



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E015 OF 2019

SALESIO KINYUA NJAGI.....1ST PETITIONER/JUDGMENT CREDITOR
GREGORY MWANIKI KARUNGA.....2ND PETITIONER/JUDGMENT CREDITOR
ALISA NJERI.....3RD PETITIONER/JUDGMENT CREDITOR
JACKLEAH WANGARI4TH PETITIONER/JUDGMENT CREDITOR
NYAGA NTHIA5TH PETITIONER/JUDGMENT CREDITOR
ALICE KAGENI NDWIGA.....6TH PETITIONER/JUDGMENT CREDITOR
EMMACULATE WANJIRU MARIGU.....7TH PETITIONER/JUDGMENT CREDITOR
JULIET MUTHONI NTHIGA8TH PETITIONER/JUDGMENT CREDITOR
VANESSA KAMBI.....9TH PETITIONER/JUDGMENT CREDITOR
NANCY MUTHONI KINYUA.....10TH PETITIONER/JUDGMENT CREDITOR

VERSUS

INVESCO ASSURANCE COMPANY LIMITED..... DEFENDANT

RULING

BACKGROUND

1. The petitioners herein filed a liquidation petition on 24th May 2019 seeking orders that: -

- a) That Invesco Assurance Company Limited be liquidated under the supervision of the official receiver and liquidator and subsequently the company be wound up.*
- b) That the Directors of the company be ordered to personally satisfy such liabilities of the company as shall remain outstanding and owing after liquidation of the company.*
- c) That such order be made in the premises as shall be just.*
- d) That the costs of this petition be provided for.*

2. The petition was filed on the grounds, *inter alia*, that the respondent had failed to pay its debts and that all the avenues to recover the debt had been exhausted as all the warrants of attachment did not yield any attachable assets.

3. The respondent opposed the petition through a Notice of Preliminary Objection dated 15th October 2019 wherein it listed the following grounds: -

1. That the petition as drawn and filed is bad in law, frivolous, vexatious and is an abuse of the process of this honourable court and should be struck out in limine.

2. That the petition seeks liquidation of an Insurance Company yet the petitioners unjustifiably and maliciously failed to notify the Commissioner of Insurance to enable the Commissioner's participation in the proceedings as required by law. Such failure makes the petition incurably defective and the same should therefore be struck out in limine.

3. That the declaration of Insolvency of an Insurance Company is a process as spelt out in the Insurance Act, that the petitioners herein have clearly violated and disregarded.

4. That an Insolvency Petition seeking to liquidate an Insurance Company cannot be prosecuted under the Insolvency Act in isolation and in exclusion of the Insurance Act, which puts in place certain measures to protect policy holders and who must be considered before a Liquidation Order is issued against an Insurance Company.

5. That the appropriate orders for such a matter cannot be issued by this Honourable court without the contribution, participation and input of the Commissioner of Insurance.

Preliminary Objection.

4. This ruling is therefore in respect to the Preliminary Objection parties

canvassed by way of written submissions which I have considered.

5. A summary of the Respondent/Judgment Debtor's submissions are that the respondent, being a limited liability company carrying out insurance business under the Insurance Act, is regulated by the Insurance Regulatory Authority established under the Insurance Act and tasked with promoting the maintenance of a fair, safe and stable insurance sector, protecting the interest of the insurance policyholders and beneficiaries and generally promoting the development of the insurance sector.

6. The respondent observed that since petitioners have not served upon the Commissioner of Insurance ("**the Commissioner**") with a copy of the Liquidation Petition, the Commissioner is not a party to these proceedings as mandated by the law. The respondent argued that a company carrying out insurance business is *sui generis* due to the sensitive nature and the level of public interest involved in its operations and, therefore and added that its liquidation process is therefore not exactly the same as the liquidation of an ordinary company.

7. It was submitted that the involvement of the government regulator, the Insurance Regulatory Authority (IRA), in the control and regulation of insurance companies makes the companies unique entities and removes them outside the purview of normal companies which can be liquidated under the Insolvency Act without other considerations.

8. The respondent noted that unlike other companies, the net asset and liability position of company rendering insurance services is not the sole determining factor in evaluating the solvency or otherwise of an insurance company and that the Insurance Act provides a purely scientific method under Sections 41 and 43 of the Insurance Act which is a technical process that cannot be undertaken by anyone. It further noted that it is therefore irregular for any person to simply seek to have an insurance company declared insolvent without following the properly laid down process.

9. The respondent's case was that there is wisdom in the requirement under Section 121 of the Insurance Act that if any other person, other than the Commissioner institutes proceedings to liquidate an insurance company, the person must serve the Petition upon the Commissioner who shall, upon service, become a respondent in the Petition.

10. It was submitted that an insurance company cannot be wound up, save through a Petition presented in court by a Commissioner of Insurance as the Commissioner is expected to exhaust the procedure outlined under the Insurance Act.

