



REPUBLIC OF KENYA



**In re United Insurance Company Limited (Winding Up Cause 22 of 2006)  
[2024] KEHC 8482 (KLR) (Commercial and Tax) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8482 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
WINDING UP CAUSE 22 OF 2006  
A MABEYA, J  
JULY 12, 2024  
IN THE MATTER OF UNITED INSURANCE COMPANY LIMITED  
IN THE MATTER OF THE COMPANIES ACT  
IN THE MATTER OF INSURANCE ACT CHAPTER 487 OF THE LAWS OF KENYA**

**JUDGMENT**

1. This classic case on how litigation should not be in this country. This case is a sad story and an indictment of slow nature of how the wheels of justice in this country grind. The old adage has it that justice delayed is justice denied. This matter was lodged in 2006 and has taken over 18years to conclude a very simple matter of an attempt to wind up a company.
2. During that period, policy holders must have suffered the blunt of exposure to non-cover. Claimants and other creditors of the Company may have waited for settlement of their claims without any outcome. I first handled the matter in 2012, went to Bungoma, Chuka and Meru High Courts and came back to this Division, only to find the matter still pending. The system needs to shape up if we are to achieve the Constitutional aspiration in Article 159 that justice should be dispensed without delay. Be that as it may, let me now consider the matter.
3. The Commissioner of Insurance filed the petition dated 31/8/2006 for the winding up of United Insurance Company Limited (“the Company”) in 2006. The petition was subsequently amended on 16/7/2007. The petition was supported by the verifying affidavit of SAMMY MUTUA MAKOVE sworn on 7/9/2006. The petition was further supported by an affidavit sworn by the statutory manager on 8/11/2008.
4. The petitioner’s contention was that, the Company was licensed to operate as an insurance company on 9/12/1987. Its registration allowed it to carry out insurance business that is life, fire, marine, accident, employer’s liability, workmen’s compensation disease, sickness survivorship, burglary, theft fidelity and transit insurance.



5. That the Company was placed under statutory management on 15/7/2005 for failing to comply with various mandatory provisions under the Insurance Act. The period of statutory management was extended by the Court for a further period of 6months.
6. The petitioner pleaded that according to the statutory manager's report, by the time the company was placed under statutory management, its cash in hand and bank totaled Kshs. 110,000/- and the admitted assets amounted to Kshs 475,040,863/- against liabilities of Kshs 2,252,546,010/-. That at the time the minimum solvency required was Kshs 177,122,420/-. That the Company's liquidity ratio as at December 2004 was 0.03:1 against the accepted ration of 1:1.
7. The petitioner contended that the Company was in contravention of sections 71(1)(b)(3)(4) and (5) of the Insurance Act ("the Act") in that, where it granted unsecured loans to its directors. That it had failed to meet the statutory tax obligations and failed to keep proper books of account in contravention of section 52 as read with section 55of the Act.
8. That the Company had been given an opportunity to improve and comply with the minimum statutory requirements but chose not to remedy the breach. That the Company had contravened section 41 of the Act which requires the insurer to keep at all times assets not less than the aggregate value of admitted liabilities.
9. Other contraventions alleged were of section 50 for investments, section 70 which limits management expenses, section 71(b) and section 47 which prescribe that assets should be kept in the name of the insurer, section 32 on the minimum deposit to be held with the Central Bank of Kenya, section 203 on the requirement to settle claims within 60 days. Other contraventions were of section 197A(1) for payment of premium tax at the rate of 1.5% of the gross direct premiums and section 197(1) for the payment of Insurance Training Levy.
10. It was the petitioner's contention that the company failed to remedy the breaches despite being issued with several notices and the statutory manager's report showed that it was impossible to revive the company.
11. It was submitted on behalf of the petitioner that the Company was in a dire state at the time the petitioner placed it under statutory management. That the bank balance was Kshs 110,000/-, admitted assets of Kshs.475 million and liabilities amounting to 2billion.
12. Mrs Kambuni SC, Learned Counsel for the petitioner submitted that the insolvency amounted to 1.9 billion with a liquidity ratio of 0.33:1. That the directors had been granted unsecured loans of 32million, subsidiary companies granted 136million and there were the taxes owing. That the shareholders of the Company and the petitioner had various correspondences where the shareholders were told to inject more capital.
13. Counsel submitted that the Company had over invested in land. That the Company was unable to realize the same to pay off debts. That although the directors had made an undertaking that the properties that had been registered in the name of Fidei Holding would be registered in the company's name, the same was not effected. That there had been a challenge of keeping accounts since the records had been poorly kept. Counsel submitted that the claims outstanding amounted to Kshs 2.4 billion and it was better to liquidate the company to have the claims settled.
14. On his part, Mr. Millimo, Learned Counsel for the statutory manager submitted that the caretaker committee and the claims settlement committee were tasked in ensuring that the assets of the Company were realized and the shareholders are given an opportunity to inject capital.



