



REPUBLIC OF KENYA



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Kipkirui ((Suing as an Administratrix and/or Personal Representative of the Estate of Roy Kipkirui-Deceased)) v Invesco Assurance Co. Ltd (Insolvency Cause 3 of 2019) [2023] KEHC 2168 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
INSOLVENCY CAUSE 3 OF 2019
RE ABURILI, J
MARCH 17, 2023**

BETWEEN

NEDDY CHEPNGENO KIPKIRUI (SUING AS AN ADMINISTRATRIX AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY KIPKIRUI-DECEASED) PETITIONER

(SUING AS AN ADMINISTRATRIX AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY KIPKIRUI-DECEASED)

AND

INVESCO ASSURANCE CO. LTD RESPONDENT

JUDGMENT

1. The creditor herein Neddy Chepngeno Kipkirui filed this insolvency petition/Cause dated October 15, 2019 seeking the following reliefs:
 - a. A bankruptcy order be issued in respect of the respondent and the respondent be adjudged bankrupt.
 - b. A liquidation order be issued in respect of the respondent Invesco Assurance Co Ltd under the provisions of part VI of the *Insolvency Act, 2015* and that an official receiver be appointed the provisional liquidator of the company.
 - c. The assets registered in the name of Invesco Assurance Co Ltd be disposed of by way of public auction and proceeds be applied towards settlement of the decree issued by the honourable court on May 22, 2018 in Kericho CMCC 171 of 2016.
 - d. The honourable court be pleased to issue such other order as it may deem just in the circumstances.



2. The petition is based on the facts that the respondent was the insurer of motor vehicle registration number KBN 132D vide policy number 053/084/1/00144/2011/10, which motor vehicle was subsequently involved in an accident killing the petitioner's son (minor). That the petitioner sued the owner of the motor vehicle registration number KBN 132D in Kericho CMCC No 404 of 2014 and obtained judgement against the said owner in the sum of Kshs 2,470,721 in general damages, Kshs 219,743/- in special damages and Kshs 57,560/- in interest. That thereafter, the petitioner instituted a declaratory suit vide Kericho CMCC No 171 of 2016 against the respondent insurance Company which suit was successful and the respondent was ordered to satisfy the decretal sum as decreed in Kericho CMCC No 404 of 2014.
3. Following the judgment and decree in the Declaratory suit Kericho CMCC No 171 of 2016, the petitioner instituted execution proceedings against the respondent wherein the court issued stay on condition that the respondent liquidates the decretal sum in 5 monthly equal installments of Kshs 589,190/- failure of which execution would issue, which sum has not been paid and the respondent is therefore indebted to the petitioner in the sum of Kshs 2, 945,947/- to which she holds no security over and that the respondent is unable and or has no prospects of paying despite being served with statutory demand and the period lapsed. The petitioner asserts that she is not aware of any respondent's movable or immovable assets that can be subjected to execution process.
4. The respondent opposed this Cause/petition and filed its grounds of opposition dated February 6, 2020 contending inter alia that the petitioner failed to comply with the mandatory provisions of Section 424(1)(e) as read with Section 384(1) of the *Insolvency Act*, that the petitioner equally failed to comply with the mandatory provisions of Sections 121 and 123 of the *Insurance Act*.
5. It was further contended that the petitioner failed to demonstrate that the respondent is unable to pay its debts or is insolvent as provided for under Sections 41(2) and 122 of the *Insurance Act* and Section 384(1) of the *Insolvency Act*.
6. The respondent further contended that the petitioner has not shown any attempts made towards execution of the decree against the respondent and or that there exist no other remedies available to her for the recovery other than liquidation.
7. Parties were directed to file their written submissions but only the petitioner complied.
8. Ms Cherotich Counsel for the petitioner after setting out the factual background of the matter submitted that by directions of the court issued on February 6, 2020, the petitioner served the Insurance Regulatory Authority with a mention notice but that the Authority failed to respond and therefore the petitioner has met the requirements under Section 121(1) and (2) of the *Insurance Act*.
9. Counsel submitted that section 384(1) of the *Insolvency Act* provides for instances when a company is unable to pay its debts; Section 423(1) and 424(1)(e) of the Act provides for the jurisdiction of the court to supervise the liquidation of companies while Section 425 provides for the class of persons who may bring an application for liquidation of a company.
10. It was further submitted that Regulation 77B of the *Insolvency Regulations 2016* provides for the manner in which a petition shall be presented.
11. The following decisions were cited in support of the petition: *Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies v Twiga Properties Ltd* (2022) KEHC 12, *Tristar Transport Ltd v East African Logistics Ltd* [2020]eKLR and *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* (2018) eKLR.