11. The respondent argued that the winding up of insurance companies under the Insolvency Act does not apply at the exclusion of the provisions of the Insurance Act which comprehensively provide for winding up procedures for such companies. It was submitted that where an insurance company is deemed to be unable to meet its commitments, the Commissioner of Insurance is permitted to intervene and place such insurance company under statutory management which is not a "winding up" but an audit by the Commissioner to establish whether the company may be revived or it may be wound up.

12. The respondent submitted that the process of determining whether or not an insurance company is able to pay its debts is a purely scientific process that can only be undertaken by experts in that field as stipulated under Section 41 of the Insurance Act and that the court cannot be in a position to determine whether or not an insurance company is insolvent for purposes of liquidation without the benefit of the data generated from the process provided for under Section 42 of the Insurance Act.

Petitioners Submissions.

13. The petitioner submitted that the Preliminary Objection intends to subject the petition to the realms of an Act of Parliament that is not mandated, by law, to deal with matters of insolvency. It was submitted that the Insolvency Act of 2015 is the operative law in dealing with liquidation of companies.

14. It was therefore petitioner's submission that the law allows them as Creditors to choose insolvency proceedings under the Insolvency Act as a way of recovering a debt without being dictated to by the debtors or any person obligated to it.

15. The Petitioner noted that Section 423(1) of the Insolvency Act provides that, only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya which includes the respondent. Reference was made to the decision in **Trade Bank Ltd v Amin Company Ltd and Another** [2000] KLR wherein it was held that: -

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and in hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters which raises issues which may involve expenses which will prejudice the fair trial of the action.”

16. The petitioners' case is that they instituted this petition after the respondent failed to honour its obligation to pay the full decretal sum as had been ordered by the court and that the assertion that the petition is bad in law is merely intended to delay the hearing and prosecution of the petition so as to prevent them from enjoying the fruits of justice. The referred to the Court of Appeal decision in **Brahmatt v Dynamics Engineering Ltd** [1986] KLR 133, where it was held that: -

“In an application to strike out a winding up petition, the court should consider whether on the evidence it is a plain and obvious case for striking out and whether the petition was bound to fail.”

17. The Petitioners argued that the respondent had not adduced any evidence to show that the petition by the respondent is bound to fail and added that to the contrary, the petition would succeed since the respondent has not disputed the debts emanating from a lawful decree. Reference was made to the decision in the matter of **Invesco Insurance Company Limited v in the matter of Companies Act Winding Up Case No. 19 of 2007 e KLR** the court held: -

“It is my view that the law does not contemplate a situation where the High Court is handling a winding up of a company and at the same time the Commissioner of Insurance is proceeding to appoint a Manager in the same company as provided under Section 67 of Insurance Act. In that case the Commissioner is only entitled to appear and participate in the hearing of petition which is already before the court.”

18. It was the petitioners' case that the assertion that the liquidation process of an insurance company is only governed by the Insurance Act is meant to mislead this Honourable Court from exercising its jurisdiction as provided in Section 423(1) and Section 3(2)(b) of the Insolvency Act 2015.

19. They argued that honourable court has powers to appoint the Official Receiver who, in turn, has the power, pursuant to Section 439 of the Insolvency Act, to appoint the Policy Holders Compensation Fund as the Interim Liquidator and that the claims by the respondent that the Insolvency Act does not put in measures to protect the policy holders are therefore far-fetched and misleading.

Analysis and Determination

20. I have carefully considered the rival arguments on the Preliminary Objection dated 15th October 2019. I find that the main issue for determination is whether the Preliminary Objection is merited. The gist of the respondent's objection is that the petitioners have invoked the Insolvency Act in seeking to liquidate the respondent instead of the Insurance Act.

21. According to the respondent, the applicable Act ought to have been the Insurance Act in view of the fact that the respondent is an Insurance Company.

22. Section 3(2) of the Insolvency Act stipulates as follows: -

“(2) This Act applies to natural persons, partnerships, limited liability partnership, companies and other corporate bodies established by any written law.”

23. Section 423(1) of the Insolvency Act on the other hand stipulates that: -

“Jurisdiction of High Court to supervise liquidation of companies

(1) Only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya.”

24. In the present case, it is not disputed that the respondent is a limited liability company incorporated under the Companies Act. No material has been placed before this court to indicate that the Insolvency Act is not applicable in the liquidation process of an insurance company. Indeed, Section 3(2) of the Insolvency Act cited herein above is clear that the Act applies in the insolvency of companies.

25. What constitutes a preliminary objection was discussed in the famous case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA 696**, where the Court held that a Preliminary Objection consists of a point of Law and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion.

26. In the present case and having regard to the observations that I have made in this ruling, I am not persuaded that the Preliminary

Objection raises a pure point of law and I therefore dismiss it with costs to the petitioner.

Dated, signed and delivered via Microsoft Teams at Nairobi this 15th day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Njagi for the petitioner.

Miss Mutugi for Omiti for the respondent

Court Assistant: Sylvia.