREDITOR
GEORGE THOYA IHA.....	15 TH CREDITOR
PT alias PHCST (minor suing Through mother and next friend MWM).....	16 TH CREDITOR
SYLVESTER KAI JEZA alias SYLVISTER KAI JEZA.....	17 TH CREDITOR
JAMES IHA KIRAO.....	18 TH CREDITOR
SALIM HASSAN RAJAB alias SALIM HASSAN RAJABI.....	19 TH CREDITOR
CHISHENGA KITI MWATSUMA alias CHISHENGA KITT.....	20 TH CREDITOR
LEWIS GAMBO DECHE.....	21 ST CREDITOR
ALBERT KATIMBO RANDU.....	22 ND CREDITOR
FEISAL MOHAMED NURIE alias FEISAL MOHAMES alias FEISAL MOHMAED NOOR alias FAISAL MOHAMMED.....	23 RD CREDITOR
ELAMO WARAB KHALIF alias ELAMO NOOR.....	24 TH CREDITOR
NYEVU KAZUNGU KANIKI.....	25 TH CREDITOR
WN alias ON (minor suing through mother and friend HMK).....	26 TH CREDITOR
STEPHEN KAHINDI KARISA.....	27 TH CREDITOR
HELLEN MWENDA KATANA.....	28 TH CREDITOR
NYAMAWI SANGA TEMBO.....	29 TH CREDITOR
CHRISTINE CHONGA MWAMBOGO alias CHRISTINE CHONGA NYAMVULA.....	30 TH CREDITOR
FK(minor suing through father and next Friend ECK).....	31 ST CREDITOR
EC(minor suing through mother and next Friend KCK).....	32 ND CREDITOR
ABY (minor suing through father and Next friend LBY).....	33 RD CREDITOR
JONATHAN MUNGUMBA CHARA.....	34 TH CREDITOR
REHEMA KITSAO alias REHEMA HARE.....	35 TH CREDITOR

KANZE KAZUNGU MBITHA (legal representative of the	
Estate of MARIELA KARISA KATANA(deceased).....	36TH CREDITOR
LUCY HAWADESA MOROA.....	37TH CREDITOR
EUNICE HAWAYU DEYE.....	38TH CREDITOR
PJ (minor suing through mother	
and next friend EHD).....	39TH CREDITOR
JS (minor suing through mother and next	
Friend EHD).....	40TH CREDITOR
ASHA HADADA NJUGUNA	
alias ASHA HADIDA NJUGUNA.....	41ST CREDITOR
GUIYATO DHADHO JEURI	
alias GUYATO DHADHA JEURI.....	42ND CREDITOR
HAZIJAH MKEAMARI NJIGI	
alias MKEAMARI DHIDHA.....	43RD CREDITOR
MARYAN YAHYE MOHAMED	
alias MARIAM YAHYA.....	44TH CREDITOR
MWANADIE MALIKA MUSA.....	45TH CREDITOR
OMAR ABIO WAYU alias OMARI ABIO.....	46TH CREDITOR
ELIZABETH NYADZUA KOLE.....	47TH CREDITOR
NADRA HABUYA NTIWANDA	
alias NADRA H. NTIWANDA.....	48TH CREDITOR
SO (minor suing through mother and next	
friend MMM).....	49TH CREDITOR
MOHAMED OMAR FADHILI (legal representative of the	
Estate of MARIAM ABOUD MAULID (deceased).....	50TH CREDITOR
DAMA NZAI RUWA.....	51ST CREDITOR
JUMWA GONA KENGA alias JUMWA GONA.....	52ND CREDITOR
MGANGA KENGA KASHINDO	
alias MUGONDA KENGA.....	53RD CREDITOR
KADHENGI BAYA GUNGA	
alias KANIKI KATHENGI.....	54TH CREDITOR

BENDERA KAINGU NGOMBO

alias BENDERA KAINGU.....55TH CREDITOR

JUMWA KIPONDA MWAVUO alias

JUMWA KIPONDA CHARO.....56TH CREDITOR

KR alias KC (minor suing

through mother and next friend

NCK).....57TH CREDITOR

ENF(minor suing through mother

and next friend JKM)58TH CREDITOR

RULING

1. Through a statutory demand filed on 15th November, 2018 issued pursuant to Section 384 of the Insolvency Act, 2015 and Regulation 77b of the Insolvency Regulations, 2016, Dama Charo Nzai and 57 other creditors who are now the respondents intimated to Invesco Assurance Co. Ltd, the Debtor/Applicant that unless the Applicant paid various sums of money owed to the respondents within 21 days from the date of the notice, the respondents would proceed to file for a liquidation order against the Applicant.

