



**Kinuthia v Xplico Insurance Company Limited (Insolvency Petition E051 of 2022)
[2023] KEHC 23704 (KLR) (Commercial and Tax) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E051 OF 2022
DAS MAJANJA, J
OCTOBER 19, 2023
IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND IN THE MATTER OF
XPLICO INSURANCE COMPANY LIMITED**

BETWEEN

JOSEPH NDEGWA KINUTHIA PETITIONER

AND

XPLICO INSURANCE COMPANY LIMITED RESPONDENT

Requirement of statutory demand in liquidation petitions is not mandatory for petitions based on court decrees

The petitioner sought liquidation of the respondent, Xplico Insurance Company Limited, due to its failure to honor a court decree for Kshs. 2,906,182. The respondent challenged the petition on grounds that the petitioner failed to serve a statutory demand. The court held that no statutory demand was necessary in the case, as the petition was based on a court decree rather than general indebtedness. The respondent's application to strike out the petition was dismissed, and the petitioner was awarded costs.

Reported by John Ribia

Insolvency Law – petition for liquidation of a company for failure to pay its debts – petition for the liquidation of an insurance company – procedural requirements - whether service of a statutory demand was a pre-requisite for filing a liquidation petition - whether a petition for liquidation based on a company's inability to pay debts under section 384 of the Insolvency Act required service of a statutory demand for all forms of debt - whether a statutory demand was required in all liquidation petitions filed under the Insolvency Act - whether the failure to serve a statutory demand rendered a liquidation petition fatally defective when based on a court decree or unsatisfied judgment - whether a petition for the liquidation of an insurance company required prior notification to the Commissioner of Insurance under the Insurance Act - whether a petition for liquidation based on a company's



inability to pay debts under section 384 of the Insolvency Act required service of a statutory demand for all forms of debt - Insolvency Act (cap 53) sections 3(1)(a), (b) and (c); 121, 384(1), and 427(1)(a); Insolvency Regulations (cap 53 Sub Leg) regulation 77B; Insurance Act (Cap 487) section 121, 122.

Brief facts

The petitioner obtained a court decree against the respondent, Xplico Insurance Company Limited, for the sum of Kshs. 2,906,182. The respondent failed to satisfy the decree, prompting the petitioner to file for liquidation of the respondent, claiming the company was unable to pay its debts. The respondent, however, sought to strike out the petition on the basis that it was not served with a statutory demand, as required under section 384(1)(a) of the Insolvency Act.

The petitioner averred and submitted that a statutory demand was only mandatory if the reason for the petition was indebtedness under section 384(1)(a) of the Insolvency Act where a creditor was seeking the payment of a debt and not under section 384(1)(b) of the Insolvency Act where the petition was for a satisfaction of a decree as was the case. The respondent had insisted that the statutory demand was mandatory regardless.

Issues

- i. Whether service of a statutory demand was a pre-requisite for filing a liquidation petition
- ii. Whether a statutory demand was required in all liquidation petitions filed under the Insolvency Act.
- iii. Whether the failure to serve a statutory demand rendered a liquidation petition fatally defective when based on a court decree or unsatisfied judgment.
- iv. Whether a petition for the liquidation of an insurance company required prior notification to the Commissioner of Insurance under the Insurance Act.
- v. Whether a petition for liquidation based on a company's inability to pay debts under section 384 of the Insolvency Act required service of a statutory demand for all forms of debt.

Held

1. Under section 384(1) of the Insolvency Act, a company was unable to pay its debts if a creditor (by assignment or otherwise) to whom the company was indebted for hundred thousand shillings or more had 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 had for twenty—one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor; if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company was returned unsatisfied in whole or in part; or if it was proved to the satisfaction of the court that the company was unable to pay its debts as they fell due.
2. Section 384(1) of the Insolvency Act and Regulation 77B of the Insolvency Regulations (Regulations) were coached in mandatory terms by the use of the word "shall". Therefore, the requirement of a statutory demand was mandatory.
3. Before a petitioner could rely on the ground of the debtor's inability to pay, to petition for liquidation of a company, the petitioner had to prove that a statutory demand was served and the debtor failed to comply accordingly and therefore the debt was not disputed.
4. Section 384(1) of the Insolvency Act set out three distinct grounds upon which a company could be deemed unable to pay its debts. Each ground was independent and had to be read disjunctively as was evidenced by use of the word "or" in section 384(1)(b). The use of the word "or" clearly made the two limbs disjunctive under law. Thus, where a petitioner relied on section 384(1)(a) of the Insurance Act, a written demand, commonly referred to the statutory demand, was a pre-requisite for the lodging the petition. Subsection (1)(b) and (c) did not require service of a statutory demand before filing the liquidation petition and the language of those provisions cannot be construed to require a notice.
5. Under regulation 77B of the Regulations, subsidiary legislation such as the Regulations could not contradict or otherwise vary the principal statute. The regulations could not impose a requirement for service of a statutory demand where in the circumstances, the Act did not require one. Regulation