15. He submitted that the assets reserved were approximately Kshs 1.2 billion but some of them had caveats and were spread all over the country. That some of the records at the lands ministry were missing and there were no potential purchasers. He supported the petition.
16. The petition was opposed by the shareholders of the Company represented by their Learned Counsel, Ms. Ithondeka through a replying affidavit sworn by George Ngure Kariki dated 1/11/2006. It was also opposed by Mr. Kasamani, a creditor through his replying affidavit. Also the policy holders represented by Learned Counsel Mr Kinyanjui opposed the petition.
17. The shareholders position was that there was a report dated 30/6/2011 which demonstrated that the company was solvent to the tune of Kshs 1.3 billion. It was stated that there were two reports by the commissioner one for liquidation and the other one in Winding Up Cause No. 67 of 2012 for revival. It was averred that the report created legitimate expectation that the Company was capable of being revived and continue running as an insurance company.
18. The policy holders on their part contended that an insurance company was not an ordinary operating company and there ought to be extreme caution in liquidating the same. That the settlement committee was at liberty to seek experts to settle the claims. It was further averred that the company was solvent as it had properties of over Kshs.4billion.
19. Mr. King'ara, Learned Counsel for the Claims Settlement Committee stated that Ang'awa J had delivered a ruling to the effect that the Statutory Manager had not been properly appointed. That the Company was solvent as it had properties worth 4 billion. That this Court had confirmed this fact vide a ruling dated 20/3/2012.
20. I have considered the pleadings, the lengthy submissions, the bundle of documents and the parties' oral hi-lights in court. The issues for determination are as follows: -
  - a. Whether the Claims Committee should be given audience in these proceedings and be allowed to make submissions.
  - b. Whether the Company is in breach of the provisions of the Insurance Act.
  - c. Whether the Company should be liquidated.
21. On the first issue, when the Counsels appeared to hi-light on their respective submissions, Mrs. Kambuni SC and Mr. Millimo objected to the submissions of the Claims Committee. Their argument was that Mr. King'ara could not submit since he did not represent any party and that the Claims Committee was not incorporated and it was an ad hoc committee created in MISC 67 of 2012. In his defence, Mr. King'ara argued that he represented an organ created by a consent in Misc 67 of 2012.
22. The Court directed that the objection will be determined in this judgment. I have considered the objection. From the record, it is clear that the Committee filed a replying affidavit dated 23/10/2023 opposing the petition. It is also not in dispute that the Committee was created in MISC 67 of 2012 and not only actively participated therein but also in these proceedings.
23. Although that entity was created in a separate proceeding, it was so created with a view to assist in the efforts directed at reviving the company. It may not have had legal status but was nevertheless permitted to be represented. I find that its being represented here does not in any way prejudice any of the parties. In insolvency proceedings under the Act, there is a lot of latitude given to the Insolvency Court in trying to achieve the objects of that Act.