2. The Applicant responded to the statutory demand first by writing to the counsel for the respondents that the demand was disputed. This was followed by the application dated 27th November, 2018 brought pursuant to 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 in which the Applicant prays for orders as follows:

“1. THAT this application be certified as urgent and service of this application be dispensed with in the first instance.

2. THAT this Honourable court be pleased to issue an order restraining the Creditors herein from proceeding to file the intended petition and advertising the intended Insolvency Petition;

3. THAT the statutory demand be set aside and/or vacated.

4. THAT the costs of this Application be provided for.”

3. The application is based on the grounds on its face and supported by the affidavit sworn on 27th November, 2018 by Kennedy Abincha, the Chief Executive Officer of the Applicant and a supplementary affidavit sworn on 19th December, 2018 by Simon Kimutai, a Director of the Applicant.

4. In summary, the Applicant’s case is that if the respondents are allowed to file and advertise the intended insolvency petition, other creditors would make similar demands thus bringing the Applicant to its knees. Further, that the debt is disputed as the same has grossly been overstated invalidating the demand. The Applicant avers that several debts in the statutory notice do not meet the bankruptcy threshold of the minimum of Kshs. 250,000. Reference is made to the claims by the 14th, 16th, 23rd, 30th, 41st, 43rd, 44th, 45th, 46th, 48th, 49th, 50th, 51st and 57th creditors. The Applicant also states that part of the debt has been settled and there are several payment plans proposed between the Applicant and the creditors. It is also averred that some of the claims have been completely settled, an example being that of the 8th Creditor.

5. It is also averred that the unpaid amount in the claim by the 2nd Creditor is Kshs. 875,965 whereas a demand for Kshs. 4,859,051 has been made which is in any case above the statutory amount of Kshs. 3 million as per Section 5(b)(v) of the Insurance (Motor Vehicles Third Party Risks) Act as the insurer did not make a special arrangement for the extension of the cover. The Applicant avers that the same situation applies to the 5th Creditor whose claim exceeds Kshs. 3 million.

6. It is the Applicant’s position that the creditors have relied on Regulation 77b of the Insolvency Regulations which is a wrong provision in an attempt to mislead the court.

7. The Applicant’s position is that it has undergone significant structural changes including a change of the top management and a lack of proper handing over of matters leading to failure of filing appeals against the awards. Further, that the Applicant intends to lodge appeals hence the debt remains disputed.

8. The Applicant states that it is willing to pay off the unpaid decrees subject to an audit being done on the correct outstanding balances and upon agreement on a suitable settlement plan. The Applicant avers that the creditors’ inability to access its office was due to stringent

measures employed by the Applicant, the Applicant having been a victim of thieves disguised as auctioneers and as averred by the creditors, their auctioneers were not accompanied by police officers.

9. The Applicant further avers that the policy limit pursuant to the insurance policy between itself and the insured is Kshs.20 million and the creditors' claim exceeds that amount.

10. The Applicant alleges that it is one of the only two insurance companies covering public service vehicles countrywide and an insolvency petition will occasion irreparable harm to the Applicant and the public at large not compensatable by damages. It is the Applicant's case that it is in the interest of justice that it be accorded reasonable time to make settlement proposals of the audited decrees and that it is willing to abide by any terms and conditions the court may impose.

11. It is also averred that the creditors will not suffer prejudice that is not compensatable if the application is allowed. Further, that the statutory demand and the intended petition are only intended to embarrass the Applicant. Also, that the instant application has been filed without delay.

12. In response to the application, the creditors filed a replying affidavit sworn on 5th December, 2018 by their advocate, Geoffrey Kilonzo. Counsel for the creditors averred that the application is based on a misapprehension of the law and is an abuse of the court process, frivolous, vexatious, misconceived, ill-advised, intended to derail justice, not candid and a violation of basic fundamental rights.

13. It is stated that under Section 15(1) of the Insolvency Act, a bankruptcy application can be made by one creditor or jointly with other creditors. Further, that the creditors are domiciled in Kenya and hold decrees issued by courts within the Republic and the decrees have been returned unexecuted and unsatisfied wholly or in part.