77B was *ultra vires* in so far as it required the petitioner to serve the statutory demand and file one to accompany the liquidation petition where a petitioner relied on section 384(1)(b) and (c) of the Insurance Act.

6. The service of the statutory demand and filing the same with the liquidation petition was not a mandatory requirement in all cases where the liquidation petition was grounded on inability to pay debts. The petitioner's case fell within section 384(1)(b) of the Insolvency Act as it was based on the failure by the respondent to settle a decree issued by the court against the petitioner hence it was not necessary to issue a statutory demand. The rationale for the absence of a requirement for a written demand in section 384(1)(b) of the Insurance Act was not difficult to see. A decree was an unconditional demand to the judgment debtor by the court to pay an adjudged debt hence it was unnecessary to issue a written demand when it remained unsatisfied after unsuccessful attempts had been made to execute it.
7. Under section 121 of the Insurance Act, the petitioner's only obligation was to serve the Commissioner. Once the Commissioner was served, it became a party to the proceedings. Further, the section did not state when the petitioner was to effect service but since the Commissioner must be heard on a petition for liquidation of an insurance company, service must be effected at any time before hearing of the petition hence failure to serve the Commissioner was not fatal as the court may direct that the Commissioner be served prior to the hearing as it was entitled to be heard on any petition concerning liquidation of an insurance company. The issue of service of the petition on the Commissioner of Insurance shall therefore be addressed at the appropriate stage.

Petition dismissed with costs.

Citations

Cases

Kenya

1. *In re Sucasa at Mombasa Road Limited* Insolvency Cause 9 of 2018; [2019] KEHC 8872 (KLR) - (Applied)
2. *Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission and 4 Others* Election Petition 1 of 2017; [2017] KESC 52 (KLR) - (Applied)
3. *Robson Harris Advocates LLP v Invesco Assurance Company Limited* Insolvency Notice E054 of 2021; [2022] KEHC 290 (KLR) - (Applied)

Statutes

Kenya

1. Elections Act (cap 7) section 83 - (Interpreted)
2. Insolvency Act (cap 53) sections 3(1) (a), (b) and (c); 121; 384(1)(b); 427(1) (a)- (Interpreted)
3. Insolvency Act (Amendment) Regulations 2018 (cap 53 Sub Leg)regulation 77B - (Interpreted)
4. Insolvency Regulations, 2016 (cap 53 Sub Leg)regulation 10 - (Interpreted)
5. Insurance Act (cap 487)sections 121, 122 - (Interpreted)

Advocates

None mentioned

RULING

Introduction and Background

1. On November 11, 2022 the petitioner filed a petition claiming that the respondent had failed to honour a decree for the sum of Kshs. 2,906,182 issued by the court in Kikuyu Magistrate's Court Civil Suit No. E218 of 2021 in favour of the petitioner and against the respondent ("the petition"). The



petitioner's case is that the respondent has failed to satisfy the decree, is insolvent and unable to pay its debts and is liable to be liquidated.

2. The respondent has now filed the notice of motion dated 26.01.2023 under section 3(1) (a), (b) and (c), 384(1), 427(1) (a) of the *Insolvency Act* ("the Act") regulation 10 of the *Insolvency Regulations, 2016* and regulation 77B of the *Insolvency Act (Amendment) Regulations 2018* ("the Regulations") seeking to strike out the petition. The application is supported by the grounds on its face and the supporting affidavit of Mohamed Haid, the respondent's Legal Manager, sworn on January 26, 2023 and is opposed by the petitioner through his replying affidavit sworn on January 27, 2023. The parties have also filed written submissions to supplement their arguments.
3. According to the respondent, the petitioner has not served it with the statutory demand and that the petition is also not accompanied by a statutory demand confirming the fact that none was served, as such the petition is fatally defective as it offends the express and mandatory provisions of section 384(1) of the Act which requires service of the statutory demand on the Respondent prior to lodging the petition and regulation 77B of the Regulations that requires that a statutory demand accompany the petition for liquidation.
4. The respondent avers it operates in a strictly regulated industry and there is no evidence on record to show that it is incapable of meeting its debts as and when they fall due. Further, there is no evidence that the Commissioner of Insurance was served with the Petition. The respondent urges the court to allow its application and strike out the Petition.
5. The petitioner opposes the application. It contends that the application does not raise any genuine issue and is meant to delay the just and expeditious determination of the petition. The petitioner states that based on the reasons for the filing of the petition, a statutory demand to the respondent is neither mandatory nor necessary prior to the filing of the petition. That section 384 of the Act provides for various scenarios in which a company may be deemed unable to repay its debt thus necessitating its liquidation and indebtedness in the strict sense is the only reason that provides for the issuance of a statutory demand prior to the filing of a liquidation petition.
6. The petitioner further states that section 384 of the Act stipulates that a company is unable to pay its debts if either, a creditor to whom the company is indebted has served on the company a written demand requiring the company to pay the debt and the company has for twenty one (21) days afterwards failed to pay the debt, if execution or other process issued on a judgement, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part or if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. Therefore, that the 21-day statutory demand only applies in the first instance where a creditor of a company requires the company to pay a debt owed to it but that the petitioner's case concerns a judgement and decree of the court that has been returned unsatisfied and the same falls within the confines of section 384 (1) (b) of the Act. Thus, the petitioner contends that he is entitled to move the court for the liquidation of the respondent in the manner that he has.
7. According to the petitioner regulation 77B(2) of the Regulations affirms the position that a statutory demand is only necessary where the reason for the liquidation of the company is indebtedness but does not extend to where the reason for liquidation is for failure to satisfy a judgement, decree or order of the court. That regulation 77B(2)(a) stipulates that the Petition shall be accompanied by a statutory demand in Form 32E set out in the first schedule if the reason for the petition is indebtedness. The Petitioner therefore submits that from the language of the relevant provisions cited, the issue and service of the 21-day statutory demand is not always necessary as it depends on the circumstances or reasons as to why a liquidation petition has been filed.



8. The petitioner depones that the Commissioner for Insurance was also served with a copy of the Petition when it was filed as required under section 121 of the *Insurance Act*. It avers that the respondent's assertion that it is capable of settling its debts as and when they fall due is misleading as nothing would have been easier than to settle the decree issued against it.

Analysis and Determination

9. The court is called upon to determine whether the petition ought to be struck out on that ground that petitioner failed to serve on the respondent a statutory demand and that the petition was not accompanied by a statutory demand. The other issue for resolution is whether it was mandatory for the petitioner to serve the Commissioner of Insurance with the petition and if so, whether this was done.

10. Under section 384(1) of the Act, a company is unable to pay its debts:

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- 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.
11. Regulation 77B provides for the Regulations provides for the manner in which a petition for liquidation is to be filed as follows:

77B. Liquidation by court

1. For the purposes of section 425 of the Act an application for liquidation shall be—
 - a. by way of a petition in Form 32C as set out in the First Schedule; and
 - b. accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.
 2. The petition for liquidation shall be accompanied by the following documents—
 - a. a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and
 - b. a statement of financial position in Form 32 as set out in the First Schedule where necessary.
12. The parties do not dispute that the aforementioned provisions in the regulations are mandatory. However, the petitioner has averred and submitted that a statutory demand is only mandatory if the reason for the petition is indebtedness under section 384(1)(a) of the *Insolvency Act* where a creditor is seeking the payment of a debt and not under section 384(1)(b) of the *Insolvency Act* where the



petition is for a satisfaction of a decree as in this case. On its part, the respondent has insisted that the statutory demand is mandatory regardless and that this position was affirmed by the court in Re Sucasa at Mombasa Road Limited [2019] eKLR as follows:

27. It is noteworthy that, the above provisions are couched in mandatory terms by the use of the word “shall”. Therefore, the requirement of a statutory demand is mandatory. In the case of; *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR, the court observed that, a requirement is never intended to be optional if a word such as “shall” or “must” is used. Similarly, in the case of; *R vs Immigration Appeal Tribunal ex-parte Jeyeastation* (1999) 3 ALL ER 231, the court held that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable caution.

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29. However, to appreciate the rationale of this mandatory requirement, one needs to examine the importance and/or the purpose of the statutory demand. It is to give notice to the debtor company of the intended liquidation order against it and to give it time to clear off the debt owed to the creditor.

30. The court in the case of *Bray Head (Ascot) Ltd v Berkshire County Council* (supra), stated as follows:

“What is the purpose of service? It is to bring to the attention of the opposite party that a serious action is contemplated against it unless the demands in the notice are met.”

31. Therefore, if the statutory demand goes unchallenged, it demonstrates that an undisputed debt is outstanding. This is a criteria that must be satisfied for a petition for liquidation to be allowed. If a liquidation application is made over a debt that is disputed, the court will simply dismiss the petition and can award costs against the creditor.

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33. It therefore follows that, before a petitioner can rely on the ground of the debtor’s inability to pay, to petition for liquidation of a company, the Petitioner has to prove that a statutory demand was served and the debtor failed to comply accordingly and therefore the debt is not disputed.

13. I agree with the rationale for the requirement for service of statutory demand set out in the decision I have cited, however, the question whether service of a statutory demand is a pre-requisite for filing a liquidation petition is a matter to be determined from the statutory language. Such language must be given its natural and ordinary meaning. Section 384(1) of the Act sets out three distinct grounds upon which a company may be deemed unable to pay its debts. Each ground is independent and has to be read disjunctively as is evidenced by use of the word “or” in section 384(1)(b). In Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 4 Others [2017] eKLR, the Supreme Court stated that, “the use of the word “or” clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting section 83 of our Elections Act, this distinction is borne in mind.” Thus, where a petitioner relies on section 384(1)(a) of the Act, a written demand, commonly referred to the statutory demand, is a pre-requisite for the lodging the petition. Subsection



- (1)(b) and (c) do not require service of a statutory demand before filing the liquidation petition and the language of those provisions cannot be construed to require a notice.
14. Turning to regulation 77B of the Regulations, it is trite that subsidiary legislation such as the Regulations cannot contradict or otherwise vary the principal statute. In this case, the Regulations cannot impose a requirement for service of a statutory demand where in the circumstances, the Act does not require one. Regulation 77B is therefore ultra vires in so far as it requires the petitioner to serve the statutory demand and file one to accompany the liquidation petition where a petitioner relies on section 384(1)(b) and (c) of the Act.
 15. I therefore reject the respondent's argument that the service of the statutory demand and filing the same with the liquidation petition is a mandatory required in all cases where the liquidation petition is grounded on inability to pay debts. The petitioner's case falls within section 384(1)(b) of the Act as it is based on the failure by the respondent to settle a decree issued by the court against the petitioner hence it is not necessary to issue a statutory demand. The rationale for the absence of a requirement for a written demand in section 384(1)(b) of the Act is not difficult to see. A decree is an unconditional demand to the judgment debtor by the court to pay an adjudged debt hence it is unnecessary to issue a written demand when it remains unsatisfied after unsuccessful attempts have been made to execute it.
 16. On the issue of service of the petition upon the Commissioner of Insurance, sections 121 and 122 of the *Insurance Act* provide as follows:
 121. Liquidation by the court
 - (1) If an application for the liquidation of an insurer is presented by a person other than the Commissioner, the applicant shall serve a copy of the application on the Commissioner.
 - (2) On being served with a copy such an application, the Commissioner becomes a party to the proceedings and is entitled to be heard at the hearing of the application.
 122. Insolvency of insurer

For the purpose of section 384 of the *Insolvency Act, 2015*, 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.
 17. Under section 121 of the *Insurance Act*, the petitioner's only obligation is to serve the Commissioner. Once the Commissioner is served, it becomes a party to the proceedings. Further, the section does not state when the Petitioner is to effect service but since the Commissioner must be heard on a petition for liquidation of an insurance company, service must be effected at any time before hearing of the petition hence failure to serve the Commissioner is not fatal as the court may direct that the Commissioner be served prior to the hearing as it is entitled to be heard on any petition concerning liquidation of an insurance company (see *Robson Harris Advocates LLP v Invesco Assurance Company Limited* [2022] KEHC 290 (KLR)). The issue of service of the petition on the Commissioner of Insurance shall therefore be addressed at the appropriate stage.

Disposition

18. It must now be clear that the respondent's application dated January 26, 2023 is for dismissal. It is dismissed with costs to the petitioner.



DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2023.

D. S. MAJANJA

JUDGE

