Makatiani v African Merchant Assurance Company Limited (Insolvency Petition E001 of 2024) [2025] KEHC 99 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 99 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

INSOLVENCY PETITION E001 OF 2024

AC BETT, J

JANUARY 17, 2025

THE INSOLVENCY ACT 2015

BETWEEN

GEOFFREY MAKATIANI ..... PETITIONER

AND

AFRICAN MERCHANT ASSURANCE COMPANY LIMITED ..... DEBTOR

RULING

1. This Ruling arises from a preliminary objection dated July 29, 2024 which is brought pursuant to Regulation 77B of the Insolvency Regulations, Section 41, 121 and 122 of the *Insurance Act* and Section 381 (1)(a) of the *Insolvency Act*.

2. The preliminary objection was raised by the Debtor herein against the Creditor's petition for liquidation dated 10th April 2024. The petition seeks, inter alia, the liquidation of the African Merchant Assurance Company Limited by this court under the *Insolvency Act* 2015. The petition was precipitated by a cumulative debt of Kshs. 1,638,666/= which the Creditor claims that the Debtor has failed to settle despite several requests and reminders.

3. The Preliminary Objection is premised on the following grounds:

    a. That the petition dated 24th April 2024 is superfluous, incompetent and an abuse of the court process and the same is fatally defective for want of both procedural and substantive law.

    b. That the statutory demand dated 18th March 2024 and attached to the Petition offends section 384 (1) of the *Insolvency Act* as the same is not signed by the creditor hence invalidating the Notice.

    c. That the Petition seeks liquidation of an Insurance Company yet the creditor unjustifiably and maliciously failed to notify the Commissioner of Insurance to enable the Commissioner's

participation in the proceedings as required by section 121 of the *Insurance Act*. Such failure makes the petition incurably defective and the same should be struck out in limine.

d. That an Insolvency petition seeking to liquidate an Insurance Company cannot be prosecuted under the *Insolvency Act* in isolation and in exclusion of the *Insurance Act*, which puts in place certain measures to protect policy holders who must be considered before a liquidation order is issued against an Insurance Company.

e. That the creditor failed to plead breach of section 41 as read with section 122 of the *Insurance Act* hence the petition herein is incurably defective and the same should therefore be struck out in limine.

f. That the declaration of insolvency of an insurance company is a process spelt out in the *Insurance Act* which the creditor herein has violated and disregarded.

g. That no proof of the debtor's inability to pay the debt or in other words insolvency has been attached by the creditor as is necessary before such an order is issued.

h. That the appropriate orders for such a matter cannot be issued by this honourable court without contribution, participation and input of the Commissioner of Insurance.

4. The Creditor opposed to the Preliminary Objection and filed a replying affidavit dated 28th October 2024 and sworn by the Creditor's advocate. The Creditor's advocate averred that the Debtor was served with a statutory demand which was received and signed contrary to the Debtor's assertions. She asserted that the Commissioner of Insurance was served with the petition via email on the 30th of July 2024 and a copy of the email extract was annexed to the Replying Affidavit. She contended that failure of an Insurance company to pay off a debt claimed after 21 days of service of a Statutory Demand is a ground for declaration of insolvency of the Debtor. She advanced that the Debtor has failed to pay its debt which is due and owing and remains unpaid till date.

Submissions

5. The preliminary objection was canvassed by way of written submissions.

6. The Debtor filed its submissions dated 17th October 2024 where Counsel for the Debtor submitted that the Creditor failed to adhere to the prescribed procedure for filing a petition for liquidation. They averred that Insurance companies are unique due to the sensitive nature and public interest associated with their operations thus making their liquidation process distinct from that of normal companies. Counsel advanced that winding up of Insurance companies under the *Insolvency Act* can only be applied together with the provisions of the *Insurance Act* which comprehensively provides for winding up procedures for such companies.

7. They posited that the involvement of the Commissioner as envisioned in Section 121 of the *Insurance Act* and proving the Debtor's inability to pay as provided for under Section 122 of the *Insurance Act* are crucial procedures that the Creditor ought to have abided by. They averred that service to the Commissioner ought to have been proven by an Affidavit of Service detailing the mode, date and particulars of the process server but the Creditor failed to do so.

8. Counsel submitted that failure to serve the Commissioner of Insurance is a critical omission that can only be cured by restarting the process since the involvement of the Commissioner helps protect the interests of policyholders, creditors and other stakeholders who may be affected by the liquidation process. The Debtor relied on the case of *Kinyanjui Njuguna & Co. Advocates v Invesco Assurance Limited* (2021) eKLR and the case of *Invesco Assurance Company Limited v Dama Charo Nzai*

& 58 Others (2019) eKLR where the courts emphasized the importance of the involvement of the Commissioner of Insurance in winding up proceedings involving Insurance Companies.