14. The creditors' position is that the debts owing are for unsecured liquidated amounts payable to them and the Applicant appears unable to pay or is unwilling to pay them. Their averment is that the Applicant has kept its doors locked and refuses to allow the auctioneers to access the same compelling them to obtain breaking orders and to seek police intervention. Further, that the auctioneer assigned to carry out executions has revealed to the creditors' advocate that the Applicant's office has nothing of value that can be recovered to cover the sums in the warrants.

15. The creditors aver that as required by Section 30(3) of the Insolvency Act, the Applicant has failed to offer them security for the debt.

16. It is stated that the creditors' claims are all genuine and undisputed as no appeals have been preferred against the judgements and neither have applications for review or setting aside been instituted in the respective suits. Further, that the failure to honour the warrants derived from the declaratory suits against the Applicant constitutes an act of bankruptcy the Applicant having failed to pay the creditors.

17. It is averred that the Applicant has committed an act of bankruptcy and should not seek the sympathy of the court by urging that other creditors would be alerted by the filing of the intended petition. Further, that the reason is insufficient to bar the creditors from filing bankruptcy orders and justice demands that the creditors' pursuit should not be frustrated by an unwarranted court order.

18. Submitting in support of the application, the Applicant asserted that Regulation 16 of the Insolvency Regulations allows a debtor to apply to the court for orders to set aside a statutory demand on the grounds provided by Regulation 17(6) of the Insolvency Regulations. It urges that the court has wide discretion in considering the grounds as held in **Peter Munga v African Seed Investment Fund LLC [2017] eKLR**.

19. The Applicant urges that as the debt is disputed on substantial grounds the winding up court ought not to be used to ascertain the creditors' debt as was held in the case of **In Re the matter of Rumorth Group of Companies Limited [2016] eKLR**. The Applicant further urges that a disputed debt cannot form a basis of bringing an insolvency petition as was held in **Kenindia Assurance Company Limited v Administrator Nakumatt Holdings Ltd & another [2018] eKLR**, **In Re Safina Ltd [1996] eKLR** and **In Re Gilani Butchery Ltd [2004] eKLR**. The Applicants asserts that it made known to the creditors that it disputed the debt as per the grounds and averments in the application. Further, that it is not only disputing the correctness of the debt in the statutory demand but the very existence of the debt.

20. The Applicant also relies on the decision of **In Re Eagle Africa Insurance Brokers Kenya Limited [2014] eKLR** to urge that it is solvent having paid off part of the undisputed claims and proposed several payment plans. The Applicant submits that it has settled part of the debt as envisaged by Regulation 17(6) of the Insolvency Regulations and relies on the finding in the case of **In Re matter of Al'amin Insurance Brokers Ltd v In the matter of the Companies Act [2009] eKLR** in support of the proposition that a disputed debt should not lead to the placing of a company under administration.

21. Citing the decision in the case of **In Re Spencion Kenya Limited [2016] eKLR** the Applicant submits that the creditors have to prove that the debt is not only due but that the Applicant is unable to pay it.

22. In addition, it is urged that the proposed payment plans are not indicators of the Applicant's inability to pay the debt but rather its willingness to pay the correct amount. This, the Applicant asserts, is a show of solvency. Reliance is placed on the decision in the case of **In Re Lucton Kenya Limited [1997] eKLR** in support of this proposition. Further, that as decided in the just cited case insistence in full payment is suppressive and intimidating. Also that the creditors have refused to acknowledge the Applicant's proposed payment plans.

23. The Applicant emphasized that several of the debts do not meet the minimum bankruptcy level to warrant the statutory demand hence the same is an abuse of the court process and waste of court resources. Further, that a petition presented with the sole intention of pressurizing the debtor to settle the debt ought to be disallowed as was held in **Al'amin Insurance Brokers Ltd (supra)**.

24. Finally, the Applicant prays that it be awarded costs since costs follow the event as was held by the Supreme Court in **Jasbir Singh Rai**

& 3 others v Tarlochan singh Rai & 4 others [2014] eKLR.

25. On their part, the creditors have submitted that the Applicant has not met the threshold for setting aside or vacating the statutory demand making the application frivolous and an abuse of the court process. Further, that the application is constitutionally unsound as it seeks to bar a party from going to court thus infringing on their right to be heard in a court of law. It is urged that the creditors ought to be allowed to file the substantive application so that their grievances are addressed in court where the Applicant has a right of reply.

