



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 7 OF 2020
IN THE MATTER OF: INVESCO ASSURANCE COMPANY LIMITED
AND
IN THE MATTER OF: THE COMPANIES ACT (CAP 486)
JUDGMENT

1. The Petitioners herein, **Millicent Atieno, Florence Awino Juma and George Onyango**, filed this **Petition** on **7th July, 2020** seeking the following orders:-

- a. That Invesco Assurance Company Limited may be wound up by the court under the provisions of the Companies Act.
- b. That the Official Receiver may be appointed as the liquidator
- c. That the petitioners are paid the sum of Kshs.2,283,682.10 owed to them by the company.
- d. That the costs of this petition be granted to the Petitioners and be paid out of the assets of the company and;
- e. That such order may be made as the court deems just in the circumstances.

2. The Petition is premised on grounds in the **Supporting Affidavit** sworn by **George Onyango John** on **7th July, 2020**.

- a. That a declaratory suit was filed in Mombasa RMCC No.491 of 2017 Millicent Atieno & 2 Others vs Invesco v Invesco Assurance Company Limited wherein judgment was delivered in favour of the petitioners for the sum of Kshs. 1,388,170.30/= after which a decree was extracted and served upon the company ordering the company to pay a decretal sum of Kshs.2,157,335.60/=. However, the company is yet to settle the decretal sum.
- b. That the Company has lost its substratum and is not able to effect that which it set out to do.
- c. That they filed an application for garnishee and the garnishee in its Replying Affidavit stated that the company's bank account with then was closed.
- d. That the Company is not able to pay its debt and has been subjected to numerous suits but creditors with the most recent suit being Insolvency/Bankruptcy Cause No.1 of 2018 at Malindi where 58 creditors filed a suit against the company that owed them Kshs.10,000,000/= and winding up cause No.9 of 2019 at Mombasa just to mention a few.
- e. That it is just and equitable that the company be wound up.

The Response

3. The debtor opposed the **Petition** vide the **Notice of Preliminary Objection** dated **26th October, 2020** on the following grounds:

- a. That the Applicant's application is bad in law, frivolous, vexatious and in abuse of the court process.

b. The application is incompetent and fatally defective.

c. The Petition offends the mandatory provisions of Sections 67A, 67B and 67C of the Insurance Act, Cap 487, Laws of Kenya.

d. The Petition does not comply with the law as provided under Regulation 77B of the Insolvency Regulations 2018 as read with Section 425 of the Insolvency Act, No.18 of 2015.

Determination

4. I have carefully considered the **Petition** and **Notice of Preliminary Objection**. To start us off, the debtor has raised a **Preliminary Objection** that the Petition offends the mandatory provisions of **Sections 67A, 67B and 67C** of the **Insurance Act**, **Section 425** of the **Insolvency Act**, and **Regulation 77B** of the **Insolvency Regulations (Amendment) Regulations 2018**.

5. The above provisions go to the root of the jurisdiction of the Court to entertain this dispute. If the said issue is successfully ventilated, the doctrine will render this Court as lacking the requisite jurisdiction to take any further steps in this case with the consequence of striking out the Petition for offending mandatory provisions of the said Act.

6. It is trite law that when a point of law, which goes to the jurisdiction of the court is raised, the court must first deal with that issue before proceeding any further in the matter. In the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1** Nyarangi, J.A held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."

7. **Section 425(1)** of the **Insolvency Act** reads:-

"(1) An application to the Court for the liquidation of a company may be made any or all of the following:

- a. the company or its directors;
- b. a creditor or creditors (including any contingent or prospective creditor or creditors);
- c. a contributory or contributories of the company;
- d. a provisional liquidator or an administrator of the company;
- e. if the company is in voluntary liquidation—the liquidator".
- f. except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two;
- g. the company is unable to pay its debts;
- h. at the time at which a moratorium for the company ends under section 645—a voluntary arrangement made under Part IX does not have effect in relation to the company; or
- i. the Court is of the opinion that it is just and equitable that the company should be liquidated.