Analysis and determination

12. I have considered the Cause/ Petition and the opposition thereto by the respondent as well as the submissions and statutory and judicial authorities cited in support of the respective parties' positions.
13. It is not in dispute that the petitioner herein is a judgment creditor in Kericho CMCC 171 of 2016 in the sum of Kshs 2,945,947/- which was decreed and the court granted leave to the respondent to settle the same in five equal monthly instalments of Kshs 589,190/-.
14. The petitioner avers that the said sum has not been paid to date, necessitating the filing of the instant petition on grounds that the respondent is unable to pay the sum.
15. The respondent opposes the Cause/petition contending that the petitioner has not advanced sufficient grounds showing that the respondent is unable to settle the decree and that the petitioner has not complied with the mandatory provisions of the law as stated in the respondent's grounds of opposition.
16. The issue to be determined here therefore, is, whether the petitioner has shown and established that the respondent is unable to pay the decretal sum and whether an order of liquidation is a proper one to be made by this court.
17. Section 384 (1) and (2) of the *Insolvency Act* sets out situations when a debtor is deemed unable to pay its debts. The situations are:
 - (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.
- (2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).
18. Applying the above situations to the facts of this Cause/ Petition, it is patently clear that the order of March 14, 2019 requiring the respondent to pay up the decretal sum has not been complied with and neither has the said order been set aside to date and the respondent is therefore under a legal obligation to pay up the said sums of money in settlement of the decree of the court.
19. The respondent has also not tendered evidence that it is in a sound financial position to liquidate the said sum, three years now after the order for payment was made.
20. I further take judicial notice of the fact that the respondent has been battling numerous court cases seeking to have it wound up for non-settlement of decrees passed by various courts. In Insolvency



Petition No E155 of 2019; *Kinyanjui Njuguna & Co Advocates v Invesco Assurance Limited* [2021] eKLR, Okwany J made the following findings:

“[37]...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.”

21. Subsequently, the learned judge suspended the issuance of the insolvency order pending the appearance by the Commissioner of Insurance in the Cause and subsequently, the Commissioner of Insurance dis appear. On February 15, 2023, the court in the above matter issued an order of winding up of the respondent herein and issued an order placing respondent Insurance Company under the management of the Official Receiver. In other words, the respondent herein has already been placed under liquidation.
22. In this petition, I find that already, a court of concurrent and competent jurisdiction having pronounced itself with finality in the matter, the respondent having already been placed under liquidation and an Official Receiver appointed to commence the liquidation process, the respondent cannot be wound up or be placed under receivership or liquidation twice. To do so would be tantamount to killing an already dead horse. In other words, there is nothing more to be wound up in the circumstances.
23. Faced with a similar situation, Majanja J in *Geoffrey Kipkoech v Insurance Regulatory Authority & 2 others* [2021] eKLR stated as follows:

“[43]. In this case, a court of competent jurisdiction has already pronounced itself on the status of the Company as a result of a petition brought by the Commissioner of Insurance who at the material time was the 2nd Defendant after it had been under statutory management of the 3rd Defendant. The Plaintiff was an active participant in the Winding Up proceedings and unsuccessfully applied to set aside the order at least twice...That judgment cannot be wished away by a side wind in collateral proceedings.”
24. Guided by the above decision which I find sound and applicable to the circumstances of this petition, I find that the High Court at Nairobi in Insolvency Case No E155 of 2019, having placed the respondent under receivership and under the management of an Official Receiver, there is nothing more to these proceedings other than directing the petitioner to register her claim with the Respondent’s statutory liquidator, the Official Receiver, for consideration.
25. That being the case, the petitioner can only join the suit in Nairobi High Court Insolvency Cause No E155 of 2019 as one of the creditors whose interests will be catered for in that matter.
26. For the above reasons, the petition herein for winding up of the respondent Invesco Assurance Company Limited is overtaken by events of the existence of a liquidation order against the respondent in Nairobi HC Commercial Court Insolvency Petition No. E155 of 2019. The Petition is hereby declined and dismissed with no orders as to costs.
27. Decree to issue.
28. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