26. The creditors point out that the Applicant has made admissions on debts owing and acknowledges them but is skirting around the issue to create a non-existent dispute. Further, that the debts have not been appealed against or set aside for exceeding the statutory limits. According to the creditors, the failure to honour the debts when they became due constitute an act of bankruptcy and so does the act of closing doors against the auctioneers. The creditors assert that the ability to pay the debt is in question hence the insolvency proceedings and they cannot therefore be accused of forcing the Applicant's hand into making payment.

27. It is the creditors' view that the Applicant aims at misleading the court by stating that the amount of Kshs. 1,664,473 as the auctioneer's fees ought to be credited to them. Further, that the Applicant claims that its maximum liability at any one time is Kshs. 20 million while the statutory demand exceeds this limit but fails to reveal that it knows that the statutory demand is comprised of judgements arising from different accidents and different motor vehicles belonging to different insured persons.

28. The creditors also urge that any part-payments were made prior to the filing of the declaratory suits.

29. It is further urged by the creditors that the Applicant seeks to discombobulate the court that as the minimum bankruptcy level is Kshs. 250,000, there are debts that fall below this. It is the creditors' case that the Applicant's assertion is disingenuous since the statutory demand, which is only one, exceeds the bankruptcy level and the intended petition would therefore be one. The creditors support their assertion by pointing out that Section 15(1) of the Insolvency Act allows one or more creditors to make a joint application.

30. It is the creditors' case that the Applicant is unable to pay its debts as per Section 384 of the Insolvency Act for reasons that the execution issued on the decrees was returned unsatisfied in whole or part and that the Applicant has closed its doors to auctioneers. Also, that the Applicant has not approached the court that issued the decrees for purposes of setting them aside or reviewing them. It is urged that Section 6 of the Civil Procedure Act bars this court from determining disputes designated for other courts.

31. Lastly, the creditors assert that the Applicant ought to deposit the entire amount stated in the statutory demand or pay the amount it does not dispute as it has failed to offer security as required by Section 30(3) of the Insolvency Act. The creditors dispute that there is a payment plan by the Applicant. Further, that there is no evidence demonstrating solvency. The creditors conclude that the application aims to seek the court's sympathy by claiming that other creditors will join the petition yet the said assertion is not a ground for setting aside the statutory demand.

32. The instant application is brought pursuant to 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.

33. Section 17(2)(d) bars the making of an application for a bankruptcy order where there is an outstanding application, like the instant one, seeking to set aside the statutory demand in respect of the debt or any of the debts.

34. Section 17(3)(b) provides that:

“(3) For the purposes of subsection (2)(c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either –

(a)....

(b) execution or other process issued in respect of the debt on a judgement or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part.”

35. The subsection (2)(c) referred to in subsection (3) provides that an application to the court for a bankruptcy order can only be made if at the time the application is made **“the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay.”**

36. Regulation 16 of the Insolvency Regulations provides the procedure for seeking to set aside a statutory demand. Regulation 17(6) provides the grounds upon which an application to set aside a statutory demanded can be granted. Although the Applicant only zeroed in on ground (b), I can only do justice by reproducing the entire subsection (6) which states:

“17(6) The Court may grant the application if—

(a) the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;

(b) the debt is disputed on grounds which appear to the Court to be substantial;

(c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the Court is satisfied, on other grounds, that the demand ought to be set aside.”

37. The Applicant’s application rests on the ground that it disputes the debt on grounds which should appear to this court to be substantial.

38. The grounds upon which the debts are disputed are that some of the claims have been settled in part but the statutory demand does not take this fact into account; that two of the claims exceed the statutory amount indicated in Section 5(b)(iv) of the Insurance (Motor Vehicles third Party Risks) Act; and that one of the claims has no indication of the case number. Other grounds are that the Applicant is willing to settle the debt; that it has made payment proposals not acknowledged by the creditors; that the aggregate amount in the statutory demands exceeds the insurance limit it holds with the insured; and that some of the claims are below the minimum bankruptcy level to warrant the continuity of the statutory demand.

39. Section 15(1) of the Insolvency Act provides that:

“A bankruptcy application may be made to the Court in accordance with the provisions of this Part –

(a) By one of the person’s creditors or jointly by two or more of them.”

40. Section 17(1) of the same Act provides that:

“One or more creditors of a debtor may make an application to the Court for a bankruptcy order to be made in respect of the debtor in relation to a debt or debts owed by the debtor to the creditor or creditors.”