9. They further submitted that the Creditor failed to demonstrate the Debtor's inability to pay as per Section 122 of the *Insurance Act*. They relied on the case of *Intona Ranch Ltd v O'Brien* (1922) KLR 1 where the court held that there must be proof of insolvency and/or a company's inability to pay its debts since in Insolvency proceedings a winding up order is not automatic. Counsel contended that the Creditor's allegations that the Debtor is unable to pay its debts do not meet the statutory requirements in Section 122 as read with Section 41 of the *Insurance Act*. They argued that the Creditor has neither pleaded that the company has failed to meet the solvency margins prescribed under Section 41 of the *Insurance Act* nor tendered any evidence to prove the same to the applicable standard.

10. Counsel further submitted that the Debtor has consistently conducted business while fulfilling all its financial obligations as demonstrated by its publicly declared book of accounts published in widely circulated national newspapers and that it would be outrageous to allege that it is insolvent and unable to meet its financial obligations. They finally submitted that the court should dismiss the Creditor's Petition with costs to the Debtor.

11. The Debtor's Counsel filed submissions dated 25th October 2024 reiterating the contents of the Replying Affidavit. Counsel argued that contrary to the Debtor's assertions, the Commissioner of Insurance was served with the instant petition through email on 30th July 2024 and that he was later served with a Mention Notice jointly with the Petition which were received by signing and stamping on 9th August 2024.

12. Counsel further submitted that the procedure for liquidation by the courts is provided for under Section 77B of the *Insolvency Act* (Amendment) Regulations 2018 which they duly followed. They relied on the case of *Kenya Artisans Limited v Chemical & Allied Workers Union* (2021) eKLR where the court enunciated similar views. They further posited that Section 384 of the *Insolvency Act* provides the circumstances under which a company is unable to pay its debts. Counsel submitted that the Debtor has not denied the debt but has simply refused to pay the debt by hanging on the allegation that the Commissioner of Insurance has not been served and that the creditor has failed to prove the debtor's inability to pay its debts. The Creditor prayed that the Preliminary Objection be dismissed with costs awarded to the creditor.

Analysis

13. I have considered the preliminary objection, the parties' affidavits and the parties' respective submissions. I note that the only issue for determination by this court is whether the preliminary objection is merited.

14. The law in regard to preliminary objections is well settled. In the case of *Mukisa Biscuits Manufacturing Co. Limited v. West End Distributors Ltd.* [1969] EA 696, the court stated as follows:-

> " 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 pleading and which if argued as preliminary objection may dispose of the suit.
>
> In other words, for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion."

15. Similarly, the Court in the case of *Oraro v Mbaja* [2005] eKLR 141, the court held as follows in respect of preliminary objections:-

> " A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection; anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

16. In *Hassan Ali Joho & Another v . Suleiman Said Shabhal & 2 Others* [2014] eKLR, the Supreme Court stated as follows:-

> " ...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."

17. From the above cited authorities, it is clear that for a preliminary objection to be successful, it must be on a matter of law which is capable of disposing off the suit and it must not be blurred by factual details calling for evidence or it must not call upon the court to exercise its judicial discretion.

18. On the first ground of objection, the Debtor herein contends that the failure of the Creditor to append his signature on the statutory demand offends Section 384 (1) of the *Insolvency Act* thus invalidating the notice. This ground falls within the ambits of preliminary objections as enunciated in the cases cited above.

19. Section 384 (1) of the *Insolvency Act* provides as follows:

> " 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."

20. Courts have applied stringent measures when determining the validity of a statutory demand, especially on the format, bearing in mind the implication that a statutory demand might have on a

debtor. The court in *Flower City Limited v Polytanks & Containers Kenya Limited* (2021) eKLR held that: -

> " There is no doubt that a Statutory Demand is an important element of the Creditors' Bankruptcy Petition as it is essentially a test of solvency."

It is therefore important that creditors, when drafting statutory demands, should be careful to adhere to the provisions of the *Insolvency Act* and the Insolvency (Act) Amendment Regulations.

21. The court in *Blueline Properties Limited v Mayfair Insurance Company Limited* [2019] KEHC 7673 (KLR) interpreted Section 384 (1) of the *Insolvency Act* to mean that a statutory demand can only be issued by a creditor. The court held as follows: -

> " Section 384 (1) of the *Insolvency Act* requires the Statutory Notice to be issued by a creditor. A creditor is defined under section 2 of that Act as:
>
> > "includes a person entitled to enforce a final judgment or final order." That definition does not include an agent, such as an advocate. A creditor on the facts before Court would be Blueline, not its advocate. It follows, as rightly submitted on behalf of Mayfair, that the Statutory Notice issued to Mayfair did not meet the threshold set out in Section 384 (1) (a) of *Insolvency Act*. Blueline was therefore not entitled to rely on the Statutory Notice issued by its advocate to seek liquidation of Mayfair. It follows that without that Statutory Notice Blueline is unable to prove that Mayfair is unable to pay its debts."

22. Similarly, the court in *Global Truck Limited v Borderless Tracking Limited* [2020] eKLR held as follows: -

> " In this case the statutory notice was signed by the Deputy Registrar of this court, contrary to statute. That notice is not valid to mount up a petition for liquidation of a company."