8. The procedure for liquidation by the Court is provided for under **Regulation 77B** of the **Insolvency Act (Amendment) Regulations 2018**. For purposes of **Section 425** of the **Insolvency Act**, an application for liquidation shall meet the procedural requirements of **Regulation 77B (1)** of the **2018 Regulations** as follows:

"77B. (1) (a) by way of Petition in Form 33B1 set out in the First Schedule

(b) Accompanied by a verifying affidavit in Form 33 B2 set out in the First Schedule; and

(2) The Petition for liquidation shall be accompanied by the following documents—

(a) A statutory demand if the reason for Petition is indebtedness; and

(b) A statement of financial position in Form 32 set out in the First Schedule where necessary."

9. Having carefully considered the **Preliminary Objection**, it is clear that the Petition has been brought under the repealed Companies Act.

The specific parts of the **Companies Act (Cap 486)**, which deal with the Winding Up of Companies were repealed and instead the **Companies Act, No.17 of 2015** came into play. The latter statute no longer deals with Insolvency and Liquidation of Companies. Instead, the **Insolvency Act No.18 of 2015** does. It is not in dispute that as at **26th August, 2020** when the Petition was filed, the **Companies Act, Cap 486** of the **Laws of Kenya** had been repealed by **Section 1023(1)** of the **Companies Act, 2015**.

10. The Supreme Court in the cases of **Daniel Kimani –vs- Francis Mwangi Kimani & Another [20150eKLR]**, and **Michael Mungai –vs- Housing Finance Co. (K) Ltd & 5 Others [2017]eKLR**, held that the extraordinary standing of that court demand that litigants must be clear on the jurisdiction they are invoking, especially by invoking the correct provision of the Constitution or Statute. The court went on to hold that an omission in that regard is not a mere procedural technicality, to be cured under **Article 159** of the **Constitution**. The court further found it sad for a party to rely on a repealed statutory provision in bringing an application before it.

11. In the case of **Michael Mungai –vs- Housing Finance co. (K) Ltd & 5 Others [2017]eKLR**, the Supreme Court held that:-

“In the case of Hermanus Phillipus Steyn v. Giovanni Gnnечи-Ruscione, Supreme Court Application No.4 of 2012, this court was categorical that a court has to be moved under a specific provision of the law. We reiterate that the only legal regime for the Supreme Court is the Constitution, the Supreme Court Act and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the Supreme Court Act. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear; none”

12. In the upshot, I find that the Petition is fatally defective and the same is hereby struck out.

13. Nevertheless, **Section 384** of the **Insolvency Act** provides for the circumstances in which a Company may be deemed unable to pay its debts. The provision states as follows: -

1. For purposes of this Part, a company is unable to pay its debts-

a. if a creditor (by assignment of 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 judgments, 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).

3. The insolvency regulations may increase or reduce the amount specified in subsection (1) (a).

14. There is no doubt that there is a Court decree against the Company which decree still remains unsatisfied to date. However, in this instance, the Petitioner has not provided any proof to the Court to demonstrate that the debtor company has been served with the unsatisfied decree or even sworn a **Return of Service** to explain the difficulty it experienced in serving the decree upon the debtor Company. The same finding also applies to service of a statutory demand by the Petitioners, which has not been done, in this instance. Therefore, pursuant to **Section 384(1)(b)** of the **Insolvency Act**, the Petitioners have failed to demonstrate that the Company was unable to pay its debts for its failure to satisfy the court decree against it.

15. For all the foregoing reasons contained in this Ruling, it is the finding of this court that the Petition herein is founded on faulty grounds, a quicksand, which renders the Petition incapable of proceeding any further. The inescapable verdict therefore is that the **Petition** dated **7th July 2020** and filed herein by the Petitioners herein be and is hereby struck out with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF JULY, 2021.

D. O. CHEPKWONY

JUDGE