



Corporate Insurance Company Limited v Clarkson Insurance Brokers Limited (Insolvency Cause E114 of 2022) [2023] KEHC 24662 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 24662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E114 OF 2022**

MN MWANGI, J

JUNE 16, 2023

BETWEEN

CORPORATE INSURANCE COMPANY LIMITED CREDITOR

AND

CLARKSON INSURANCE BROKERS LIMITED DEBTOR

RULING

1. The debtor herein filed a Notice of Motion application dated 21st July, 2022 brought under the provisions of Section 384 of the *Insolvency Act*, 2015, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Regulations 10, 15, 16 & 17 of the *Insolvency Regulations, 2016* and all other enabling provisions of the law. The debtor/applicant seeks the following orders-
 - i. That the statutory demand dated 30th June, 2022 be set aside; and
 - ii. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it, and is supported by an affidavit sworn on the same day by Jacinta Muia, the applicant's Finance and Administration Manager. In opposition thereto, the respondent filed a replying affidavit sworn by Zephania Ndwiga, the respondent's Credit Control Manager on 15th December, 2022.
3. The present application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Muriu, Mungai & Company Advocates LLP on 12th May, 2023, whereas the respondent's submissions were filed on 15th March, 2023 by the law firm of CM Advocates LLP.
4. Mr. Kenneth Wilson, learned Counsel for the applicant submitted that on 1st July, 2022, the applicant received a statutory demand dated 30th June, 2022 issued by the respondent demanding immediate payment of Kshs 19,111,252.00 allegedly owed to the respondent as unremitted premiums. He stated



- that prior to issuance of the said statutory demand, parties had previously engaged in correspondence with regard to the alleged outstanding debt, which culminated in the applicant's letter dated 14th June, 2022 in which it disputed owing the said amount. He stated that the instant application seeks to set aside the statutory demand on the ground that the amount of Kshs 19,111,252.00 in unremitted premiums is owed by third parties and not the applicant. He submitted that the existence of a genuine dispute regarding a debt is a sufficient ground for the Court to set aside a statutory demand.
5. He contended that the applicant's role as a reinsurance broker is to collect premiums from the cedants and remit the same to the reinsurer(s), upon which the applicant deducts its commissions. He posited that the applicant is only liable for the remission of premiums it has received from the cedants, but not for the cedants' unpaid premiums. In submitting that an insurance broker's role is akin to a go-between as it connects insurance companies (cedants) to reinsurance companies, Mr. Kenneth Wilson relied on the case of *Chester Insurance Brokers Limited v Commissioner of Domestic Taxes* [2021] KEHC 185 (KLR) where the Court explained the process of a normal insurance transaction.
 6. He referred to Regulation 2 of the Reinsurance Arrangements Guidelines, 2018, which defines a cedant as an insurer who enters into a reinsurance arrangement with a reinsurer and indicated that the cedant buys protection for the risks it has undertaken from the reinsurer by paying premiums which are collected by the reinsurance broker and that thereafter, the reinsurance broker remits the premiums received from the cedant to the reinsurance company after deducting its commission or the commissions can be paid by the insurer at a later date after reconciliation of the accounts. He stated that it is only where the broker is paid the premium by the insured that an obligation arises for the full premium to be remitted to the insurer.
 7. Mr. Kenneth Wilson relied on the case of *Mercantile Life and General Assurance Company Limited v Crested Sea Agencies Limited* [2006] eKLR and stated that in this case, there is no evidence that the premiums demanded were ever received by the applicant. He submitted that the respondent was clearly informed that as at 14th June, 2022, the premiums were still outstanding from the cedants and it was advised to follow up with the cedants since it is at liberty to collect the unpaid premiums directly from them in which case, the applicant would forfeit its commission. He stated that the respondent was advised that the rest of the debt was pending reconciliation, and that the applicant requested for supporting documents from the respondent which were never provided.
 8. The applicant's Counsel referred to Regulation 17(6)(b) of the *Insolvency Regulations, 2016* and the Court of Appeal holding in the case of *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR and submitted that if a debtor has genuine and substantial grounds for disputing the debt, the Court should not allow the statutory demand to stand and that it should be dismissed so that the parties can determine any dispute in a civil Court. He further submitted that the applicant herein is a solvent company which is able and willing to pay all its undisputed debts.
 9. Mr. Waigwa, learned Counsel for the respondent submitted that the respondent issued the statutory demand dated 30th June, 2022 in exercise of its right espoused under Section 384 of the *Insolvency Act, 2015* due to the continuous deceitful attempts by the applicant to avoid remitting outstanding premiums. He further submitted that the applicant is an insurance broking company based in Kenya and it had a business relationship with the respondent wherein it was selling policies on behalf of the respondent. He stated that the applicant was under a duty to remit premiums, less its commission, to the respondent but it refused to remit the said premiums.
 10. He also stated that the applicant in its letter dated 14th June, 2022 admitted that the debt herein is due and owing. The respondent's Counsel stated that in the said letter, the applicant admitted the existence of the outstanding amounts from various cedants and it informed the respondent that demand letters