24. Additionally, the court in *East African Cables Limited v Trans- Africa Energy Limited* [2022] KEHC 12260 (KLR) rendered itself thus:

> " In the case at hand, the statutory demand was not signed by Cables or even the advocate, but by the Deputy Registrar. The Deputy Registrar is not the creditor and had no instruction from Cables. The Deputy Registrar could not issue the statutory notice on behalf of Cables. Counsel for Cables did not point out any provision that empowers the Deputy Registrar to issue and sign the statutory notice on behalf of a creditor."

25. Flowing from the authorities above, it is clear-cut that it is of utmost importance that a Statutory Demand is signed by the creditor in question for it to be considered valid. In the instant case, the Statutory demand was signed by the Registrar and not the Creditor. I therefore find that the failure by the Creditor to sign the Statutory Demand rendered it invalid and the Debtor cannot be considered to have been duly notified.

26. On the second ground of objection, the Debtor contends that the Creditor failed to notify the Commissioner of Insurance to enable the Commissioner's participation in the proceedings as required by Section 121 of the *Insurance Act*.

27. Section 121 of the *Insurance Act* provides that: -

> "(1) If an application for the liquidation of an insurer is presented by a person other than the Commissioner, the applicant shall serve a copy of the application on the Commissioner.
>
> (2) On being served with a copy such an application, the Commissioner becomes a party to the proceedings and is entitled to be heard at the hearing of the application."

28. The court in *Kinuthia v Xplico Insurance Company Limited* [2023] KEHC 23704 (KLR) interpreted the provisions of Section 121 of the *Insurance Act* and stated that: -

> "Under section 121 of the *Insurance Act*, the petitioner's only obligation is to serve the Commissioner. Once the Commissioner is served, it becomes a party to the proceedings. Further, the section does not state when the Petitioner is to effect service but since the Commissioner must be heard on a petition for liquidation of an insurance company, service must be effected at any time before hearing of the petition hence failure to serve the Commissioner is not fatal as the court may direct that the Commissioner be served prior to the hearing as it is entitled to be heard on any petition concerning liquidation of an insurance company."

29. The import of the above cited decision is that a creditor need not enjoin the Commissioner of Insurance to the suit. All that is needed is for the creditor to serve the Commissioner before the hearing of the petition. In the instant case, the petition had not matured to the hearing stage, hence the failure to effect service upon the Commissioner cannot suffice as a ground of objection to justify the striking out of the petition in limine.

30. In regard to the third ground of objection, the Debtor argues that the Creditor failed to plead breach of Section 41 as read with Section 122 of the *Insurance Act* hence the petition is incurably defective and the same should therefore be struck out.

31. Section 41 of the *Insurance Act* provides:

> "Capital adequacy
>
> (1) An insurer carrying on insurance business in Kenya shall at all times maintain the capital adequacy ratio of one hundred per centum.
>
> (2) An insurer carrying on both long term and general insurance business shall at all times maintain separate capital adequacy ratios.
>
> (3) The following assets shall neither be included in the capital available computation nor be used for the purposes of determining the insurer's capital adequacy under this section—
>
> a. goodwill and other intangible assets that exceed five percent of total assets;
>
> b. deferred tax income or expenses and deferred tax assets;
>
> c. assets pledged to support credit facilities obtained by an insurer or other specific purposes;

d. assets over their concentration limits;

e. all credit facilities granted by an insurer and secured by its own shares."

32. Section 122 of the *Insurance Act* provides:

> " For the purpose of section 384 of the *Insolvency Act*, an insurer is taken to be unable to pay its debts if at any time the requirements of Section 41 (which relate to margins of solvency) are not observed by the insurer."

33. When dealing with a similar matter, the court in the case of *Robson Harris Advocates LLP v Invesco Assurance Company Limited* (2022) eKLR pronounced itself as follows: -

> " I hold that a reading of section 122 of the *Insurance Act* does not require a specific plea in the petition to the effect that the insurance company has violated section 41 of thereof.... As I have stated, the question of whether or not the Debtor is solvent, at least in the circumstances of this case, is a matter of fact and evidence which cannot be considered at this preliminary stage before hearing the Commissioner on the matter as required by section 121 of the *Insurance Act*."

34. Similarly, I find that a Petitioner need not specifically plead Section 41 and 122 of the *Insurance Act*. A petition for liquidation only needs to comply with the provisions of Section 77B of the Insolvency (Act) Amendment Regulations at first instance. Flowing from this, I find that this ground fails.

Determination

35. To the extent that the petition for liquidation of the Debtor is founded on an invalid statutory notice ,I find that the same is incompetent and consequently fundamentally and fatally defective. The defect is incurable and calls for the Creditor to go back to the drawing board.

36. The upshot is that the Debtor's preliminary objection dated July 29, 2024 is allowed on the merits of the 2nd ground of objection. Consequently, the Creditor's petition for liquidation dated April 10, 2024 is hereby struck out.

37. The Petitioner shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Wambui Ngigi for the Petitioner/Creditor

No appearance for the Debtor

Court Assistant: Polycap