41. Subsection (2) of the same Section provides that the application contemplated by subsection (1) can only be made, for among other reasons, if **“(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level.”**

42. Regulation 3 of the Insolvency Regulations states that:

“For the purposes of the Act, the prescribed bankruptcy level for all other bankruptcies is two hundred and fifty thousand shillings.”

43. It is noted that the creditors have made a single statutory demand for an aggregate amount of Kshs. 30,777,739. The demand is allowed by Section 7(2)(a) of the Insolvency Act and exceeds the bankruptcy level of Kshs. 250,000 as prescribed by Regulation 3. Consequently, the Applicant’s assertion that some of the claims fall below the prescribed bankruptcy level is unsustainable as a ground for setting aside the statutory demand.

44. It is not in dispute that each of the claims is for an unsecured liquidated amount payable to an identified creditor and the Applicant save for disputing the amount of some of the debts acknowledges the demand for payment by the creditors. The Applicant having deponed that it has settled part of the debt cannot be held to have rightly submitted that the debt is non-existent.

45. The Applicant has alleged that the debt in the statutory demand is overstated and calls for the invalidation of the demand. The position in law is that an overstatement of the debt does not invalidate the demand except when certain conditions are met. Section 17(6) of the Insolvency Act provides that:

“17(6) An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless—

(a) the debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing; and

(b) the debtor makes that notification within the period specified in the demand for the debtor to comply with it.”

46. In **Peter Munga** (supra) the Court held at paragraph 60 that:

“It is important to point out that the mere overstatement of amount claimed in a statutory demand does not perse invalidate the demand. The debtor is obligated to contest the amount and within the requisite period and additionally it must be such as to cause prejudice and injustice to the debtor if the demand was allowed to subsist.”

47. There is the debtor’s notification of the overstatement through the letter dated 20th November, 2018 to the creditors which was within the 21 days of the statutory demand. Does this of itself invalidate the demand? It does not for Section 17(7) of the Insolvency Act provides that:

“17(7) A debtor complies with a demand that overstates the amount owing by—

(a) taking steps that would have complied with the demand had it stated the correct amount owing, such as by paying the creditor the correct amount owing plus costs; and

(b) taking those steps within the period specified in the demand for the debtor to comply.”

48. The Applicant has indicated the amount it owes and the steps it took by settling part of the amount. The last payment as by its annexures was in April, 2018. The statutory demand was made in November, 2018 and the Applicant, save for disputing the correctness of the debt in writing, did not take any step by paying what it admits to be the amount owing within the period of 21 days as per the statutory demand.

49. This does not answer the question as to whether the debts are disputed. The matter can be looked at from two levels. One of the levels is that stressed by the creditors. Their position is that the debts arose from court decrees which have not been appealed or reviewed. They also point out that their attempts to execute the decrees have been unsuccessful meaning that the Applicant is unable to pay its debts. Looking at the issue from this point of view, it becomes easy to agree with the creditors that there is no dispute about the debts. They have been certified through the court process as payable.

50. The second level upon which to look at the issue is that adopted by the Applicant. The Applicant's case is that the creditors have not factored in the part-payments it has made thus rendering the debts disputable. Is the Applicant correct in its assertions? The evidence placed before the court by the parties will determine this issue.

51. In support of its assertions that it had partly paid some of the debts, the Applicant exhibited copies of some cheques and remittance slips showing that monies had been paid to the creditors' counsel. The two remittance slips are for transfer of funds done in January, 2018. Of the five copies of the cheques, the last one was issued on 12th April, 2018.

52. Another document exhibited by the Applicant is a notice of intention to file a declaratory suit dated 29th June, 2018 addressed to the Applicant's Claims Manager by the creditors' counsel in specific reference to **Malindi CMCC No. 273 of 2016 Veronica Njeri Mburu a.k.a. Veronica Njeri v Maryam Omar Abdulrehman & 2 others**. Through the notice counsel acknowledges receipt of Kshs. 2,124,035 out of the judgement sum of Kshs. 4,505,148. The Applicant was being threatened with filing of a declaratory suit if the balance of Kshs. 2,735,016 was not received within ten days. The Applicant claims the part-payment has not been acknowledged in the statutory demand. This claim appears to be unfounded. It is apparent that counsel for Veronica Njeri Mburu a.k.a. Veronica Njeri did indeed go ahead, as threatened, to file a declaratory suit against the Applicant being Malindi CMCC No. 231 of 2018 for which judgement for Kshs. 3,077,798 was entered. It is apparent that the part payment was therefore taken into account at the time the declaratory suit was filed.