had been issued and sought help from the respondent in making a follow up. He submitted that the applicant claimed that there existed reconciliation issues pertaining to a part of the debt in the sum of Kshs 1,161,560.00 and admitted that the various sums on the general brokerage sum of Kshs 5,693,601.00, were received by them but not remitted to the respondent since their records were missing, and others were yet to be collected by themselves.

11. Mr. Waigwa contended that the applicant had also admitted the debt owed, through the letters dated 29th April, 2021 and 11th October, 2021 but in both letters it claimed that the reconciliation of accounts is pending, but no reconciliation report had been placed before this Court to prove that fact. Learned Counsel relied on the case of *Re Genghis Capital Limited* [2019] eKLR, where the Court held that when considering whether the debt is disputed substantial grounds for such dispute must be placed before Court. He contended that the debt in issue is not disputed on substantial grounds. He also relied on the case of *Ndung'u & another (Suing as the administrator of the Estate of Samuel Ndung'u Thuo (Deceased) & 3 others v Xplico Insurance Company Limited* [2022] KEHC 9931 (KLR) (Commercial and Tax) (14 July 2022) (Ruling), where the Court declined to strike out a liquidation petition as the debt was not disputed.
12. The respondent's Counsel contended that in the instant application, no evidence had been placed before this Court to prove the applicant's solvency and the existence of substantial grounds to dispute the debt herein thus the instant application should fail. Mr. Waigwa cited Regulation 17(6) of the *Insolvency Act* and the case of *Flower City Limited v Polytanks & Containers Kenya Limited* [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) (Ruling) and stated that since no substantial grounds had been placed before this Court to prove that indeed the debt is disputed, there is *prima facie* proof that the debtor is unable to pay its debts and it ought to be liquidated. He further stated that the instant application is simply an attempt to drag the insolvency proceedings.

Analysis and Determination.

13. This Court has considered the instant application, the affidavit filed in support thereof, the replying affidavit by the respondent as well as the written submissions by Counsel for the parties. The issue that arises for determination is if the statutory demand should be set aside.
14. The applicant in its supporting affidavit deposed that it is a multinational insurance brokerage company with its headquarters in Nairobi, and it operates as a reinsurance broker by obtaining business from cedants and placing the risk with reinsurers on the cedants' behalf. It averred that the applicant's dual role was to act on behalf of the cedants by ensuring full placement of each risk allocated to it, collect premiums from the cedants and thereafter remit the same to the respondent, upon which it deducts its commissions. The applicant further averred that its role is merely to collect the premiums from the cedants and as such, it is only liable for the remission of premiums received from the cedants, but not for the cedants' unpaid premiums.
15. It was stated by the applicant that on 1st July, 2022, it received a statutory demand dated 30th June, 2022 from the respondent where it was demanding immediate payment of Kshs 19,111,252.00 allegedly owed to it as unremitted premiums. The applicant stated that prior to issuance of the said statutory demand, the parties herein had previously engaged in correspondence with regard to the alleged outstanding debt, which culminated in the applicant's letter dated 14th June, 2022 disputing owing the said amount.
16. The applicant asserted that it would be highly prejudicial for the respondent to institute liquidation proceedings against it to recover monies owed by third parties. It urged that in the interest of justice,



the statutory demand dated 30th June, 2022 ought to be set aside, so as to allow the parties herein to resolve this matter amicably.

17. The respondent in its replying affidavit deposed that the applicant was under a duty to remit premiums to it, less its commissions, but the applicant refused to remit the said premiums. That as a result, the respondent engaged the Insurance Regulatory Authority (IRA) vide a letter dated 5th October, 2021 informing the latter of the applicant's duplicitous actions. The respondent averred that in a letter dated 29th April, 2021, the applicant admitted to owing the respondent a debt of Kshs 13,538,383.00 and an additional Kshs 4,935,474.00. Further, in a letter dated 11th October, 2021, the applicant admitted to owing the respondent a debt of Kshs 14,649,854.00.
18. The respondent contended that the applicant bears the burden of proving that the cedants had not remitted the premiums as alleged but no evidence had been tendered to support the same. The respondent deposed that in the absence of any evidence to show remittance, the applicant is approaching this Court in bad faith seeking to use the Court as a shield for its conduct.

If the application herein is merited.

19. Under the provisions of Regulation 16(1)(a) of the Insolvency Regulations 2016, this Court is empowered to set aside a statutory demand issued under the *Insolvency Act*, 2015, if the debtor makes an application for the same within twenty-one days of service of the statutory demand. Regulations 17(6) of the Insolvency Regulations, 2016 on the other hand provides that the Court may grant such an 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.”

20. In determining an application to set aside a statutory demand, Courts have to determine whether an applicant has established either one or all the grounds to set out under Regulations 17(6) of the Insolvency Regulations, 2016. In the instant application, the applicant seeks to set aside the statutory demand issued on the ground that the alleged debt is disputed. In *Universal Hardware Limited v African Safari Club Limited* (*supra*), the Court of Appeal summarized the position regarding the striking out of a petition on account of a disputed debt as follows -

“The principle as I understand it is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.”



21. It is noteworthy that the applicant and the respondent were in a business relationship where the applicant as an insurance broker had a duty to collect premiums from the cedants and remit the same to the respondent for a commission to be deducted from the said premiums. The applicant contended that it is only liable for the remission of premiums it has received from the cedants, but not for the cedants' unpaid premiums. The respondent on the other hand submitted that the debt herein is not disputed since in a letter dated 29th April, 2021, the applicant admitted owing the respondent a debt of Kshs 13,538,383.00 and an additional Kshs 4,935,474.00. Additionally, in a letter dated 11th October, 2021, the applicant admitted owing the respondent a debt of Kshs 14,649,854.00
22. The parties herein have highly relied on the contents of the letter dated 14th June, 2022. The appellant averred that in the said letter, it disputed owing the respondent the debt in issue on substantial grounds in that the debt is owed by third parties, whereas the respondent submitted that in the said letter, the applicant admitted the existence of the outstanding amounts from various cedants, informed the respondent that demand letters had been issued, and sought help from the respondent in following up. In addition, the applicant claimed that there existed reconciliation issues pertaining to a part of the debt and admitted that the various sums on the general brokerage were either received by them and not remitted to the respondent since their records were missing, and others were yet to be collected by themselves.
23. In light of the foregoing, it is evident that the money claimed by the respondent from the applicant arises out of insurance transactions. In the case of *Chester Insurance Brokers Limited v Commissioner of Domestic Taxes* (*supra*) cited by the applicant, Majanja J., explained how a normal insurance transaction works in the following words-
- “...in a normal insurance transaction, an insurance broker, as an agent and intermediary for purposes of completing the transaction, sells an insurance policy to the insured on behalf of the insurance company. The broker then issues a risk note to the insured whereupon the insured pays the premium to the insurance company. In cases where the insured pays the premium to the broker, the broker is under a statutory obligation to immediately remit the full premium to the insurance company). At the end of each month, the insurance company prepares a statement of accounts showing the brokerage commission payable to the broker within the scale provided under the *Insurance Act* and after deducting WHT and any other costs related to the service provided by the Broker. The Commission paid to the Broker is a percentage of the insurance business placed by the Broker.”
24. From the above, it is evident that there are instances where in the course of an insurance transaction, the cedants pay the premiums directly to the re-insures such as the respondent. However, in the event that the cedant pays the premium to the insurance broker, the broker is under a statutory obligation to immediately remit the full premium to the insurance company.
25. On perusal of the letter dated 14th June, 2022, I note that the applicant indicated that out of the amounts of Kshs 13,417,651.00, Kshs 12,256,091.00 is outstanding from various cedants and Kshs 1,161,560.00 needs to be reconciled thus supporting documents ought to be provided.
26. In regard to the Kshs 5,693,601 general brokerage, the applicant indicated that for the Nairobi branch, Kshs 509,450.80 has been received but not yet remitted, Kshs 520,015.76 has been paid, and it should be knocked off, Kshs 38,538.75 is unpaid by clients, Kshs 261,422.78 reconciliation items have been shared, and Kshs 504,456.95 is in credits. For the Mombasa branch it indicated that for Kshs 316,458.00 the records are missing since they are very old, hence the respondent should provide the



details. As for the Kisumu branch, Kshs 3,894,730.24 is unpaid by the County Government of Kisumu and Kshs 657,441.75 is not collected.

27. From the above, it is evident that the debt in issue is substantively disputed and the applicant maintains that the said debt is largely owed by third parties to the respondent and the latter is at liberty to pursue the said third parties in order to recover the sums due and owing to it in terms of unpaid premiums.

28. I agree with Counsel for the applicant that the applicant as an insurance broker is only liable for the remission of the premiums it has received from the cedants. To this end, I am persuaded by the holding in the case of *Mercantile Life and General Assurance Company Limited v Crested Sea Agencies Limited* (*supra*) where the Court held that –

“In order to succeed the Plaintiff can only recover premia actually received by the Defendant, it cannot recover any sums which the Defendant did not receive and its remedy was, as the Defendant stated, to bring action to recover outstanding premia by court action or such other means as may have been necessary to recover the premia. The Defendant as an agent had no right to sue for money due to the Plaintiff.”

29. In the case of *Flower City Limited v Polytanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) (Ruling). Mativo J (as he then was) in disallowing an application similar to the present one held as follows-

“The rationale for applications of this nature is to enable the debtor to satisfy the court that he genuinely disputes the debt. Simply put, a debtor must demonstrate the existence of a genuine dispute. Though it may not be possible to provide a closed list of the elements of a genuine dispute, the applicant must: -

- i. Show a plausible contention requiring investigation;
- ii. Be bona fide, genuine and real;
- iii. Be in good faith and show a *prima facie* plausibility;
- iv. Truly exist in fact, and contain a serious question to be tried;
- v. Be something more than mere bluster or mere assertion;
- vi. Be a claim that may have some substance;
- vii. Have a sufficient degree of cogency to be arguable;
- viii. Have objective existence; and
- ix. Have sufficient factual particularity.”

30. The Learned Judge further held that –

“It is important to point out that once a debtor shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The meaning of the expression “genuine dispute” connotes a plausible connection requiring investigation, and raises much the same sort of considerations as the serious question to be tried” criterion which arises on an application for an interlocutory injunction.”

31. Having analyzed the averments and submissions by the parties herein, it is my finding that the applicant has demonstrated the existence of a genuine dispute on the amount of money it owes the respondent.



32. In the result, the application dated 21st July, 2022 is merited. The statutory demand dated 30th June, 2022 is hereby set aside. Parties are encouraged to resolve the dispute through mediation or any other ADR mechanism as it is apparent that there are issues of reconciliation to be dealt with. Each party shall bear its own cost.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Opole h/b for Mr. Kenneth Wilson for the debtor/applicant

Mr. Waiguru for the petitioner/creditor

Ms B. Wokabi – Court Assistant.

