



**Mulwa & 59 others v Invesco Assurance Company Limited & another (Insolvency Petition E008 of 2019) [2023] KEHC 21411 (KLR) (Commercial and Tax) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21411 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E008 OF 2019**

**EC MWITA, J**

**JUNE 8, 2023**

**BETWEEN**

**BENSON MULEVU MULWA & 59 OTHERS ..... PETITIONER**

**AND**

**INVESCO ASSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**INSURANCE REGULATORY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The 60 petitioners filed a petition dated 5<sup>th</sup> April 2019 against Invesco Assurance Company Limited (Invesco), seeking orders that Invesco be liquidated for failing to pay debt; appointment of official receiver as liquidator; payment of petitioners' debt of Kshs 72,400,535 and costs of the petition from Invesco's assets; an order stopping Invesco from issuing insurance policies pending its liquidation and that all premiums owed by Invesco's insureds be paid to the liquidator.
2. The petitioners further sought an order that assets of Invesco's shareholders and directors acquired using money appropriated from Invesco be traced and preserved for sale by the liquidator to pay debts, and any dealing in those assets by sale, transfer, lease, mortgage or whatsoever be stopped pending liquidation. The petitioners also prayed that directors of Invesco (both past and present) or their proxies be permanently barred from being directors of any other insurance company in Kenya.
3. The petition was supported by an affidavit by Benson Mulevu Mulwa sworn on his behalf and on behalf of the other petitioners. The petitioners also filed written submissions dated 2<sup>nd</sup> June 2021 and supplementary submissions dated 16<sup>th</sup> September 2021.
4. The petitioners' case is that on diverse dates while travelling as fare paying passengers in various public service vehicles that had been insured by Invesco as required by the *Insurance (Motor Vehicles Third*



Party Risks) Act, (Cap 405), those motor vehicles were involved in road traffic accidents and the petitioners suffered bodily injuries. The petitioners subsequently sued owners of the vehicles in various courts and were awarded damages for the bodily injuries sustained. A total of Kshs. 45,953,806 was awarded against the insureds, while Kshs. 26,446,729 was against Invesco, making a total of Kshs. 72,400,535

5. The petitioners called on Invesco to pay but no payment was made within the statutory period (of 90 days). A demand letter dated 23<sup>rd</sup> November 2018 was then served on Invesco. Invesco responded through letter dated 5<sup>th</sup> December 2018 and requested for an appointment with their advocates to discuss how the matter could be settled. Their advocates informed Invesco through letter dated 14<sup>th</sup> January 2019 that a meeting was not necessary and sought a proposal on payment.
6. The petitioners stated that subsequently, on 4<sup>th</sup> March 2019, their advocates served a statutory notice under the Insolvency Act, and the Companies Act to Invesco but there was no response and the entire debt remains unpaid to date. The petitioners' case, therefore, is that Invesco is unable to pay its debts and ought to be liquidated.
7. The petitioners asserted that section 203 (1) of the Insurance Act requires an insurer to pay claims within 90 days, while section 203 (5) provides that failure to pay claims or statutory penalties within that period constitutes inability to pay debts which is a ground for liquidating an insurer. Relying on sections 384 and 424 (1) (e) of the Insolvency Act, the petitioners asserted that Invesco is unable to pay debts.
8. The petitioners relied on Mugoya Construction & Engineering Company Limited [2015] eKLR for the proposition that judgments and decrees are sufficient for all intent and purposes to constitute a valid debt on which a petition for winding up can be founded.
9. The petitioners argued that failure to pay the amount owed within 21 days of service of the statutory demand, is a ground for winding up of a company. For these reasons, the petitioners urged the court to allow the petition with costs.

## Response

10. Invesco opposed the petition through an answer to petition dated 9<sup>th</sup> February 2021; an affidavit by Paul Gichuhi sworn on 9<sup>th</sup> February, 2021 and written submissions dated 9<sup>th</sup> September, 2021. According to Invesco, the petition is fatally defective for not complying with mandatory and relevant provisions of the law on a petition to liquidate an insurance company. Invesco asserted that the allegation of inability to pay the debt of Kshs. 72,400,535 does not meet the statutory requirement under section 424 (1) (e) of the Insolvency Act. Invesco further asserted that no evidence had been tendered to prove non-compliance with any regulatory requirements under the Insurance Act to warrant the draconian action of liquidation.
11. Invesco contended that the amount the petitioners claimed arose out of personal injury claims and ought to be pursued through the established modes of execution of decrees. Invesco maintained that in the circumstances of this petition, insolvency proceedings are disproportionately draconian and unwarranted.
12. Invesco challenged validity of the decrees, the subject of this petition. According to Invesco, the decrees have been paid or are being paid and, therefore, the insolvency proceedings are an abuse of the court process and are intended to embarrass and coerce it into settling disputed, illegal and unfounded claims.
13. Invesco contended that it is one of the oldest insurance companies in Kenya with a wide customer base in the PSV subsector, and a share capital of more than one billion Kenya Shillings and, therefore, the



- alleged debt is a small fraction of its valuation and does not meet the threshold under section 424 (1) (e) of the *Insolvency Act* for its liquidation.
14. Invesco urged the court to consider interests and rights of the shareholders, insured public, employees and other creditors of preferential ranking. Invesco and argued that liquidation on the grounds presented in the petition would be contrary to the legislative objects set out in section 3 of the *Insolvency Act*.
  15. Invesco again asserted that the petition, was filed contrary to alternative regulatory steps and procedures available in law for the management and resolution of disputes like the present petition. If allowed, Invesco argued, the petition would occasion disproportionate prejudice to it and interested stakeholders relative to the benefits, if any, to the petitioners.
  16. Invesco also argued that being an insurance company regulated under the *Insurance Act*, only the regulator can mount a winding up cause pursuant to sections 41 and 122 of the Act. Section 122 provides that 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 relates to margins of solvency) are not observed by the insurer.
  17. Invesco contended that an insurance company's solvency is premised on several factors that have nothing or little to do with the actual payment of claims by creditors as and when they arise. Under section 42 (1) (b) of the *Insurance Act*, some of the factors for consideration include capital charges that are determined by the Insurance Regulatory Authority (IRA) from time to time.
  18. Invesco maintained that while insurance companies are regulated under both the *Insurance Act* and the *Insolvency Act*, the rationale includes protection of the insured public, employees, investors and the spiral effect a liquidation order would have on the public at large. Invesco further relied on Regulation 12 of the Insurance (Policyholders Compensation Fund) Regulations, 2010, which provides that it is the board of trustees, in consultation with the Cabinet Secretary of Treasury, which determines from time to time, the amount payable as compensation for different types or classes of insurance policies. For that reason, Invesco contended that sustaining it as a going concern gives the petitioners a better chance of being paid than the statutory policy holders fund would.
  19. Invesco asserted that the petitioners had neither pleaded sections 41, 122 of the *Insurance Act*, proved non-compliance with those provisions nor prayed for any reliefs in respect thereof. Invesco further asserted that the petition was not served on the Commissioner of Insurance as required by section 121 of the *Insurance Act* and no leave had been sought to do so.
  20. According to Invesco, the petitioners' claims are speculative in that although they demanded Kshs. 53,284,914.25 in the statutory demand of 6<sup>th</sup> March 2019, they nonetheless claimed Kshs. 72,400,535 in the petition. It is Invesco's case that the alleged debt is disputed hence the need for settlement of accounts to reconcile the amounts owing to the petitioners, if any. Reliance was placed on *Re African Safari Club Ltd [2006] eKLR*; *Blueline Properties Limited v Mayfair Insurance Company Limited [2019] eKLR* and *Matic General Contractors v Kenya Power and Lighting Company Limited [2001] LLR 4837 (CAK)* for the proposition that a petition for winding up on grounds of inability to pay debts is an abuse of the process of the court when the debt is disputed.
  21. Invesco argued that claim numbers 13, 39, 41, 42, 44, 46, 50, 51, 55, 56, 57, 58, 59 and 60 in exhibit marked 'B' related to unsealed and unsigned decrees whose authenticity cannot be verified. Similarly, claims numbers 26, 29, 30, 34 and 35 relate to matters that were still pending hearing and were yet to be concluded (according to petitioners' own admission in the last column of exhibit marked B), while claim numbers 23, 39, 47 and 52 of Exhibit marked B relate to amounts over Kshs. 3 million well in



excess of the statutory maximum that an insurer is obligated to pay when arising out of a claim by one person pursuant to section 5 (b) (iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*.

22. Invesco maintained that a number of the remaining claims are either partly paid or are under verification to ascertain their bona fides, a necessary process before payment. Once verified and upon settlement of accounts with the petitioners' advocates, Invesco would proceed to settle any amount due.
23. For those reasons, Invesco prayed that: (a) the petition be struck out and/or dismissed with costs; (b) that in the alternative, parties be directed to settle accounts under supervision of the court for further directions, and that subject to prayer (b) above, the court does make such orders as it deems necessary that would be proportionate and just in the circumstances. (c) Costs of the proceedings.

The 2<sup>nd</sup> respondent neither filed a response nor took part in these proceedings.

### **Petitioners' rejoinder**

24. In a short rejoinder, the petitioners posited that section 112 of the *Insurance Act*, as amended by section 57 of the Companies and Insolvency Legislation (Consequential Amendments) Act, Act No. 19 of 2015, a person other than the Commissioner, may present a petition to wind up an insurance company and that section 122 was repealed and substituted with a new section under the Consequential Amendments Act.
25. The petitioners argued that there are other instances when an insurer can be found to have failed to pay debts under sections 67 (9) (as amended under the Consequential Act (above)); 123 and 203. Section 203 (1) (d) gives an insurer 90 days to pay a claim after its liability to pay is determined by the court and failure to do so is a ground for its liquidation under section 203 (5) as read with section 123. Failure to pay after a statutory demand is served is another ground under section 384 (1) (c).
26. The petitioners again argued that the *Insolvency Act* applies to all companies in Kenya as expressly stated in section 3 (2) and that Invesco had not made a proposal for payment or attempted to pay since service of the statutory demand. The petitioners also argued that Invesco did not adduce evidence in rebuttal of the decrees exhibited. The petitioners maintained that a delinquent insurer should be wound up before going under with serious consequences to policyholders, third party creditors and the insurance industry in general.

### **Determination**

27. I have considered the petition, the response and decisions relied on by parties. The petitioners were victims of road traffic accidents. They sued various insureds for the injuries sustained in the road traffic accidents and obtained compensation in various judgments against owners of those vehicles which had been insured by Invesco. The petitioners later obtained some declaratory judgments against Invesco. Demand notices were served on Invesco as the insurer but no payments were made, forcing them to serve a statutory demand notice under the *Insolvency Act*, which was also ignored. The petitioners filed this petition for the liquidation of Invesco.
28. Invesco opposed the petition, arguing, among other things, that the petition is not merited because the IRA did not certify the failure to pay debts; that the petitioners had not complied with the law and that the amount claimed is disputed, has not been ascertained and accounts taken. According to Invesco, whereas the petitioners claimed Kshs. 53,284,914.25 in the statutory notice dated 6<sup>th</sup> March 2019, they claimed Kshs. 72,400,535 in the petition, thus confirming that the debt has not been ascertained. Invesco maintained that some of the decrees attached to the petition had not been sealed and were not



verified, while others had been paid or settled. Invesco further pointed out that some of the decrees were against the insureds. From these contestations, the issues before this court are whether the petition complied with the relevant law, namely; the *Insurance Act*, and whether Invesco has failed to pay debts and should, therefore, be liquidated.

### **Whether petition complied with the law**

29. The first issue to be disposed of is whether the petition was improperly filed. Invesco argued that the petition was filed contrary to alternative regulatory steps and procedures available in law for the management and resolution of such disputes, one of which is involvement of the IRA. A perusal of the petition shows that IRA is a party to this petition. IRA did not enter appearance or file a response. IRA did not also participate in these proceedings despite being a party. Failure by IRA to take part and answer to issues such as whether Invesco was solvent or not, cannot be blamed on the petitioners who discharged their obligations under the law by not only including IRA in the petition, but also serving that office. It was up to IRA to discharge its mandate once the petition was served and certify whether or not Invesco is insolvent. I find no merit in the argument by Invesco in that regard.

### **Whether Invesco failed to pay debts**

30. There is no doubt that Invesco is an insurer registered under the *Insurance Act*. All motor vehicles on the road are required to have insurance, while Public Service Vehicles are required to have PSV insurance. See section 4 of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405). The petitioners' case is that Invesco has failed to meet its debt obligations and should be liquidated.
31. Section 424(1)(e) of the *Insolvency Act* provides that a company may be liquidated if it is unable to pay its debts. Section 2 of the Act defines "debt" as the obligation or liability of a person to pay money or money's worth, which includes liability under a written law, liability under a contract/bailment or liability arising from an obligation to make restitution, among others. On that basis, the petitioners asserted that Invesco, as the insurer, has an obligation to pay the debt as a requirement of law, namely, the Insurance (Motor Vehicle Third Party Risks) Act,
32. Section 384 of the *Insolvency Act* further states that for purposes to the Act (*Insolvency Act*), a company is unable to pay debts where a creditor to whom the company is indebted for hundred thousand or more has served a 21 days written demand requiring the company to pay the debt, but the company fails to pay or take any other steps towards payment to the satisfaction of the creditor, or execution or other process issued on a judgment, decree, order of any court in favour of the creditor is returned unsatisfied in whole or part.
33. In that regard, the law, requires that there be a legitimate debt and the company must have failed to pay the debt after service of the notice as required by sections 384 and 424 of the Act, before one can petition to liquidate the company. In that case, therefore, the question is whether the petitioners have satisfied the provisions of sections 384 and Section 424 of the Act to mount a successful petition for liquidation. Put differently, have the petitioners proved that Invesco owes the amount demanded in the petition and is unable to pay the debt.
34. The petitioners argued that Invesco failed to pay the debt claimed even after service of the statutory demand notice. On its part, Invesco argued that the amount claimed is disputed. According to Invesco, the notice served demanded a different amount from that in the petition. Second, Invesco argued that some of the decrees are against insureds; that some of the decrees have been settled while others have not been verified and or accounts taken. In essence, Invesco's case is that it has not failed to pay the debt due.



35. I have perused the record and the petition. It is true that the dated 6<sup>th</sup> March 2019 served on Invesco demanded Kshs. 53,284,914.25 while the amount claimed in the petition is Kshs. 72,400,535. The statutory demand notice dated 4<sup>th</sup> March 2019 states that the other court awards in favour of third parties against insureds add up to Kshs. 37,228,413.16 while the judgments against the company (Invesco) were Kshs. 16,056,500 making a total of Kshs. 53,284,914.
36. The petitioners further stated at paragraph 6 of the supporting affidavit that the aggregate decrees against Invesco is Kshs. 26,446,729 while the other decrees are against the insureds in the sum of Kshs. 45,953,086, making a grand total of Kshs. 72,400,535. The petitioners did not explain the reason for these discrepancy and, therefore, Invesco's claim that the amount is speculative.
37. Invesco's argument that some of the decrees were against the insureds and not herself is not farfetched. I have again perused the record and the annexures to the affidavit in support of the petition. It is true that a number of the decrees the petitioners have attached have nothing to do with Invesco this fact is clearly admitted in petition and supporting documents.
38. A scrutiny of the petitioners' documents further reveal that indeed some of the decrees were not signed and sealed. For instance, at page 76 of the petition, CMCC No. 4016 of 2010, CMCC No. 7716 of 2014, CMCC No. 81140 of 2017, are not signed or sealed. Further, CMCC No. 5733 of 2017 and CMCC No. 6933 of 2016, among others are not signed and sealed. The petitioners did not also explain why this is the case and the relevance of attaching decrees that are not signed and not against Invesco to claim that Invesco has failed to pay the debt.
39. Invesco once again argued that some of the decrees had been paid while others had not been verified and accounts taken for purposes of payment of the true and just outstanding balance. The petitioners, did not address this argument at all. The petitioners stated not a single sent had been paid yet Invesco argued that some decrees had been paid.
40. The petitioners stated in the affidavit in support of the petition, that after service of the demand notice, Invesco wrote to their advocates requesting for a meeting but the advocate declined, stating that there was no need for the meeting. This is clearly an admission that the amount had not been ascertained and accounts taken. I have perused the record and indeed there is letter dated 5<sup>th</sup> December 2018 from Invesco to the petitioners' advocates requesting for a meeting to discuss the issue of the amount and mode of settlement. the letter from the Advocates that Invesco was responding to did not state the amount. The advocates' letter dated 15<sup>th</sup> January 2019 stated that there was no need for the meeting since Invesco had a list of the claims.
41. The meeting, if held, would have ironed out some of the issues that are plain in this petition, not least, the decrees that have nothing to do with Invesco, the decrees that were not signed and sealed or how much had been paid or was outstanding.
42. The tests for determining whether a company should be wound up were stated in *Re: The India Electric Works v Unknown* AIR 1970 Cal 398, citing *Re Cine Industries and Recording Co. Ltd*, AIR 1942 Bom 231, thus:

The test for determining whether a company should be wound up is whether the company is commercially insolvent at the date of the petition for winding-up. The expression 'commercially solvent' means that the existing assets and the liabilities of the company are such as to make it reasonably certain that the existing and probable assets would be sufficient to meet the existing liabilities.



The other test is whether at the date of the presentation of the winding-up petition, there was any reasonable hope that the object of trading at a profit with a view to which a company was formed would be attained.

43. It was the petitioners' obligation to show that indeed Invesco was insolvent; was commercially insolvent and had no reasonable hope of trading at a profit for which Invesco was formed.

44. In *Mohammed Amin Brothers Ltd v Dominion of India & others* AIR 1952 Cal 323, 54 COWN 514, Harris, C. J. stated:

A winding up petition is perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the court gives to a creditor against a company unable to pay its debts...A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the company. A petition presented ostensibly for winding up order to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court. (emphasis)

(See also *Matic General Contractors Limited v Kenya Power and Lighting Company Limited* [2001] LLR 4837; *Re M. Weiss Ltd* [1992] eKLR.)

45. The principle emphasised above is that disputed amount cannot be the basis of presenting a petition for liquidating a company. My understanding of the law is that a company must have been unable to pay its debts before liquidation proceeding can be initiated. Inability to pay is a question of fact and a petitioner has to show that indeed the company was unable to pay legitimate debt at the time of presenting the petition, but not where the debt or amount is disputed. The word inability to pay a debt means the company is in such financial position that it cannot meet its financial obligations to its debtors at all.

Whether or not there is a dispute on substantial grounds over the amount will depend on the facts of the case to be decided on a case by case basis. Where there are disputed facts requiring evidence to resolve, would, in my view, amount to a disputed debt. In this regard, in the Nigerian case of *Hansa International Construction Ltd v Mobile Producing Ltd*. 9 NWLR (PT. 366) 76, it was held by the Court of Appeal of Nigeria, that where a petition is based on a debt that is disputed on substantial grounds the petitioner is not a creditor who has the locus standi requisite to present the petition even if the company is in fact insolvent.

(See also *Tate Industries Plc v Devcon Merchant Bank Ltd*, [2005] 3 CLRN 78).

46. In the present petition, Invesco challenged the validity of some of the decrees, arguing that some decrees had been paid or were being paid, accounts had not been settled and that other claims were against insureds while others were for amounts over Kshs. 3 million, in excess of the statutory maximum that an insurer is obligated to pay where the amount arises out of a claim by one person in terms of section 5 (b) (iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*. The section states that a policy shall not cover liability of any sum in excess of three million shillings, arising out of a claim by one person. Invesco argued, therefore, that the proceedings were intended to coerce it into settling disputed, illegal and unfounded claims.

47. The petitioners did not respond to any of the arguments put forward by Invesco, some of which are statutory defences. In this regard, the argument by Invesco that the debt is disputed, amounts had not been ascertained and accounts settled, and further that some decrees had been paid, while others were against insureds, are not idle concerns. This is so, bearing in mind that the petitioners themselves agree that some of the decrees are not against Invesco, but the insureds. Parties elected to dispose of



this petition by way of submissions thereby leaving matters of fact that could only have been resolved through oral evidence unexplained.

48. The petitioners stated that Invesco did not respond to the statutory notice and the amount had not been paid. The petitioners did not allege that Invesco admitted the debt claimed in the petition. The law obligates a creditor to serve a mandatory statutory demand before instituting insolvency proceedings. I have not seen, and the petitioners did not point out a reciprocal obligation on Invesco to respond to a statutory demand or dispute the alleged debt once the statutory demand is served. In that respect, failure to respond to the statutory demand would be immaterial in determining whether the debt is disputed on substantial grounds or not at the hearing of the insolvency petition.
49. Flowing from the discussion above, the position in law is that a debt is proved where it is either expressly or impliedly admitted or satisfactorily proved. Short of that, the court should not entertain insolvency proceedings if the debt is substantially disputed.
50. It is also important to appreciate that even where insolvency is proved, one of the objects of the *Insolvency Act* under section 3 (1), is to give insolvent natural persons, including incorporated and unincorporated entities, whose financial position is redeemable, an opportunity to continue to operate as going concerns so that ultimately they may be able to meet their financial obligations to their creditors in full or at least to the satisfaction of those creditors, thus achieve a better outcome for the creditors, than would likely be the case if those persons and entities were adjudged bankrupt.
51. In that regard, the object of the Act is not to liquidate companies which can be rescued, but to give them an opportunity to try and come out their liquidity problems for the sake and benefit of the creditors.

### **Conclusion**

52. I have carefully considered the petition and the materials placed before this court. The petitioners have not proved that Invesco has failed to pay a just and legitimate debt as required by law. What is clear, is that the debt is substantially disputed, a fact that clearly emerges from the petitioners' pleadings. For that reason, a disputed debt cannot be the basis for a petition to liquidate a company.
53. Consequently, the petition is declined and dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2022**

**E C MWITA**

**JUDGE**