53. It is also noted that the decrees exhibited by the creditors were all issued after the payments referred to by Applicant had been made. As correctly submitted by the respondents, if the Applicant has any issues with the figures reflected in the decrees it ought to approach the courts that issued them. At this stage we have valid decrees in favour of the creditors which have been returned unsatisfied in whole.

54. In light of the evidence placed before the court, the Applicant's case should fail at this stage and the creditors should be allowed to carry on with the course they have elected. The Applicant did however raise other issues.

55. The Applicant submitted that a few of the debts exceeded the statutory amount provided by Section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act. The said Section limits liability to a maximum of Kshs. 3 million arising out of a claim by one person. Counsel for the creditors asserted that this issue has not been taken up by the trial court.

56. Another issue raised by the Applicant is that the debt exceeds the insurance limit of Kshs. 20 million. On this, it ought to be pointed out that the Kshs. 20 million insurance limit refers to insurance cover taken out per vehicle hence the issue cannot be used to shield the company from the debt in the statutory demand which the creditors aver arose from awards in respect of accidents involving different motor vehicles.

57. There was the cry by the Applicant that it is one of the only two insurance companies that cover risks in the public transport sector and it is in the public interest that it should be allowed to continue operations. Secondly, the Applicant averred that there will be a run in on its assets were the creditors allowed to advertised the intended petition.

58. In **Peter Munga** (supra) the Court held that:

“[26]. My view is that, when asked to set aside a demand on any other ground other than the grounds stated under paragraphs (a),(b) and (c), the question then becomes whether the applicant-debtor can show a substantial reason akin to the reasons under the preceding three paragraphs. The court must also consider the consequences of setting aside the demand and whether the creditor ought to pursue the bankruptcy proceedings rather than engage in a litigation that is obviously bound to succeed in his favour. The test, which is not necessarily conclusive, is whether it would be unjust for the statutory demand to give rise to insolvency proceedings in the particular case.”

59. Section 17(6)(d) of the Insolvency Regulations does empower the court, if satisfied, to set aside a statutory demand on other grounds. In **Peter Munga** it was observed that:

“ It is evident when one reads paragraph (d) above that the grounds for the setting aside of a statutory demand are not limited by statute. Paragraph (d) opens it up and gives the court a spacious discretion. It is certainly not possible to foresee all the instances which may properly fall under paragraph (d) of Regulation 7.”

60. It is a miracle for a company against which a bankruptcy order has been made to resurrect from the bankruptcy graveyard. On the other

hand, an insurance company that is no longer capable of meeting its obligations to the insured is a danger to the public. It is like a rabid dog and it needs to be put to sleep. The court has a duty to balance the interests of the company and those of the public at large. Whereas it is a good policy that commercial companies should be allowed to thrive, it is also in the public interest that an entity that is no longer capable of meeting its obligations should be liquidated.

61. The Applicant did indicate that it has just undergone restructuring and may need a little more time to put its house in order. The creditors on the other hand have the right to enjoy the fruits of judgement.

62. Section 16(2) of the Insolvency Act empowers this court to stay proceedings on a bankruptcy application on the ground that the court is of the opinion that a requirement of the insolvency laws has not been complied with in material respect. Such a stay can be accompanied by conditions. In the case of **In Re Lucton Kenya Ltd** (supra), Aganyanya, J (as he then was) stayed the statutory notice on condition that the sum claimed by the creditor was deposited in court in 30 days.

63. A suspension of the bankruptcy petition was also done in the case of **In Re Eagle Africa Insurance Brokers Kenya Limited [2014] eKLR** subject to the debtor meeting certain conditions.

64. In the case before me, I find no reason why the statutory demand should be set aside as prayed by the Applicant. However, in order to allow the Applicant to put its house in order owing to the large claim by the creditors, I suspend the creditors' statutory notice dated 16th November, 2018 for a period of six months from the date of this ruling. The suspension of the demand is on condition that the Applicant pays to the creditors the sum of Kshs. 10 million within 60 days from today's date. It should also file a proposal in court on how it intends to liquidate the balance within the period of the suspension of the demand notice. Failure to comply will lead to the automatic reinstatement of the statutory demand for any balance outstanding at that time. The creditors/respondents shall have the costs of the application.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT