



REPUBLIC OF KENYA



**In re Africa Merchant Assurance Company Limited (Insolvency Petition
E001 of 2020) [2023] KEHC 1 (KLR) (4 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 1 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
INSOLVENCY PETITION E001 OF 2020**

OA SEWE, J

JANUARY 4, 2023

**IN THE MATTER OF MWANTHI KALUNDA (LEGAL REPRESENTATIVE
OF THE ESTATE OF AMOS MALONZA KALUNDA (DECEASED))**

AND

IN THE MATTER OF THE INSURANCE REGULATORY AUTHORITY

AND

IN THE MATTER OF THE INSOLVENCY ACT, NO. 18 OF 2015

AND

IN THE MATTER OF THE INSURANCE ACT, CAP 487, LAWS OF KENYA

RULING

1. This Petition was filed by Mwanthi Kalunda, the legal representative of Amos Malonza Kalunda (deceased), for the liquidation of Africa Merchant Assurance Co. Ltd (hereinafter, “the company”), on the ground that it is unable to pay its debts. At paragraphs 5 and 6 of the Petition, it was explained that the company agreed to insure Motor Vehicle Registration No KAQ 410D, Prime Mover belonging to Al-Khaleej Transporters Limited and issued a Certificate of Insurance No B5999713 for the period between October 18, 2012 and October 17, 2013.
2. At paragraphs 7 and 8 of the Petition, it was averred that on the January 19, 2013, the aforementioned motor vehicle was involved in a road traffic accident in which Amos Malonza Kalunda died; and that in a suit filed for compensation on behalf of the estate of the deceased, namely Voi CMCC No 98 of 2015: Mwanthi Kalunda (legal representative of the estate of Amos Malonza Kalunda (Deceased) v Al-Khaleej Transport Lt & Mombasa Highway Transport, an award was made in the total sum of Kshs 2,400,107.50, inclusive of costs. The petitioner thereafter sought a declaratory judgment against the company in Voi SRMCC No 139 of 2018 for the purpose of enforcing the decree issued in Voi SRMCC No 98 of 2015; which judgment was delivered on April 18, 2018.



3. After fruitless attempts to levy execution against the company, the petitioner served the company with a statutory demand dated October 7, 2020 before filing this Petition. The petitioner averred, at paragraph 20 of his Petition that the company has been unable to pay a debt which it admitted as due and therefore ought to be liquidated accordingly. A set of correspondence in which the company admitted the debt and asked for time to pay by instalments was annexed to the petitioner's Supporting Affidavit as Annexure "MK-14" and "MK-15" while the Statutory Demand was marked Annexure MK-16". It was therefore the contention of the petitioner that, in the circumstances, the company ought to be wound up for being unable to pay its debts.
4. Although an Answer to the Petition was filed herein on March 10, 2022 by M/s Mburugu & Kanyonge Associates Advocates, on behalf of the company, the parties thereupon embarked on negotiations with a view of reaching an amicable settlement so as to avoid liquidation. Thus, on May 18, 2021, a consent was reached by the parties thus:

"By consent the Respondent company to pay the petitioner a liquidated sum of Kshs 2,600,000/= by way of monthly instalments of Kshs 200,000/= w.e.f 11.6.2021 and thereafter on or before 11th day of every succeeding month until payment in full.

Further, in the event of default, the entire sum as shall be the balance at the time falls immediately due and the matter be listed for further orders of the court."
5. The consent was consequently adopted as an order of the Court and the parties given time and space to comply. It was not until October 18, 2021 that it was brought to the attention of the Court that the company was in default. At the instance of counsel for the company, Mr Kanyonge, more time was given for the company to pay the debt. In the meantime, the Petition was listed for hearing on June 2, 2022.
6. The record shows that, well in advance of the hearing date, the parties filed a consent letter dated 1st April 2022, requesting that this Petition be marked as withdrawn. By that time, two creditors, Maimuna Omari Zema and Mwanasiti Swaleh Masemo, had filed their respective Notice to Appear on March 31, 2022 through the law firm of Njoroge & Njoroge Co. Advocates. When the matter came up for mention on June 15, 2022 with a view of recording the consent as per the letter dated April 1, 2022, Mr Njoroge raised an objection, citing Section 31 of the *Insolvency Act*. He therefore prayed that, instead of having the Petition withdrawn, the Court ought to allow the two creditors aforementioned to take it over and ventilate their own complaint against the company.
7. Both Ms Vanani for the petitioner and Mr Kanyonge for the company opposed Mr Njoroge's request and submitted that the same was made too late in the day; and that the two creditors ought to file their own petition to champion their cause. They insisted that since the company has fully paid the debt it owes the petitioner, this suit is spent.
8. I have given due consideration to the matter in the light of the pleadings and proceedings to date. It is plain that the consent of April 1, 2022 was filed around the same time as the Notices to Appear by the two creditors Maimuna Omari Zema and Mwanasiti Swaleh Masemo. However, for the record, the Notices to Appear were filed first as they bear the date of March 31, 2022. It could very well be that by that time the dispute had been resolved in readiness for the filing of the consent letter dated April 1, 2022 as posited by counsel for the petitioner. It was for that reason that the Court entertained the objection by the two creditors, noting that the right to be heard is a constitutional precept.
9. Accordingly, the issue for determination is whether, in the circumstances, the two creditors are entitled to take over the prosecution of this Petition. If the answer is yes, then it would mean that the consent



between the petitioner and the company must be discarded and their request for withdrawal of this Petition declined.

10. In urging the case of the two creditors, Mr Njoroge relied on Section 31 of the *Insolvency Act*, No 18 of 2015 which provides that:

“In the case of a creditor’s application, the Court may substitute another creditor for the creditor making the application if—

- (a) the applicant creditor has not proceeded with due diligence, or at the hearing of the application offers no evidence; and
- (b) the debtor owes the other creditor two hundred and fifty thousand shillings or more.

11. It is instructive that the conjunctive “and” is employed in the above provision. This obviously means that both conditions ought to be satisfied for an application for substitution to be allowed under that provision. The first condition is not supported by the facts; and although in the Notices to Appear certain sums are indicated as owing to the two creditors, what is envisaged under Section 31, in my view, is concrete proof of definite indebtedness on the part of the company. This is why conditions are set, by dint of Section 17 of the *Insolvency Act* to the filing of an application for bankruptcy. No such proof was availed by the two creditors.

12. More importantly, it is noteworthy that Section 31 falls under Part III of the *Insolvency Act*. That part is confined to provisions relating bankruptcy of natural persons and has nothing to do with liquidation of companies.

13. It is therefore manifest that Mr Njoroge’s oral application for the substitution of the petitioner by the two creditors is utterly misconceived. The same is accordingly hereby declined with the result that the consent filed herein on April 1, 2022 as between the petitioner and the company is hereby adopted as an order of the Court and this Petition is hereby marked as withdrawn.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 4TH DAY OF JANUARY 2023.

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**OLGA SEWE
JUDGE**