24. In this regard, in so far as there was no specific prejudice that was either alleged or shown that would be caused by the submissions of Counsel for the Committee, I will reject the objection and proceed to consider the said submissions.
25. The second issue is whether the company was in breach of the provisions of the Act. Under the Insolvency Act, a company is deemed to be insolvent if it is unable to pay its debts. Section 384 (1) of the Insolvency Act outlines the requisite components of a demand in the case of liquidation of companies. It provides: -
- “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 a 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;
  - c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.”
26. On the other hand, section 122 of the Insurance Act provides for insolvencies of insurance companies. It provides: -
- “122. 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.
27. Further, section 123 of the Act provides for instances when an insurance company may be liquidated. It provides for the liquidation of an insurer: -
- a) ...
  - b) on the ground that the insurer is unable to pay the insurer’s debts within the meaning of section 384 of the Insolvency Act;
  - ...
  - c. on the ground that the insurer is unable to fulfil the reasonable expectations of policy-holders or potential policy-holders;
  - d. on the ground that it is just and equitable in the interests of the policy holders that the insurer should be wound up;
  - e. on the ground that the insurer has failed to pay tax that is due and outstanding;
  - f. ...”



28. In the present case, the Company was placed under statutory management for failing to comply with the mandatory provisions of the Act. As regards the petition for its liquidation, it was alleged that the Company was in distress for some time.
29. In fulfilment of its duties under section 67 (C) of the Act, the Statutory Manager gave a report which outlined the following: -
- a. that the cash and bank balances for the company as at the time of placement in statutory management amounted to only Kshs. 110,000/-;
  - b. the assets of the company were Kshs. 475,040,863/- against liabilities of Kshs. 2,252,546,010/- resulting in an insolvency of Kshs.1,954,627,429/-
  - c. liquidity ratio as at December 2004 was 0.03:1 against the accepted ratio of 1:1;
  - d. the company was in contravention of sections 71(1)(b)(3)(4) and (5) of the Act by granting unsecured loans to its directors;
  - e. the company failed to meet its tax obligations when they fell due;
  - f. the company was in contravention to section 52 as read with section 55 of the Act for failure to keep proper books of accounts;
30. The petitioner's position was that the Company was in serious breach of the express provisions of the Act and continues to be in the same state to-date despite being given ample opportunity to comply with the minimum statutory requirements.
31. On the other hand, the shareholders and the Committee contended that the company is solvent. Firstly, they challenged the competency of the petition for not being filed with an affidavit verifying the petition. Secondly, they contended that in MISC E67 of 2012, the Court had already ruled that the company was solvent. They further contended that the company had assets to the tune of Kshs. 4 billion.
32. On the competency of the petition, the Court notes that from the record that a preliminary objection dated 30/5/2019 challenging the competency of the petition was dismissed by Tuiyott J. The issue is therefore res-judicata as it was determined by a court of equal and competent jurisdiction. It does not arise for determination.
33. The parties took a lot of time submitting on the solvency or otherwise of the Company. On record is the report produced as 'SMM3'. It shows that the company was insolvent to the tune of Kshs. 1,954,627,420/-. I have considered the respondent's averments that the company's assets exceed the liabilities thereby making the Company solvent. That the Company had invested in land which could be sold and bring revenue to it.
34. Section 41 of the Insurance Act gives the margins of insolvency. It provides that the total admitted assets should not be less than the total admitted liabilities. I have thoroughly perused the record and the reports available fail to give the total assets available for sale. With respect to the available assets, the first auditors report read that 50% of the assets were registered in the name of Fidei Holdings Ltd, a subsidiary of the Company.
35. Further, the Statutory Manager's contention was that, most of the assets (land) were not available for sale as they had caveats, others had secured loans and others did not have any buyers since they were in remote places. It is important to note that availability of assets do not equate to the solvency of



an Insurance Company. If those assets cannot be easily liquidated to generate money to rescue the Company, then they do not aid the process.

36. In any event, the law is clear that in considering the liquidity and solvency of an insurer, capital assets are not to be considered. By heavily investing in land, the Company shot itself on the hip as the same proved difficult to easily liquify and produce liquid money to turn around the Company. Further, by having 50% of its assets registered in its subsidiary, that was a serious breach of the Act.
37. As regards the Court's finding in 2012 that the company was solvent, that was based on the materials produced at the time. It had been shown then that there was land available that could be disposed off and realize liquid cash to turn around the Company. However, that was not to be because as it turned later, there were caveats on some properties and there were no buyers for the same. That even records at the lands offices were missing for some of the properties.
38. The Company had ample time to have those assets turned into cash to offset the huge liabilities that was outstanding. However, it was unable to do so and those opposing the petition cannot therefore be heard to state that the Company is solvent and should be left to operate. An insurer is supposed to pay claims as and when they arise. 12 years after the Court observed that there were assets capable of making the Company liquid, nothing has come out of it.
39. It was the petitioner's case that the directors of the Company and shareholders had been advanced unsecured loans. This was neither denied nor challenged. Any challenge did not displace the evidence of the petitioner of this fact. Section 71(1) of the Act provides that: -

“71.

- 1) No insurer shall, in Kenya–
  - a. grant any loan, advance, financial guarantee or other credit facility against the security of his own shares; or
  - b. grant to or permit to be outstanding without adequate security any loan, advance, financial guarantee or other credit facility not being a loan against and within the surrender value on a policy of life assurance issued by that insurer, to any shareholder, director, officer or employee or member of his family, or to any company of which the shareholder, director, officer or employee or member of his family is a shareholder, director, officer or employee.”

40. The petitioner provided evidence to show that the directors and shareholders had been given unsecured loans. The same loans were advanced to the subsidiary company Fidei Holdings Limited. This evidence was not rebutted and is a clear demonstration that the Company was in clear breach of section 71(1) of the Act.
41. An insurance company is under an obligation to make some statutory payments. This is with respect to the tax owing to the Kenya Revenue Authority and a training levy. The Act makes it mandatory under section 197, for all insurance companies to comply with the law. At the beginning of the statutory management, there was evidence that the Company had not paid the required levies thereby being in breach of the law.



42. From the foregoing, it is clear that the Company has been in serious breach of several provisions of the Insurance Act. One of the objects of that Act is to protect the interests of among others, the policy holders. Insurance companies are regulated by the Insurance Act. The IRA is a creation of the Insurance Act. Its functions are set out in section 3 of the Act as follows: -

- “ 3A. The objects and functions of the Authority shall be to–
- a) ensure the effective administration, supervision, regulation and control of insurance and re-insurance business in Kenya;
  - b) formulate and enforce standards for the conduct of insurance and re-insurance business in Kenya;
  - c) ...
  - d) protect the interests of insurance policy holders and insurance beneficiaries in any insurance contract;
  - ...
  - h) ...”

43. The petitioner is a member of the IRA. He is mandated to realize the objects of the Authority. In exercising this role, he has proved to the Court the grounds set out in section 123 of the Act for the liquidation of the Company.

44. The last issue is whether the company should be wound up. Statutory Management ought to be one of the safeguards against insolvency. The position of the Statutory Manager as outlined under section 67(c) of the Act should be carried out with outmost diligence for the interest of the company, its shareholders as well as the policy holders.

45. The record shows that the Company does not have enough money to keep running. There is evidence that it is unable to fulfill the reasonable expectations of its policy holders or potential policy holders. The shareholders have not injected and are not willing to inject any additional capital to keep the Company running or to offset the huge debts that be-devil the Company.

46. This is an old matter and there are claims that still remain unpaid for more than 10 years since the Company was placed under statutory management. These claims pursuant to section 203 of the Act ought to have been met within 90 days. Any further delay infringes on the claimants’ consumer rights under Article 46 of the Constitution. With the outstanding claims, the policy holders remain exposed.

47. Weighing the interests of the creditors/policy holders as against the shareholders of the company, with the proved breaches, it is in the best interests that the Company be wound up. The petitioner has proved every ground for liquidation.

48. Accordingly, I find the petition meritorious and I allow the same and make the following order: -

- a. An order of liquidation is hereby issued against United Insurance Company Limited.
- b. Mr. Anantroy Kamal Bhatt is hereby appointed as the liquidator.
- c. The costs of the petition shall be borne from the company assets.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY, 2024.**



**A. MABEYA, FCI Arb**

**JUDGE**

